ONTARIO'S NEW HUMAN RIGHTS SYSTEM: OVERVIEW AND NEW ROLE FOR THE COURTS[1]

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[2] Drawn from original paper authored by Mary Cornish, Fay Faraday, Jo-Anne Pickel and Kate Hughes, lawyers with Cavalluzzo Hayes Shilton McIntyre & Cornish LLP, '*Transitioning to Ontario's New Human Rights System: What Do You Need to Know? – Part I– Overview*' (2008); online at www.cavalluzzo.com/publications.

EXECUTIVE SUMMARY

A. June 30, 2008 – The Start Date

On June 30, 2008, Ontario's new human rights system came into force. Bill 107, *An Act to Amend the Human Rights Code*, transforms how human rights are enforced. The new system consists of four cornerstones aimed at building a culture of human rights compliance in Ontario: the Ontario Human Rights Commission (the "Commission"), the Human Rights Tribunal of Ontario (the "Tribunal"), the new Human Rights Legal Support Centre (the "Centre"), and the Courts. The Bill significantly changes the existing roles of the Commission and Tribunal to introduce a "direct access" model of enforcement. The Government's stated goal is to provide "a more open, accessible and faster complaint resolution process" and "to resolve individual disputes fairly, quickly and effectively."[3] It also provides an explicit enforcement role for the Courts.

This paper is drawn from a paper co-authored by Fay Faraday, Kate Hughes, and Jo-Anne Pickel, lawyers at Cavalluzzo, Hayes, Shilton, McIntyre & Cornish. Fay Faraday and Jo-Anne Pickel have also authored two other papers which provide more detail on the Tribunal's Rules and the Transitional provisions. (See www.cavalluzzo.com for these papers.) As well, the author, Fay Faraday and Jo-Anne Pickel are co-authors of the forthcoming Canada Law book publication: Enforcing Human Rights in Ontario – A Guide to Bill 107.

B. The New System

Ontario's human rights institutions and procedures have been restructured by Bill 107 as a result of the desire to reflect understandings developed over the last half century of what was needed to eliminate both individual and systemic discrimination and to achieve equality. The reform drew on the experience under the original framework and built on more than two decades of calls for reform and task force reviews. By providing individuals with direct access to the Human Rights Tribunal to file applications, combined with access to a Human Rights Legal Support Centre and enhanced civil access, the reform sought to increase access to justice for individuals and to reinforce the protection of individual rights. The reform also sought to address broader patterns of inequality by reorienting the Commission's mandate and providing it with expanded tools to build a culture of human rights in the province.

Under Bill 107, claimants file applications directly with the Tribunal rather than the Commission. The Tribunal, in disposing of applications, can employ a range of adjudicative and alternative dispute resolution techniques, selecting the method that "offers the best opportunity for a fair, just and expeditious resolution of the merits of the application": s. 40. The Tribunal has enhanced powers to award damages and the existing $10,000 cap on damages for mental anguish has been eliminated. The Courts are given expanded statutory powers to enforce the Code in civil proceedings and decide stated cases. They will play a more limited role in reviewing Tribunal decisions with the right to appeal to the Divisional Court is replaced by a strong statutory patent unreasonableness privative clause. There are transitional rules to address the time until the Commission no longer has the power to refer complaints as of January, 2009.

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[3] Ministry of the Attorney General, news release and backgrounder, 26 April 2006

The Commission no longer investigates, mediates or settles individual complaints; nor does it screen complaints to determine whether a complaint can be heard by the Tribunal. The Commission's re-oriented mandate now focuses on pro-active efforts to promote human rights compliance and to eliminate discriminatory practices, including the power to initiate complaints and to participate in Tribunal hearings on issues of public interest. The Commission also has powers which allow it to further the development of human rights principles in a manner consistent with the public interest. This includes: the power to develop policies to guide the application of Parts I and II of the *Code* which set out the protected freedoms from discrimination and their interpretation. The Commission will also have the power to request that a case be stated to the Divisional Court by the Tribunal where the Tribunal's decision is not consistent with Commission policy.

The Human Rights Legal Support Centre has been created to address the fact that the Commission will no longer have carriage of every individual human rights complaint that is before the Tribunal. Instead, applicants have carriage of their own cases as they do before other administrative tribunals and courts. When introducing Bill 107, the Attorney General promised to create a human rights support centre that would provide "full access to legal assistance", including information, support, advice and legal representation to all persons seeking a remedy. The Government committed to "ensure that, regardless of level of income, abilities, disabilities or personal circumstances, all Ontarians would be entitled to share in receiving equal and effective protection of human rights, and all will receive that full legal representation."[4] During the Legislative Committee hearings the Bill was amended to expressly create the Centre, set out its broad mandate to provide advice, support and legal representation that is available across the province, and confirm public funding for the Centre.

This paper after providing some initial background context will address the new role for the courts and then review the new roles of the Commission, the Tribunal and the Human Rights Legal Resource Centre. It will then highlight the transitional provisions.

I. BACKGROUND CONTEXT

A. What Rights are Protected by the Code

The *Human Rights Code* is quasi-constitutional law and sets out the fundamental rights of all persons in Ontario. Many of the rights were drawn originally from the 1948 *Universal Declaration of Human Rights*.[5] It protects every person's right to equal treatment without discrimination in five key areas of social interaction – services, goods and facilities; accommodation; employment; contracts; and vocational associations. This is done on the basis of fifteen grounds of differentiation which operate to the disadvantage and prejudice of individuals in society – race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, disability and

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4 Attorney General Michael Bryant, Hansard, 26 April 2006

5 G.A. Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810 at 71 (1948).

receipt of public assistance.[6] The *Code* is normative, aimed at working proactively to shape behaviour – to prevent and eliminate discrimination – in the five social areas even in the absence of litigation.

2. Human Rights Enforcement Pre Bill 107

Under the former Code, the Ontario Human Rights Commission played a gatekeeper role with complaints being filed with the Commission who screened them, tried to settle them and decided which ones were referred to a hearing before the Tribunal. The Commission had broad powers under the existing s. 34 of the *Code* to exercise its discretion to decide not to deal with a complaint.[7] The only complaints that proceeded to adjudication were those which were referred to the Tribunal by the Commission "where it [appeared] to the Commission that the procedure is appropriate and the evidence warrants an inquiry."[8] The Commission until the last few years referred only a small percentage of the complaints filed with it.[9] If the Commission did refer a matter to the Tribunal, it had carriage of the file. The Commission would lead evidence and make the legal argument in advancing the human rights complaint, but did not act on behalf of the complainant. The Commission was instead an impartial third party representing the public interest. While many complainants relied on the Commission to advance the complaint, many others retained their own counsel to represent their interests in the proceedings.

The previous Tribunal process was premised on the fact that only a limited number of complaints were referred to it each year and that these complaints had already been fully investigated and prepared by the Commission. The Tribunal process was designed to provide for full and formal adjudication of the complaint. In introducing Bill 107, the government indicated that under the former system, it could take up to four or five years between when a

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[6] Not all fifteen grounds of discrimination apply to all five social areas. Some grounds are only protected in relation to specific areas. For example, the right to equal treatment without discrimination based on receipt of public assistance applies only in relation to the social area of accommodation. The right to equal treatment without discrimination based on record of offences applies only in relation to the social area of employment.

[7] The grounds on which the Commission can decline to deal with a case are "(a) the complaint is one that could or should be more appropriately dealt with under an Act other than [the Code]; (b) the subject-matter of the complaint is trivial, frivolous, vexatious, or made in bad faith; (c) the complaint is not within the jurisdiction of the Commission; or (d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay." This is a discretion respondents have frequently sought to invoke to have complaints dismissed without a decision on the merits.

[8] See current s. 36(1)

[9] The number of complaints referred to the Commission over the past five years are as follows:

2000-2001:	73 referrals
2001-2002:	60 referrals
2002-2003:	58 referrals
2003-2004:	89 referrals (this includes some 200 individual human rights complaints dealing with access to education for children with autism which have been combined into a single hearing)
2004-2005:	150 referrals

complaint was filed with the Commission and when it was finally determined by the Tribunal.

The Ontario Human Rights Code Review Task Force, chaired by Mary Cornish issued its 1992 Report " Achieving Equality" which called for a direct access enforcement system to a Tribunal with a strong Commission focusing on pro-active compliance and a system of legal services for complainants. The Government on introducing Bill 107 acknowledged that this Report formed the starting point for the Government's reforms.[10]
Bill 107 generated much debate. Concerns expressed by a number of groups led the Government to introduce numerous significant changes that strengthened and clarified details of the Bill that were underdeveloped in earlier versions.

II. THE NEW ROLE OF THE COURTS

A. Introduction

Bill 107 calls on the Courts to play an important role to ensure the enforcement of human rights protected by Part I and II of the Code rights which arise in the many diverse contexts found in civil proceedings. The Courts have three major roles: 1) applying the Code when deciding civil claims where an infringement of the Code has been alleged;[11] 2) deciding judicial review applications from Tribunal decisions or Code-related decisions of administrative bodies; and 3) deciding stated case applications by the Tribunal which are initiated by the Commission. specific power to decide whether the Code has been infringed where the issue arises in a civil proceeding. Overall, the aim is to provide greater coherence and accessibility in securing Ontarian's human rights protections.

Administrative law bodies which have the power to decide questions of law have the power to apply the Code as a result of the Supreme Court of Canada decision in *Tranchemontagne v. Ontario (Director, Disability Support Program)*.[12]

B. Enforcing the Code in Civil Proceedings – Section 46.1

1. Overview

The Court has been given the same power as the Tribunal to make a finding of an infringement of a right under Part I of the Code and to order monetary and/or non-monetary restitution for losses arising out of that infringement. Section 46.1 provides as follows:

> *Civil remedy*
> *46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:*

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[10] Achieving Equality, Report on the Ontario Human Rights Code Review Task Force, Queen's Printer, Ontario, 1992.

[11] *Human Rights Code,* R.S.O. 1990, c.H-19, s. 46.1.

[12] [2006] 1 S.C.R. 513.

> *1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.*
> *2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect. 2006, c. 30, s. 8.*
> *Same*
> *(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I. 2006, c. 30, s. 8.*

This provision is designed to provide an explicit mechanism for human rights claimants to use the civil justice system to secure human rights protection. While widening the current scope for potential human rights claims being raised in civil courts, it also avoids duplication of proceedings by barring Tribunal applications on the same issue. It also seeks to promote a more coherent and direct analysis of human rights violations, while expanding the remedial options available to the courts.

The section provides expressly that this remedial right does not create a cause of action based on an infringement of Part I.[13] This is consistent with the Supreme Court of Canada's refusal to recognize a new tort of intentional discrimination based on a Code breach in *Seneca College of Applied Arts and Technology v. Bhadauria*. [14] Given the Tribunal is no longer the sole adjudicator of Code breaches, *Bhadauria* has been overruled to that extent.

2. Requirements for a Section 46.1 Claim

The Court must find "in a civil proceeding" that another party to the proceeding has infringed a Part I Code right. Plaintiffs must assert a cause of action other than a Code breach. Given the diversity of civil proceedings, such causes of action could range from a restrictive covenant in a lease or contract to matters such as constructive wrong dismissal

Prior to s. 46.1 and the Supreme Court of Canada's 2008 decision in *Honda Canada Inc. v. Keays,*[15] two types of claims alleging Code violations were allowed by Ontario courts:(1) where pleaded in support of a cause of action (i.e. constructive dismissal);[16] and (2) where pleaded as an independent actionable wrong giving rise to punitive damages.[17] Some have argued the

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[13] Code, s. 46.1(2).

[14] [1981] 2 S.C.R. 181.

[15] 2008 SCC 39.

[16] See, for example, *L'Attiboudeaire v. Royal Bank of Canada*, [1996] O.J. No 178, (C.A.); *Ganasegaram v. Allianz Insurance Company of Canada* (2005), 251 D.L.R. (4th) 340 (Ont. C.A.); *Alpaerts v. Obront*, [1993] O.J. No. 732 (Gen. Div.); *Skopitz v. Intercorp Excelle Foods Inc*. [1999] O.J. No. 1543 (Gen. Div.). For other cases which were permitted to proceed, see: *Taylor v. Bank of Nova Scotia*, [2005] O.J. No. 838 (C.A.); *Brookes v. Hudson's Bay Co.*, [2002] O.J. No. 5698 (S.C.J.); *Kulyk v. Toronto Board of Education*, [1996] O.J. No. 2972 (Gen. Div.); *Farris v. Staubach Ontario Inc.*, [2004] O.J. No. 1227 (S.C.J.).

[17] *Honda Canada Inc. v. Keays, supra*

claim must be just raised in the same proceeding as another cause of action rather than be connected to it. As the alleged infringement cannot be the basis of the cause of the action, and the court must find that a Code right has been infringed in a "civil proceeding", the infringement arguably must be relevant to the main cause of action.

Of note, is the difference in the generally two year civil claim time limit and the one year time limit for Tribunal applications.[18]

3. Tribunal Claim Barred

As the Code automatically bars Tribunal applications alleging the same Code infringement, the courts have exclusive authority to determine a human rights infringement that is raised in civil proceedings:s.34(11) This automatic bar arises as follows:

> (I) where a civil proceeding has been commenced in a court in which the person is seeking an order under s. 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or
>
> (ii) where a court has finally determined the issue of whether the right has been infringed or the matter has been settled.[19]

These provisions overrule jurisprudence which had permitted in certain circumstances a Code complaint and civil proceeding to proceed concurrently.[20] The Tribunal is not given any direct residual jurisdiction to review that court decision as it may do with administrative bodies' decisions. See Tribunal section below. However, claimants may try to argue that they should be allowed to proceed before the Tribunal if they believe the court decision or settlement did not address the human rights claim. As the Courts do not have the broad Tribunal power under s. 45.2(3) to direct the responding party to do anything necessary to do "to promote compliance" with the Code, claimants may also seek to pursue that broader relief before the Tribunal. The Commission may also try to file a Tribunal application as the Code does not prevent the Commission from filing a s. 35 application where there has been civil claim.

4. Broader Scope for Human Rights Claims and Analysis

Ontario will now be different from other provinces with its statutory court power to grant relief where a human rights law has been infringed by private parties. The Supreme Court of Canada in *Honda Canada Inc.v. Keays* (dealing with the former Code) overruled Ontario trial and appeal court decisions which held a breach of the former Code could constitute an independent actionable wrong giving rise to punitive damages in a wrongful dismissal action.[21]

Courts have now been given an opportunity to engage in a direct analysis of human rights violations and remedies. The lower court *Keays v. Honda* decisions were amongst the first court

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18 Limitations Act, 2002, S.O. 2002, c. 24

19 Human Rights Code, s. 34(11)

20 See *Farris v. Staubach Ontario Inc*., [2004] O. J. No. 1227 (S.C.J.)

21 [2005] O.J. No. 1145 (S.C.J.); varied [2006] O.J. No. 3891 (C.A.); reversed 2008 SCC 39

decisions to apply a full human rights analysis, although restricted within the courts' assessment of punitive damages. With courts now specifically directed to consider whether Code rights have been infringed and the harmonization of the courts' restitution powers with that of the Tribunal, courts will be looking to the wealth of human rights legislation jurisprudence to help shape their decisions. While the courts' *Charter* jurisprudence has looked to human rights jurisprudence for guidance, the tests under the *Charter* and the human rights laws remain separate.

5. Enhanced Remedies – Section 46.1 Restitution Orders

a. The Meaning of Restitution

With the broad power to order "restitution" for "loss arising out of the infringement", courts are able to remedy the rights violation itself, rather than having to take any relief for the infringement into account in analyzing another head of damages as happened previously. Restitution can be both monetary and non-monetary, including for injury to dignity, feelings and self-respect. As noted above, the power found in s. 45.2(3) to direct "any party to the application to do anything that, in the opinion of the Tribunal the party ought to do to promote compliance with this Act" is reserved to the Tribunal. It is likely plaintiffs will argue that courts can order remedies such as an apology, a reference letter, and even systemic remedies such as policy changes or anti-discrimination education, where they can be shown to fall within the ambit of compensation for losses arising out of the infringement.

Given the similarity of the Tribunal and Court power to order restitution, the Courts will likely look to Tribunal jurisprudence both now and pre-Bill 107 to assist in determining the meaning of "restitution" and what constitutes "non-monetary" "restitution".The former Code's section 41(1) remedial power was also focused on restitution.[22] This jurisprudence will have to be carefully considered since some of it was influenced by the previous $10,000 cap on mental anguish damages and the requirement to show the infringement was wilful or reckless to get such damages. However, the Tribunal under the previous Code gave a broad meaning to "restitution".

In *Fuller v. Daoud*, the Board of Inquiry (now the Tribunal) stated:

> *The overarching power conferred on the Board by subsection 41(1)(b) is to order a respondent to make restitution. It is apposite to note that monetary compensation for loss arising out of the infringement is just one of a panoply of restitutive remedies under that broad power. Restitution is an equitable remedy. That restitutive power allows the Board to restore a complainant to her or his original position before the loss or injury occurred; or to place a complainant in*

[22] *41. (1) Where the Tribunal, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of s. 9 by a party to the proceeding, the Tribunal may, by order:*
a) direct the party to do anything that, in the opinion of the Tribunal, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000 for mental anguish. [Emphasis added.]

> *the position he or she would have been in, if the breach had not occurred. Restitution includes the act of restoration including restoring anything to its rightful owner; the act of making good or giving the equivalent for any loss, damage or injury one sustains; or indemnification. Restitution may take on different forms depending on the nature and legal context of the breach: (see Black's Law Dictionary, 6th ed.).*[23]

Similarly, in *Turnbull v. Famous Players*,the Board of Inquiry held that:

> *In the remedial stage, the Board may (it is discretionary), after finding a complainant's right has been infringed, order specific measures and damages per section 41(1). The test in the remedial stage of the hearing is that of reasonableness. This is consistent with the Board's overarching power to order restitution, an equitable remedy. As found in Black's Law Dictionary, 6th ed., "The term "equity" denotes the spirit and habit of fairness, justness, and right dealing ..."*[24]

The Supreme Court of Canada in *International Corona Resources Ltd. v. Lac Minerals Ltd* commented on the law of restitution as follows In the civil context,:

> *[T]he function of the law of restitution 'is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued to his benefit, it is restored to him.' Restitution is a distinct body of law governed by its own developing system of rules. Breaches of fiduciary duties and breaches of confidence are both wrongs for which restitutionary relief is often appropriate.*[25]

Many Tribunal decisions under the former Code focussed on monetary restitution and placing the claimaint in the position he or she would have been but for the discrimination.[26] Jurisprudence prior to Bill 107 did not always clearly differentiate the Tribunal's power to order non-monetary compensation and its prior general compliance power.[27] As the courts were not

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[23] [2001] O.H.R.B.I.D. No. 19 at para. 64

[24] [2001] O.H.R.B.I.D. No. 20 at para. 235

[25] [1989] 2 S.C.R. 574.

[26] *Di Marco v. Fabcic*,[2003] O.H.R.T.D. No. 4 at para. 52 and *Cuff v. Gypsy Restaurant* [1987] O.H.R.B.I.D. No. 28 at para. 166.

[27] In *Wedley v. Northview Meadow Co-operative Homes Inc.* decision, the Tribunal states:

> This remedial power [in s. 41] has been interpreted in Ontario human rights jurisprudence as creating several categories of remedies that can be ordered by a Tribunal. *Under subparagraph (a), Tribunals have ordered both personal remedies, such as promotion or reinstatement in employment*, and public interest remedies, such as the establishment of workplace anti-discrimination policies and staff training. Under subparagraph (b), Tribunals have ordered monetary compensation for specific losses, such as lost earnings, expenses incurred in job search, commonly known as "special damages". Further, under subparagraph (b), the Tribunal has authority to order two kinds of monetary compensation for intangible losses, commonly referred to as "general damages". The first type of general damages compensation provides for the "loss of the right to freedom from discrimination", which

given the Tribunal's general compliance power found in s. 45.2(1)3. they will need to consider whether systemic or general remedies properly fall within "non-monetary" restitution or are meant to be only ordered by the Tribunal. Arguably some systemic or public interest remedies may be necessary to ensure that the loss suffered by a plaintiff such as a "poisoned work environment" can be remedied.

b. Reinstatement as a Court Remedy

While the courts have traditionally declined to order specific performance of a contract for services in a wrongful dismissal action, s.46.1 opens up the possibility that such an order could be made as a form of "non-monetary" restitution where the loss of the employment can be connected to the Code infringement. Under the former Code, re-instatement was not usually ordered by the Tribunal and when it was, it is not clear whether it flowed as restitution or pursuant to the general compliance power.(under the former 41(1)(a), now 45.2(3)).

In *Naraine v. Ford Motor Co.*,[28] the Board of Inquiry ordered reinstatement.

> *After reflecting upon the problems inherent in quantifying the value of reinstatement, and considering all of the other factors present in this case, I have concluded that only the remedy of reinstatement would properly serve as restitution to Mr. Naraine. Reinstatement is the remedy which most fully attempts to put Mr. Naraine back into the position he would have enjoyed had the wrong not occurred, to "make whole" his loss resulting from the violation of the Code. Reinstatement can also serve the educational purposes of human rights legislation in that it will signify to all Ford supervisors, employees and members of the wider community, through a concrete and highly visible order, that discriminatory conduct will be redressed by boards of inquiry. [Emphasis added.]*

The Board also provided "Guidelines to Assist the Parties in Reinstatement" and directed Ford to provide the complainant with training and employee counselling and to institute procedures to handle complaints quickly and effectively.[29]

c. Quantum of Damages

While the Tribunal had an overall history of ordering relatively modest damage awards (often in $2,000.00 to $4,000.00 range) for mental anguish, those awards were made at a time when

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> recognizes the inherent value of the right to equal treatment and dignity of each person. Second, if the discriminatory conduct was engaged in "willfully or recklessly" and negatively affected the complainant's emotional well-being, the Tribunal may exercise its discretion under s. 41(1)(b) to make an additional general damages award of compensation for the complainant's mental anguish, up to the statutory limit of $10,000. [Emphasis added.] [2008] O.H.R.T.D. No. 12 at para. 72

[28] [1996] O.H.R.B.I.D. No. 43

[29] Ibid, para. 22.The Divisional Court upheld the Board's decision on judicial review. The Court of Appeal's decision to overturn the reinstatement does not appear to undermine the board's jurisdiction to order reinstatement generally finding rather that reinstatement was not justified on the facts due to the claimant's conduct and undue delay. *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (2002), 209 D.L.R. (4th) 465 at para. 72 (Ont. C.A.).

the claim was capped at $10,000.00. Without the cap, the Tribunal will likely significantly increase those awards. Courts are used to ordering higher damage awards as was reflected in the *Keays v. Honda* decisions.

At the same time, human rights tribunals have made some significant general damage awards, i.e. $25,000.00[30] and also high special damage awards, awarding a 57 year old claimant lost wages to age 65 where the person had no reasonable expectation of finding alternative employment.[31] In *Quereshi v. Toronto Board of Education*, the Tribunal awarded a complainant denied a teaching position on the basis of ethnicity and place of origin 9 years worth of compensation for lost wages and benefits minus his earnings over that period.[32] This is higher than a court would award on a reasonable notice test.

C. JUDICIAL REVIEW

1. Substance of Decisions

The courts will review the substance of Tribunal decisions on the basis of the statutorily mandated standard of patent unreasonableness set out in s. 45.8 of the Code as follows:

> *Subject to section 45.6 of this Act, section 21.1 of the Statutory Powers Procedure Act and the Tribunal rules, a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.*

Unlike the former Code's full right of appeal, this amendment was designed to provide the Tribunal with the same deference to its specialized expertise as existed for other specialized administrative tribunals. Given the jurisprudence concerning the standard of review was in a state of flux, the Legislature decided to fix directly in the Code the review standard as patent unreasonableness. After Bill 107 passed, the Supreme Court of Canada in *Dunsmuir v. New Brunswick*[33] collapsed the patent unreasonableness and reasonableness *simpliciter* standards into one "reasonableness" standard of review.

It remains to be seen what impact, if any, the *Dunsmuir* decision will have on the Court's interpretation of the statutory patent unreasonableness standard. In British Columbia, some courts have found that *Dunsmuir* does not apply if there is a statutory patent unreasonableness test.[34] Where human rights tribunals statutes include rights of appeal. courts have found they

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30 *Quereshi v. Toronto Board of Education,* (2003) O.H.R.T.D. No.11 (Q.L.) at paras. 8-10 and 32. rev'd *Quereshi v. Ontario(Human Rights Commission*) {2006} O.J. No. 1782 (Div.Ct.) (Q.L) *(Quereshi)* Div. Ct).

31 See *McKee v. Hayes-Dana Inc.,* (1992) 17 C.H.R.R. D/79 at para. 46.

32 *Quereshi v. Toronto Board of Education, supra*.

33 2008 SCC 9.

34 The question has arisen in British Columbia as the *Administrative Tribunals Act* prescribes a standard of patent unreasonableness to certain types of administrative tribunal decisions. Although the courts have not adopted a uniform approach, the predominant approach has been to continue to apply the patent unreasonableness standard notwithstanding the Supreme Court's elimination of the standard in Dunsmuir:

are owed much less deference, applying generally applied a correctness standard to legal issues and a reasonableness *simpliciter* standard to the application of law to facts.[35]

2. Procedural Grounds

While courts have traditionally accorded administrative bodies very little or no deference on procedural issues relating to natural justice issues, the legislature has given the Tribunal considerable power and flexibility to shape and implement its procedures to arrive at "a fair, just and expeditious resolution of the merits" .

> *Section 41:*
>
> *This Part [Part IV] and the Tribunal rules shall be liberally construed to permit the Tribunal to adopt practices and procedures, including alternatives to traditional adjudicative or adversarial procedures that, in the opinion of the Tribunal, will facilitate the fair, just and expeditious resolutions of the merits of the matters before it.*
>
> *Section 43(8):*
>
> *Failure on the part of the Tribunal to comply with the practices and procedures required by the rules or the exercise of discretion under the rules by the Tribunal in a particular manner is not a ground for setting aside a decision of the Tribunal on an application for judicial review or any other form of relief, unless the failure or the exercise of discretion caused a substantial wrong which affected the final disposition of the matter.*

Section 43(8) changes the general administrative law rule that decisions not made in accordance with procedural fairness are set aside regardless of whether the breach affected the final disposition of the case. Ultimately, though, the rules of procedural fairness are broader than mere compliance with a tribunal's own rules of procedures. Therefore, it remains to be seen how much deference courts will accord to the Tribunal on procedural matters.

D. STATED CASE APPLICATIONS

Where the Commission is a party or intervenor and the decision is a "final" one, the Commission may apply to the Tribunal to have the Tribunal state a case to the Divisional Court if it is inconsistent with a policy approved by the Commission: s.45.6(1). The Tribunal then has a discretion to state a case to the Court requesting its opinion on the question if the

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see for e.g. *Evans v. University of British Columbia*, [2008] B.C.J. No. 1453 (S.C.) and *Carter v. Travelex Canada Limited*, 2008 BCSC 405. For the contrary opinion, see *Howe v. 3770010 Canada Inc*, [2008] B.C.J. No. 474 (S.C.).

[35] See *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 and *Berg v. University of British Columbia*, [1993] 2 S.C.R. 353; *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (C.A.); *Quereshi v. Ontario (Human Rights Commission)*, [2006] O.J. No. 1782 (Div. Ct.). Courts only applied the most deferential standard of patent unreasonableness to decisions by the Commission under ss. 34 (whether to deal with complaint), 36 (whether to refer complaint to Tribunal), and 37 (reconsideration) of the old Code: *Gismondi v. Ontario (Human Rights Commission)*, [2003] O.J. No. 419 (Div. Ct.); *Batson v. Ontario (Human Rights Commission)*, [2007] O.J. No. 2233 (Div. Ct.).

Commission's application relates to a question of law and the Tribunal considers it appropriate to do so.[36] On a stated case, the parties are the parties in the proceeding and the Commission if the latter was an intervenor in the case.[37] Such an application will not stay the final decision or order of the Tribunal, unless the Tribunal or Court orders otherwise.[38] This would allow a successful individual applicant to gain the benefits of their decision without having that held up while the policy matter is reviewed.

Any party who supports or opposes the Commission's stated case application to request a stated case can make submissions to the Tribunal. The Divisional Court must hear and determine the stated case and may hear submissions from the Tribunal. Any party to the stated case proceeding may apply within 30 days from the decision to the Tribunal for reconsideration of its original decision or order: s. 46.7.[39]

The standard of review generally applied to stated cases is correctness since a stated case requests a court's opinion rather than a judicial review of a Tribunal's decision or order.
The privative clause which mandates that a patent unreasonableness standard be applied in judicial review applications, explicitly states that it is "subject to s. 45.6.":s.45.8. Commission policy is intended "to provide guidance in the application of Part I and II of the Code": s.30. In deciding a stated case, the court will need to consider what "guidance" means and whether and what relative deference should be accorded to the specialized expertise of the Commission and the Tribunal. If a correctness standard is applied on a stated case, it could lead to an incongruous situation where a different standard of review could be applied to the same Tribunal decision in a case depending on the means by which it is contested. For example, the Commission could apply to have the Tribunal state a case on a matter of law to the Divisional Court if it considers that the Tribunal's decision is inconsistent with one of the Commission's policies. On a judicial review application by the Commission arguing that the Tribunal erred on a question of law, the Court would be bound by the legislation to apply the deferential standard of patent unreasonableness.

III. THE COMMISSION'S NEW ROLE

A. Introduction and Composition

The Commission is significantly strengthened under the new system with a broader range of choices and strategies being given to the Commission for promoting and enforcing human rights. These multi-dimensional powers help to leverage the Commission's ability to build an Ontario-wide culture of human rights compliance. The efficacy of the Commission's role will depend on a number of factors, including the level of government resources it receives to carry out its mandate.

The Chief Commissioner is Barbara Hall and Commissioners must now "have knowledge,

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36 S. 45.6(2).

37 S. 45.6(3)

38 S. 45.6(6)

39 S. 45.6(7)).

experience or training with respect to human rights law and issues". The appointment process recognizes "the importance of reflecting, in the composition of the Commission as a whole, the diversity of Ontario's population:" S.27. Longstanding concerns about safeguarding the Commission's independence were partly addressed by a provision that the Commission reports to the Legislature:. s. 31.6(2).

B. Functions

The Commission has a significant role to play in litigating human rights complaints and issues and in guiding the development of consistent human rights jurisprudence. The Commission's functions now include the following:

a. to forward the fundamental policy of the *Code* that "the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law";
b. to develop and conduct public information and education programs to promote awareness, understanding of and compliance with the *Code* and to prevent and eliminate discriminatory practices;
c. to undertake research into discriminatory practices and make recommendations to prevent and eliminate such practices;
d. to examine and revise any statute, regulation, or program or policy made under statute for compliance with human rights and make recommendations in respect of any inconsistency with the *Code*;
e. to initiate reviews and conduct inquiries and make recommendations regarding incidents or conditions in a community, institution, industry or sector of the economy and encourage and coordinate plans, programs and activities to reduce such incidents;
f. to make policies to provide guidance on the *Code*'s application; and
g. to report to the public on the state of human rights in Ontario.

C. The Commission's Diverse Tools

The *Code* provides the Commission with the mandate to actively intervene to encourage and facilitate a culture of human rights compliance. a number of tools with the potential to address human rights systemically and pro-actively and Under the new system, the Commission and Tribunal can be seen as playing distinct but complementary roles. These roles and the interconnections between the two institutions have the potential to allow for a more multidimensional approach to human rights promotion and enforcement in Ontario.

1. Commission Applications

The Commission is empowered to file its own Tribunal applications where it is of the opinion that the application is in the public interest: s. 35(1). This allows the Commission to bring cases to the Tribunal as an extension of its investigative and educational work on issues of systemic discrimination. It is given the discretion to determine what issues should be litigated in the public interest and when it is appropriate for the Commission to use litigation as a tool to advance compliance with the *Code*. This permits the Commission to bring complaints which might otherwise fall through the cracks or remain unaddressed because there are no complainants willing and/or able to come forward with complaints. It also allows the Commission to

incorporate litigation into the range of its other pro-active strategies. Where the Commission has used its public inquiry power and been unable to resolve a human rights issue with that process, it has the power to bring a complaint itself under s. 35 on the issue.

A complaint by the Commission will not affect the right of any individual to make their own application to the Tribunal in respect of the same matter. The Commission and individual complaints will be dealt with together unless the Tribunal decides otherwise: s. 35(3)(4).

2. Commission as Intervenor and Interaction with Tribunal

The Commission has the express right to intervene in any application before the Tribunal on such terms as the Tribunal may determine: s. 37(1). When an applicant consents, the Commission has full rights of participation in the hearing, including the right to lead evidence, the right to disclosure and the right to make argument.

At the request of the Commission, the Tribunal is required to disclose to the Commission copies of applications and responses filed with the Tribunal and may disclose to the Commission other documents in its custody or in its control", s.38. Access to this information enables the Commission to participate in Tribunal litigation, to be aware of developing issues before the Tribunal and informs the Commission's broader pro-active mandate with respect to education, inquiries and policy development.

Just as the Commission can bring matters to the Tribunal, the Tribunal can now also refer to the Commission public interest matters arising out of its proceedings which the Commission can decide whether to address:45.4. This provides another point at which the activities of the Commission and the Tribunal can work independently and yet reinforce or harmonize the development of human rights principles.

3. Public Policy Power

The Commission has the power to affect human rights compliance and litigation through its power to make policies to provide guidance on the *Code*'s application: s. 30. This allows the Commission to play a significant role in setting policy with respect to the interpretation of the *Code*'s provisions and seeking a consistent development of human rights law in the public interest. The Commission issued a number of significant policies, particularly in the field of disability accommodation.

The Tribunal may consider these policies in its deliberations, and the Tribunal is specifically required to consider these policies if requested to do so by a party or intervenor in a case: s.45.5. While the policies are binding on the Tribunal (as is the case with Canadian Human Rights Commission guidelines), the Commission can request the Tribunal state a case to Divisional Court if it believes that a Tribunal decision or order is inconsistent with an approved Commission policy: s.45.6. Within 30 days of a Divisional Court decision on a stated case, any party to the proceeding may apply to the Tribunal for a reconsideration of its original decision. The Tribunal may also, of its own motion, reconsider its own decision in accordance with its rules: s. 45.6(7), 45.7.

4. Anti-Racism and Disability Rights Secretariats

An Anti-Racism Secretariat and a Disability Rights Secretariat are to be established by the Commission to undertake research; make recommendations to prevent discriminatory practices; and to develop and provide public education programs to eliminate race and disability-related discrimination: ss. 31.3 and 31.4. Although their roles remain undeveloped, these secretariats could provide important resources on race and disability-related discrimination.

5. Advisory Groups

The Commission has the power to establish groups to advise the Commission about the elimination of discriminatory practices that infringe Code rights: s31.5. These advisory groups provide an important opportunity those with human rights duties such as employers and service providers to collaborate with human rights advocates to identify and work on key areas for pro-active and systemic action.

6. Public Inquiry and Reporting Powers

The Commission's new broad public inquiry power allows the Commission to examine and investigate systemic discrimination in a particular institution, throughout an economic sector, or within any area of community interaction. This includes where there is human rights tension or conflict within a community The Commission "may conduct an inquiry under this section for the purpose of carrying out its functions under this Act if the Commission believes it is in the public interest to do so.":s.31. This includes the power "to make recommendations, and encourage and co-ordinate plans, programs and activities, to reduce or prevent such incidents or sources of tension or conflict": s. 29(e).

A person appointed to conduct such an inquiry has very broad inquiry authority to enter premises, to require production of documents and to question persons on relevant matters: s. 31(7). The person may be accompanied by an expert who can assist the inquiry process. There are also legal obligations to cooperate with the inquiry. A person who has been requested to produce a document or thing shall produce it and shall provide any assistance that is reasonably necessary to produce a document in readable form: s. 31(11). The Commission may also authorize the person conducting the inquiry to apply to a Justice of the Peace for a search warrant: s. 31.1

The Commission's public inquiry power can leveraged to at least three different ends:

a. to pro-actively investigate an area of systemic discrimination, make recommendations for preventing and eliminating discrimination and to develop plans to eliminate discrimination. For example in the employment context, this could involve examining an economic sector where there is preponderance of vulnerable often non-unionized workers who are fearful of bringing individual complaints.

b. to support either the complaints initiated by the Commission or in other complaints as the evidence that is secured through the inquiry may be lead in evidence before the Tribunal: s. 31.2

c. to focus and support the Commission's reports to the Legislature and the public.

The Commission is required every year to prepare a report of its activities and to submit it to the Speaker of the Assembly by no later than 30 June. The Speaker arranges for the Report to be laid before the Legislature: s. 31.6(1)(2). The Commission also has the broader power to "make any other reports respecting the state of human rights in Ontario and the affairs of the Commission as it considers appropriate, and may present such reports to the public or any other person it considers appropriate": s. 31.7. This power is similar to that held by the Canadian Human Rights Commission which has used it to conduct investigations into and report on urgent issues of systemic discrimination.[40]

III. THE TRIBUNAL'S NEW ROLE

The Tribunal's powers and processes have changed to facilitate the new direct enforcement process and to ensure human rights complaints are fairly and expeditiously dealt with. Like the Commission, Tribunal appointments are to be made through a competitive process based on certain criteria, including experience, knowledge or training in human rights, aptitude for impartial adjudication and aptitude for applying the Tribunal's alternative adjudicative practices and procedures: s.32(3).

A. Filing Applications

1. Timing

Applications (previously referred to as "complaints") can now be made by individuals, groups, or by the Human Rights Commission. The time limits for filing applications have been extended from the previous 6 months to 1 year after the incident to which the application relates or, if there was a series of related incidents, within 1 year after the last incident in the series: s. 34(1)(a)(b). This can be extended "if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay": s.34(2).

2. Applications by individuals, groups or the Commission.

A person who believes that his or her rights have been infringed can make an application to the Tribunal, and two or more persons who are each entitled to make an application, can make an application jointly: s. 34(1)(4). A new provision permits a person or organization, other than the Commission, to make an application on behalf of another person if that person consents: s. 34(5). This provision will enhance access to justice by allowing individuals or organizations to make applications in a representative or public interest capacity. Under this provision, unions will be permitted to make applications to enforce members' rights under the *Code*. Similarly, public interest groups will now be able to file complaints on behalf of individuals who are vulnerable to reprisals if they bring applications in their own names. Groups that make applications on behalf of another person may participate in the proceeding in accordance with the Tribunal rules: s. 34(6). A person on whose behalf a complaint is made retains the power to withdraw an application in accordance with Tribunal rules: s. 34(10).

The Commission has the power to file an application with the Tribunal if it considers it in the

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[40] See, for example, *Protecting Their Rights*, the Canadian Human Rights Commission's 2004 Special Report regarding systemic discrimination in correctional services for federally sentenced women.

public interest to do so: s. 35. See Commission section above.

B. Rules of Practice and Tribunal Process

1. Tribunal Rules of Practice

The Tribunal has the power to make rules of practice and procedure, including rules regarding alternatives to traditional adversarial or adjudicative procedures. The Tribunal issued revised Rules of Practice effective January 31, 2008 which remain in effect to deal with all complaints which are referred to the Tribunal by the Commission up to December 31, 2008. On January 1, 2009, the Commission will no longer have the power to refer complaints. The Tribunal has also issued Rules of Practice effective June 30, 2008 which apply to all applications filed from that date under Bill 107. The Tribunal's core values are accessibility, both physically and functionally, fairness, transparency, timeliness and opportunity to be heard.

2. Fair Just and Expeditious Resolution Test

While concerns were initially raised about the fairness of the Tribunal's new powers to dismiss applications quickly and without a hearing, amendments were made to expressly ensure that the Tribunal must dispose of applications by:

> "adopting the procedures and practices provided for in its rules or otherwise available to the Tribunal which, in its opinion, offers the best opportunity for a fair, just and expeditious resolution on the merits of the matters before it": s.40 (emphasis added)

Another concern raised over many years and expressed in the *Achieving Equality* Report is the importance of human rights complainants feeling like they have been heard – that they have had a fair "day in court" – and ensuring that they understand why their complaint has been dismissed if it is dismissed. To this end, Bill 107 provides that the Tribunal rules shall ensure that, in any proceeding before the Tribunal: 1) An application that is within the jurisdiction of the Tribunal shall not be finally disposed of without affording the parties an opportunity to make oral submissions in accordance with the rules; and 2) An application may not be finally disposed of without written reasons: s. 43(2).

3. Tribunal Active Inquiry Powers and SPPA

Bill 107 has given the Tribunal the power to create rules of practice and procedure which allow the Tribunal to be an active inquiry adjudicator with effective powers to control its process to best suit the case before it and to ensure that appropriate and relevant evidence is brought forward. This includes:

a. providing for and require the use of hearings or of practices and procedures that are provided for under the *Statutory Powers Procedure Act* or that are alternatives to traditional adjudicative or adversarial procedures;
b. authorizing the Tribunal to define or narrow the issues, limit the evidence or submissions of parties on such issues and determine the order in which issues and evidence will be presented;
c. authorizing the Tribunal itself to conduct examinations in chief or cross-

examinations of a witness;

d. prescribing the stages of its processes at which preliminary, procedural or interlocutory matters will be determined;

e. authorizing the Tribunal to make or cause to be made such examinations of records and other inquiries as it considers necessary in the circumstances;

f. authorizing the Tribunal to require a person to produce any document, information or thing, provide a statement or oral or affidavit evidence; or adduce evidence or produce witnesses who are reasonably within the party's control: s. 43(3)

The *Statutory Powers Procedure Act* applies to Tribunal proceedings unless they conflict with a provision of the *Code*, the regulations or the Tribunal rules. In the event of a conflict, the *Code*, the regulations or the Tribunal rules prevail: s. 42.

C. Power to Order Inquires

The Tribunal has important new investigative powers. Under s. 44, the Tribunal has powers, where requested by a party, to appoint a person to conduct an inquiry where it is appropriate in the circumstances in order to obtain evidence "that may assist in achieving a fair, just, and expeditious resolution of the merits" of an application. Alternatively, the Tribunal may request the Commission to appoint a person to conduct an inquiry: s. 44(15). The br

The inquiry powers are broad and include the power to enter premises without warrant, request documents or things, question persons, and take photographs or make other recordings. A report is to be prepared and submitted to both the Tribunal and the parties to the application: s. 44(14). This power helps to ensure that individual applicants will not bear the full burden of investigating their own complaints and gives the Tribunal the tools to ensure it as appropriate and full evidence in respect of an application before it.

D. Remedial Powers

1. Individual Applications

The new *Code* sets out different remedial schemes depending on whether an application is brought by an individual or by the Commission. Section 45.2 sets out the following remedies that may be sought by individual applicants or groups who have brought complaints under s.34:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

3. An order directing any party to the application to do anything that,

> in the opinion of the Tribunal, the party ought to do to promote compliance with this Act, both in respect of the infringement that was the subject of the application and in respect of future practices.

Section 45.2(2) underscores that where there is an infringement, the Tribunal may make an order to promote compliance with the *Code* in respect of future practices, even if no such order was requested. This remedial power furthers the fulfillment of the systemic public interest objectives of the *Code*.

2. Commission Applications

In applications made by the Commission under s. 35, the Tribunal "may make an order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance" with the *Code*. As with individual applications, subsection 45.3(2) provides that, in response to applications brought by the Commission, the Tribunal may direct a person to do anything with respect to future practices. The Tribunal may also make orders to remedy past practices as well.

These remedial provisions represent an improvement over the current provisions of the *Code* in several respects

(a) they eliminate the current $10,000 cap on monetary damages for "mental anguish";
(b) they eliminate the distinction which is often difficult to draw between damages for mental anguish and damages for losses arising out of the infringement of rights;
(c) by doing so, the provisions also eliminate the necessity for the applicant to show that conduct was engaged in "wilfully or recklessly" in order to successfully claim damages to compensate for mental anguish arising from the infringement.

The new remedial provisions also refer to ordering parties to do anything they ought to do to "promote" compliance with the *Code* rather than to "achieve" compliance with it which was previous wording. The term "promoting" is more consistent with the broader approach to human rights enforcement taken under the new *Code*.

E. Dismissal of Applications Without Hearing

Under Bill 107, except where applications fall outside the Tribunal's jurisdiction, the Tribunal is required to afford parties an opportunity to make oral submissions prior to disposing of any application that is timely and within the Tribunal's jurisdiction. However, the Tribunal still maintains power to govern its own proceedings by requiring the use of "alternatives to traditional adjudicative or adversarial procedures": s.39(3)(a). It may also exert control over proceedings by defining or narrowing the issues in an application and limiting the evidence and submissions of the parties on these issues: s.39(3)(b). These provisions have the potential to enhance access to the Tribunal while also vesting the Tribunal with the power to manage its caseload as effectively as possible.

This contrasts with section s. 34 of the former *Code*, where it was the Commission which could decide to not deal with a complaint for a number of reasons: whether the complaint could be

brought under another Act; whether it is trivial, frivolous, vexatious or brought in bad faith; whether it is outside the Commission's jurisdiction; or whether it is brought out of time. In addition, the Commission had the power to decide which cases it will refer to the Tribunal based on its assessment of whether the Tribunal procedure is appropriate and the evidence warrants an inquiry. As a result, many complaints under the old system never proceeded to the Tribunal to be adjudicated on the merits.

F. Multiple Proceedings/Choice of Forum

1. Concurrent Jurisdiction of Different Administrative Tribunals

The rules with respect to addressing matters which are also being addressed by other administrative tribunals have changed. Under s. 45, the Tribunal may defer an application in accordance with its rules. Under s. 45.1, the Tribunal may dismiss an application, in whole or in part, only if it finds that the other administrative tribunal "has appropriately dealt with the substance" of the human rights claim. This provision appears to provide both the applicants and the Tribunal with greater flexibility in determining how to proceed where two or more tribunals may have overlapping jurisdiction over a matter. Unlike the former s. 34(1)(a), the new provision looks not to the form of a complaint (should it or could it proceed under a different Act?) but instead to how the human rights issue was in fact dealt with on the merits. It looks at whether a different proceeding has "appropriately dealt with the substance of an application". This provides greater protection to claimants to ensure that the substance of their human rights claim can be fairly and fully dealt with on the merits.

Under s. 34(1)(a) of the former Code, the Commission could decide not to deal with a complaint if it *could* or *should* be more appropriately dealt with under another Act. Particularly in respect of unionized employees, complaints have been routinely dismissed under s. 34(a) on the basis that they could or should more appropriately be dealt with in grievance arbitration, whether or not a grievance has in fact been filed and whether or not a grievance has adequately addressed human rights issues.

The change in approach to deferral and dismissal signals that the Tribunal has the mandate to monitor consistent compliance with human rights standards across the system and to act as the guardian of those legal standards. Where there is overlapping jurisdiction and claims are filed before different bodies, the Tribunal will maintain jurisdiction over an application. However, it can defer the application until it decides whether on a case-by-case basis the other proceeding has substantively dealt with the claim. The amendments ensure that claimants can bring human rights claims to the Tribunal when they feel this is the most appropriate forum to resolve those disputes. This may happen when a person or a union is trying to address broad concerns about systemic discrimination and/or seeking systemic remedies. While labour arbitrators have the jurisdiction to interpret and apply the *Code*, they have rarely issued the kinds of systemic remedies that are necessary to eradicate the dynamics or practices that support discriminatory behaviour or the kinds of damages that have been awarded by human rights tribunals. Labour arbitrators also face institutional limits in that they are unable to amend the collective agreement and lack the institutional independence or security of courts and tribunals.[41]

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[41] See, Fay Faraday, "The Expanding Scope of Labour Arbitration: Mainstreaming Human Rights Values and Remedies", (2006) 12:3 Canadian Journal of Labour and Employment Law

There will also be opportunities to use the enhanced human rights protection before the Tribunal to influence the development of administrative law and remedies. The developments before the Tribunal have the potential to feed back into the promotion of human rights by administrative boards and tribunals. To the extent that the Tribunal maintains jurisdiction over an application until such time as it ensures that the substantive matter of the human rights claim has been adequately dealt with, this could lead to greater harmonization between the application of human rights principles and remedies by Administrative boards and tribunals.

2. Concurrent Claims Brought in Civil Courts

As set out above, where there are concurrent civil claims before a court that have not been finally determined or withdrawn: s. 34(10).

IV. HUMAN RIGHTS LEGAL SUPPORT CENTRE

The Human Rights Legal Support Centre, is a critical pillar of the new human rights system, particularly as the Commission no longer has carriage of complaints before the Tribunal.

A. Governance and Funding

Bill 107 establishes the Human Rights Legal Support Centre as a corporation without share capital."The Centre shall be independent from, but accountable to, the Government of Ontario as set out in this Act": s. 45.11(5). It is governed and managed by a Board of Directors of between five and nine members appointed by Cabinet in accordance with regulations:s. 45.14(2). The Chair of the Board is designated by Cabinet: s. 45.14(3). The Chair is Raj Anand.

Section 45.14(8) and (9) further set out the Board's duty to act responsibly and its standard of care:

a) (8) The board of directors shall act in a financially responsible and accountable manner in exercising its powers and performing its duties.

b) (9) Members of the board of directors shall act in good faith with a view to the objects of the Centre and shall exercise the care, diligence and skill of a reasonably prudent person.

The Centre submits its annual budget to the Minister: s.45.15. At s. 45.15(3), the Bill provides that "the money required for the purposes of this Act shall be paid out of such money as is appropriated therefore by the Legislature." Further, at s. 45.16, the Bill provides that "the Centre's money and investments do not form part of the Consolidated Revenue Fund and shall be used by the Centre in carrying out its objects." The Centre submits an annual report to the Minister within four months after the end of its fiscal year: s. 45.17.

B. The Centre's Mandate

The new *Code* designates the Centre's objects as follows:

a) to establish and administer a cost-effective and efficient system for providing support services, including legal services, respecting applications to the Tribunal under Part IV; and

b) to establish policies and priorities for the provision of support services based on its financial resources: s. 45.5.

Consistent with the new *Code*'s broader approach to human rights, the Code requires that the Centre provide a broad range of "support services" which extend beyond representation in proceedings before Tribunal. Section 45.6 provides that the Center will provide the following support services:

a) advice and assistance, legal and otherwise, respecting the infringement of rights under Part I of the Code
b) legal services in relation to making applications to the Tribunal, proceedings before the Tribunal, applications for judicial review arising from Tribunal proceedings, stated case proceedings, and the enforcement of Tribunal orders
c) such other services as may be prescribed by regulation: s. 45.6(1).

As such, the Centre is required to provide a full range of services – both legal and non-legal – that include advice and assistance prior to making an application with the Tribunal as well as steps following the disposition of a matter by the Tribunal. It appears that the Centre will provide support only to those seeking to enforce human rights under the *Code* rather than to those responding to applications.

The Center is required to ensure that its services are available "throughout the Province, using such methods of delivering the services as the Center believes are appropriate": 45.6(2). The new *Code* does not establish any criteria that individuals have to meet in order to receive services from the Centre. However, in light of the emphasis on "cost effectiveness" in the Center's objects, it is possible that the Center will adopt criteria to prioritize access to its services.

The full scope of the Centre's role is not apparent yet as Cabinet has broad jurisdiction to make regulations affecting many of the core duties of the Centre. Section 48(1)(c) gives Cabinet broad authority to make regulations "respecting the Human Rights Legal Support Centre". Section 48(2) elaborates upon this as follows in a way that allows significant aspects of the Centre's mandate, operation, and funding to be governed by regulation.

There is no doubt that the Centre's effectiveness will depend on how well it is funded and what level of resources it is given.

V. TRANSITIONAL PROVISIONS

A. Process for Dealing with Complaints as of June 30, 2008

Where a complaint is already before the Commission or is filed with the Commission before the effective date, the following process applies:

(a) For a six-month period beginning on the effective date, the Commission shall continue to deal with the complaints that are before it in accordance with the old Part IV: s. 53(2)

(b) At any time during this six-month period, a person who has a complaint before the Commission may, in accordance with the Tribunal rules, elect to abandon the complaint and make an application to the Tribunal with respect to the subject-matter of the complaint. The Tribunal shall make rules to ensure that such applications are dealt with in an expeditious manner: s. 53(3)(4).

(c) If, after the six-month period, the Commission has failed to deal with the merits of a complaint and the complaint has not been withdrawn, the complainant may make an application to the Tribunal with respect to the subject-matter of the complaint within a further six-month period.

(d) No application, other than the two kinds of applications identified above, may be made to the Tribunal if the subject-matter of the application is the same or substantially the same as the subject-matter of a complaint that was filed with the Commission under the old Part IV: s. 53(8)

(e) Where before the effective date or during the six-month period following the effective date a settlement was effected by the Commission and agreed to in writing, signed by the parties and approved by the Commission, the settlement can be enforced under the new s. 45.9.

Where a complaint was referred to the Tribunal by the Commission either before the effective date or during the six-month period following the effective date, the following procedures apply:

(a) On or after the effective date, the new Part IV applies to the complaint as though it were an application made to the Tribunal and the Tribunal shall deal with it in accordance with the new Part IV: s. 55(2).

(b) The Commission shall continue to be a party to a complaint that was referred to the Tribunal before the effective date: s. 55(3)(a).

(c) The Commission shall not be a party to a complaint that is referred to the Tribunal during the six-month period after the effective date unless (I) the complaint was initiated by the Commission, or (ii) the Tribunal sets a date for the parties to appear before the Tribunal before the end of the six-month period: s. 55(3)(b),(4). Nothing, however, prevents the Tribunal from adding the Commission as a party or prevents the Commission from intervening in such a complaint: s. 55(5).

3. Regulations

Finally, Cabinet has the power to make regulations “providing for transitional matters which, in the opinion of the Lieutenant Governor in Council, are necessary or desirable to facilitate the implementation of the *Human Rights Code Amendment Act, 2006*”: s. 56.

VI. CONCLUSION

Ultimately, the real measure of success for the human rights system as a whole must be whether it can achieve significant and ongoing reductions in the inequalities facing those who are protected by the *Human Rights Code* and whether it can secure a culture of pro-active human rights compliance. While certainly the number of applications filed with the Tribunal each year and the Tribunal's ability to dispose of these applications fairly and expeditiously on the merits are a measure of its effectiveness, the success of the system as a whole must also look beyond complaints to examine whether there is an increase in overall human rights compliance. In this respect, Bill 107 requires that the Minister appoint a person to conduct public consultations and submit a report reviewing "the implementation and effectiveness of the changes resulting from the enactment of the Act".