

**"Moving Beyond a Narrow Focus on the Adjudication System:
Challenging Governments to Effectively Carry out their Role as the
Guarantor of Human Rights Protection"**

Prepared for Osgoode Conference on the Pinto Report

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1. Introduction

The release of the Pinto Report provides a fresh opportunity to assess the state of human rights in Ontario. In the concluding pages of the Pinto Report it asks: “Whose responsibility is human rights enforcement?” Yet it does not really answer that question. While the Report raises many important issues about the functioning of the four Bill 107 pillars¹ of Ontario’s human rights system, it fails to focus on the key overall entity responsible for making sure Ontarians are guaranteed human rights protection – the Ontario Government.

In some ways this is understandable since the Review's Terms of Reference were drafted by the Government, which was not looking for any assessment of its compliance responsibilities. However, Ontario's human rights system is much broader than these four pillars. While the HRLSC, HRTTO and the Courts focus on the adjudication of human rights complaints, it is only the Commission that maintains a broad mandate.

The HRLSC and HRTTO are the face of Ontario's human rights system for many individuals as they learn about their rights, obtain representation when such rights are violated, and bring issues to adjudication. As the Pinto Report finds, the OHRC is not properly discharging its wider public interest mandate, which is perhaps exemplified by the fact that it does not even accept calls from the public. The focus of the Government and the Pinto Report on the adjudication pillars continues to foster the ongoing perception that Ontario’s human rights system should be judged by the success of these complaint-focused institutions.

This paper argues that the test for judging Ontario's human rights systems should be based on first assessing whether Ontario is meeting the guarantee made to its inhabitants that they will be able to live lives free from discriminatory employment, with access to non-discriminatory services and accommodation. Having an effective adjudication system for human rights complaints is just a small, though important, part of building an overall province-wide culture of human rights compliance.

As those suffering from discrimination are already vulnerable and disadvantaged, they need a human rights system where entities with human rights obligations, such as governments, employers, accommodation are not only obligated, but are facilitated in executing their duties. Ontarians don’t want to spend their time enmeshed in an adjudication system to battle for their human rights. The system’s effectiveness cannot solely be measured in the number of cases that were adjudicated in a given year, nor the average damages awards figure.

An effective human rights system must support and enforce the broader actions required to transform the dynamics that support discrimination. It should therefore focus primarily on measures to promote compliance, not complaints. When a prevention and

¹ The four pillars are the the Human Rights Tribunal of Ontario (HTRTO, the Human Rights Legal Support Centre (HRLSC), the Ontario Human Rights Commission and the Courts.

compliance test is focused on, the primary human rights enforcement institutions to look at are the Ontario Government and the OHRC.

With this short paper, we choose to focus on the role of the government, and hopefully start a conversation that will challenge it to closely assess whether its actions are fulfilling the overarching mandate to ensure human rights compliance. Creating a culture of transformative practices must start at the very top of Ontario's human rights system- the Ontario Government- which must incorporate equality- promoting measures into all of its actions while also avoiding measures that widen inequalities.

2. Ontario's Human Rights Guarantee

Ontario's Attorney General started off the Pinto review process by stating "All Ontarians have a right to live free from discrimination, inequality and intolerance, and the protection of human rights is a fundamental principle in this province." As a quasi-constitutional law, Ontario's Human Rights Code and related human rights laws represent society's fundamental values – the legal guarantee that all Ontarians have equal rights and opportunities in the three key social areas of employment, services and accommodation. It is sometimes forgotten that this is a guarantee - it is not just something to work on from time to time. A human right is just that – a right.

The quality and extent of human rights enforcement across the entire system shapes the degree to which this guarantee/right can be met. We know that inequality and discrimination remain deeply entrenched in Ontario's social and economic fabric and Ontarians are suffering from systemic human rights violations. Therefore, what must governments do to tackle this wide-spread systemic problem?

3. The Role of Government as Guarantor

While the Pinto Report briefly considers the divergent views on the role of government in the enforcement of human rights², it does not flesh out that role or its relationship to enforcing human rights compliance. Yet focusing on the responsibility of governments to ensure human rights protections or "guarantee" them, provides an important framework for establishing a more robust vision of human rights in Ontario.

The government as guarantor framework accepts that human rights breaches are public wrongs, but does not rely on prosecutions and adjudication as the primary resolution mechanism. Instead, the framework places responsibility on the government and its governmental institutions with delegated power to foster a culture where the prevention of human rights violations and promotion of respect for human rights is planned for and monitored.

This framework is also consistent with nature of Ontario's human rights systems which are multi-dimensional and intersecting. These systems consist of numerous human rights laws and policies – for example specialized laws as the *Accessibility for Ontarians*

² Pinto Report, supra at p. 192

with *Disabilities Act*, 2005 and the *Pay Equity Act* as well as the collective bargaining human rights system provided for in the *Labour Relations Act* and collective agreements.

4. Government Obligations to Mainstream Human Rights Compliance

Ontario's human rights systems all flow from Canada's international human rights obligations set out in documents from the United Nations ("UN"), the International Labour Organization, and other instruments, as well as the *Canadian Charter of Rights and Freedoms*. These instruments and the *Charter* all focus on the role of the state and governments to enforce and guarantee human right protections.

At the international level, the 1948 Universal Declaration of Human Rights was followed in the late 1970's and onwards with comprehensive international human rights instruments detailing extensive pro-active obligations on the part of governments and other civil society institutions to achieve equality of outcomes. This included wide-ranging public education measures and requirements for collaboration amongst those with equality obligations. The 1979 UN Convention on the Elimination of Discrimination against Women led to the 1995 UN Beijing Declaration and Platform for Action setting out required simultaneous actions in 12 critical areas to ensure an integrated and multi-layered approach to gender equality. The 2006 UN Convention on the Rights of Persons with Disabilities includes, amongst many ground-breaking obligations, the requirement for governments to take all appropriate measures to ensure persons with disabilities have equal access to the physical environment, transportation, information and communications and other public facilities.

With a focus on "mainstreaming", these instruments focus on governmental responsibility to build a compliance culture where all those with human rights obligations (e.g. governments, employers, service and accommodation providers) are "mainstreaming" pro-active human rights compliance into the operation of their organizations so that the necessity for complaints is minimized. Such "mainstreaming" or pro-active compliance is key to a successful human rights enforcement system since the pro-active auditing of laws, policies, and practices properly leads to the removal of discriminatory barriers along with the development of positive equality measures.

This pro-active compliance approach is also embedded in Canada's domestic human rights and *Charter* jurisprudence. In its 1987 *Canadian National Railway Co.* landmark decision, the Supreme Court of Canada, citing the 1984 Abella Royal Commission Report, held that the remedy for systemic discrimination is pro-active measures which "break the continuing cycle of systemic discrimination." Further cases such as the *BCGSEU* firefighters case called for "transformation" as the goal and the requirement for those with equality obligations to "build conceptions of equality" into society's standards and practices.

Closing the gap on socio-economic inequalities faced by disadvantaged groups requires a combination of transformative and integrated interventions. Acknowledging the many different causes and roots of discrimination creates the understanding that there is no

single path to closing discriminatory inequalities. What is required are pro-active planning and remedies that are “human rights-sensitive” and systemic in nature to be used by those with human rights responsibilities. Just as multi-dimensional planning is needed to achieve governmental, business and organizational objectives, so too is such planning needed to achieve and promote equality.

5. Cornish Recommendations Regarding Human Rights Enforcement

The 1992 Ontario Human Rights Code Review Task Force Report – “Achieving Equality” did focus on the role of the Ontario Government in human rights enforcement. It is therefore useful to review its overall conclusions and its important focus on the role of government.

The 1992 Report, (chaired by co-author Mary Cornish) relied on the new understandings about the nature of systemic discrimination which flowed from the Abella Report and the above international instruments. It analyzed the issue of effective enforcement from this same broad, systemic perspective. It concluded that “effective enforcement means that the persons and groups who are discriminated against are empowered and enabled to achieve their equality rights in the Code.”³ The Report concluded that the success of an enforcement system can ultimately be measured by one test - did the system lead to a measurable and real reduction in the discrimination faced by its citizens who are protected by the *Code*?⁴ It found that the ‘gatekeeper’ model failed this test since individuals and groups who experience discrimination are denied proper justice in the human rights enforcement system.

The “Achieving Equality” Report and recommendations were built around four cornerstones for achieving equality:

1. A consumer perspective which presents consumers of the system with options for how best to deal with a human rights claim – a system which empowers and those who experience discrimination in order that they may direct the methods used in achieving equality including the right to direct access to a hearing through mediation or adjudication
2. A community-driven focus which empowers the regions of Ontario and their many communities to play a major role in ensuring a strong and responsive human rights system;
3. A proactive approach of building equality into Ontario's institutions by the adoption of pro-active measures and policies to ensure compliance without having to file Tribunal claims; and

³ Achieving Equality, supra .

⁴ Achieving Equality, supra,

4. An effective, accessible, expert and timely claim resolution process (including mediation or adjudication) where compliance is not forthcoming.⁵

These four cornerstones for achieving equality are an important underlying focus for the discussion now and in the Achieving Equality Report about the role of the Government.

6. Cornish Report Recommendations on the Role of Government

Achieving Equality found that disadvantaged groups depend on the state for protection, assistance, and the provision of equitable services to accommodate their particular needs. It noted that the Ontario Government has been one of the most frequently complained against respondents over the years. The Report found that instead of embracing its role as the main defender of human rights, the government, through the Legislature and the Executive Branch had often acted as if the Ontario Human Rights Code was an unwelcome constraint on its power. It concluded that Ontarians had a right to expect that their governments at all levels would pro-actively implement the Code's guarantees without wasting their tax money on marshalling teams of government lawyers to create a myriad of objections to such claims.

In this regard, the Report made the following recommendations about the role the Government should play in the human rights system. These recommendations continue to be relevant for consideration today. None of these recommendations were implemented by the Ontario Government.

1. The Government of Ontario and major public bodies should require positive action to be taken in all areas under its control in order to overcome present patterns of systemic discrimination and ensure that members of discriminated against groups benefit equally and fairly from government job opportunities and services at all levels
2. The Premier mandate the Cabinet Office in consultation with the community to establish a mechanism to develop a coordinated strategy to advance equality rights, to ensure the integration of that strategy throughout the Government's decision-making (including the development of policies, practices and laws, the provision of services and/or employment practices), and to monitor the Government's performance in advancing equality rights.
3. On behalf of the Cabinet Office, the Minister would receive and monitor equality reports from every ministry and from the specialized equality agencies, such as the Anti-Racism Secretariat, the Office for Disability Issues, the Women's Directorate and the Office of Seniors Issues.

⁵ "Achieving Equality" supra, at p.

4. The Government, through the Cabinet Office and the responsible Minister, should submit an annual Equality Rights Report to the Legislature. The Report together with the Commission's Annual Report should be widely distributed and be submitted to the United Nations as part of Ontario's reporting requirements under international human rights covenants.
5. An all-party Legislative Committee on Equality Rights should be established to provide a forum and to monitor and advance equality rights in Ontario.
6. The Legislative Committee should invite members of the community, including equality-seeking groups, to appear before it to give their assessment of the Equality Report and the Government's performance in equality rights, as well as their recommendations for improvements.
7. Each year the Legislature should have a day of debate on equality rights, which could take place at the time the Equality Report was tabled in the legislature.
8. The work of the various equality agencies should be coordinated, both in enforcing rights and in education, research, community development, and proactive initiatives. A regular mechanism should be put in place for ongoing coordination and cooperation.
9. The Cabinet Office should establish a coordination mechanism that would allow for regular meetings of all provincial government agencies that have the specific mandate to advance equality rights for particular groups protected by the Code, such as the Ontario Women's Directorate, the Office of Disability Issues, the Anti-Racism Secretariat, and the Office for Seniors' Issues.
10. Each government ministry and major public body should be required to adopt and implement a clearly stated equity plan for services provided or overseen by the ministry or agency.
11. The Deputy and Agency Head should be accountable for ensuring that the employees in their organizations are informed on human rights issues.
12. Deputy Ministers should receive training in the principles of effectively implementing equality and should be accountable for the resolution of the particular equality issues raised by their ministry's mandate in all the areas covered by the Code.
13. Every ministry and major public body should provide equality rights training to their staff to ensure that an equality perspective is integrated within all levels of decision-making in the ministry.
14. Operational responsibility for implementing these service equity audits and plans should be with the Deputy Minister or head of the major public body. Success in effectively carrying out these reviews and implementing strategies for change

would be a specific, significant factor in performance appraisal of the Deputy Minister or top official.

15. The Deputy or Agency Head and the responsible Minister should be required to meet with the Commission every six months to assess the effectiveness of the organization's initiatives and their plan for the next six months.
16. Each ministry and agency should post a notice about the Code's requirements, as well as an outline of their service equity plans, in a prominent location. The information should be available in a manner that can be understood by all employees.
17. The Government and all major public bodies should conduct an immediate review of all rights claims made against them, seek a positive resolution wherever possible, and ensure that persons responsible for deciding to defend such claims and their lawyers are properly trained and informed on the Code's proactive obligations and committed to a positive, constructive approach.
18. Public bodies should take a constructive approach to human rights claims made against them by focusing on the real, underlying issue of whether they have made sufficient positive efforts to achieve equality rights and whether improvement could be made.
19. The Government should review and monitor its instructions to inside and outside legal counsel on matters relating to human rights claims made against it to ensure these instructions are consistent with a positive proactive approach to compliance.
20. A public body against whom a human rights claim has been filed should be required to make public how much money it is spending on the case. The body must report to the Commission (re-named Human Rights Ontario in the Report) every six months the amount of money that it is spending on the defence of rights claims, any settlements that have been reached, and copies of any decisions on those claims. The Commission could then make this information public and include it in its annual report to the Legislative Committee.

The *Achieving Equality* recommendations provide a useful example of the many ways in which a government can bolster the overall system-wide effectiveness of its compliance measures. Unfortunately, the current state of affairs points to a system where the government has refused to embrace its full responsibilities to as the Guarantor of Ontarian's human rights protections.

7. Role of Government as Legislator and Respondent

In order to increase access to the human rights system, the government must proactively create legislation that is attuned to trends of discrimination in the province and continuously monitor any required amendments.

While the Pinto Report talks about the importance of "public interest" remedies after an adjudicated finding of discrimination, a more effective pro-active enforcement measure would be for the Government to legislate specific pro-active obligations for employers and accommodation and service providers. This was exactly what the Employment Equity Act, 1993 did and yet the Government repealed it. By repealing the law, the government failed to lessen the incidents of human rights violations in the province, and thus, the overall effectiveness of its human rights system. Reinstating that law would be an important first step. A current example of another effective pro-active law is seen in the *Accessibility for Ontarians with Disabilities Act, 2006* and the standards and compliance measures developed under that Act.

Another effective way to prevent human rights violations and promote compliance would be to amend the *Human Rights Code* to provide that employers, accommodation and service providers must establish a Human Rights Committee, which would function similar to the already legislated occupational health and safety workplace committees. This would mainstream the discussion and enforcement of human rights into the operations of those with human rights responsibilities.

In a similar manner, the government should also exercise extreme discretion when it chooses to defend discriminatory legislation as occurred in *Tranchemontagne*, or repeal ameliorative legislation, as occurred with the proxy sections of the *Pay Equity Act*. The government must always be guided by the overarching goal to reduce the preponderance of human right violations in the province.

8. Role of Government as Policy Maker and Planner

Inequality is a constant feature of daily life in Ontario. And yet, there is no system-wide plan to rectify it. The Ontario Government employs legions of planners and policy makers and yet there is no system whereby government planning and policy making is embedded with understandings and measures to determine whether governmental plans or policies are closing, widening, or have a neutral effect on the equality gaps experienced by disadvantaged groups.

For example, women workers still experience a pay gap of around 24%-28% (depending on the measure) when compared to men, and this number is magnified for racialized and aboriginal women and those with disabilities. The Equal Pay Coalition in 2007 called on the Ontario Government to develop a province-wide "Closing the Gender Pay Gap Plan". The Coalition met with officials from the Ministry of Finance to discuss how they could ensure that Ministerial financial plans subject to their review, could be assessed to determine whether they closed, widened or had no effect on the pay gap. The puzzlement on the part of these officials to this process speaks to the general lack of awareness in government with carrying out human rights impact assessment.

It was clear that such equality assessments were not part of their planning, and yet such assessments is a key mechanism by which "mainstreaming" is carried out.

The Province has a Poverty Reduction Plan. Also needed is a province-wide Human Rights Compliance Plan that will plan how to enforce the human rights guarantee. Such a plan would be developed after consultation with both rights holders and those with rights obligations. It should include the "Achieving Equality" recommendations noted above. In that plan, the adjudication system would just be one component.

9. Role of Government as Funder of the Human Rights System

The Pinto Report Terms of Reference were clear that any recommendations would have to be cognizant of the challenging fiscal context for the government. Yet the Ontario Government, by international standards, should be spending maximum available resources to meet its human rights guarantee to Ontarians. The focus should be on the "maximum available resources" test, not on what the Government says it has set aside for human rights enforcement.

It is notable that even within the Government's restrictive parameters, the Pinto Report noted that a human rights system without adequate funding compromises fundamental rights. The report pointed out that each Ontarian spends only \$1.57 on the human rights system and that the overall amount of government spending is quite low in response to the serious and long-standing problem of discrimination in society.

It is clear that the Government is failing in its responsibilities to properly fund the adjudication system. However, even completing this mandate would just be a start. There is a need to fund the entire enforcement system which would include such compliance-promoting measures as training public service staff to conduct human rights impact assessments when implementing public policies.

10. Conclusion

There is no doubt that human rights adjudication has inherent, social, and political value through its truth seeking and liability-apportioning functions. However such mechanisms should be conceived of as a last resort for human rights enforcement. They are a necessary pre-condition for an effective enforcement system but the real measure of success in human rights enforcement comes with a strong Government that uses its power and resources to enforce the guarantee of human rights protection. Attention must be paid to the ways in which the government acts as a guarantor of human rights by exercising good judgment and discretion in promoting equality and respecting human rights when making legislation and litigation related- decisions; creating proactive human rights promoting policies; and ultimately, funding the overall enforcement system.