REPORT OF THE

ONTARIO HUMAN RIGHTS REVIEW 2012

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PART I - INTRODUCTION

Mandate

On June 30, 2008, the human rights system in the Province of Ontario fundamentally changed with the full coming into force of the *Human Rights Code Amendment Act, 2006*. The *Act*, formerly called Bill 107, became law on December 20, 2006 and, once fully in force, altered the system of human rights enforcement in the province. The most significant changes were that:

1. Human rights applications (formerly called complaints) would be filed directly with the Human Rights Tribunal of Ontario (HRTO or Tribunal), rather than with the Ontario Human Rights Commission (OHRC or Commission). The Tribunal would be responsible for processing the application, offering mediation services and, where the application still remained unresolved, adjudicating the application on its merits.

2. The Ontario Human Rights Commission would no longer receive, process, mediate, and investigate complaints and, where the Commission considered it appropriate, forward them to the Tribunal. Instead, the Commission's role would be revised to focus on developing policies, providing information and education and promoting compliance with the Code. However, the Commission retained its authority to initiate and intervene in applications before the Tribunal.

3. A new agency, the Human Rights Legal Support Centre (HRLSC or the Centre), was created to assist applicants (formerly called complainants) with advice, support and representation in respect of applications before the Tribunal.

Section 57 of the revised *Human Rights Code* required that three years after the new system came into effect, a person would be appointed to review the changes under the new *Code.* On August 12, 2011, I was appointed by the Honourable Chris Bentley, former Attorney General of Ontario, to conduct a review of the Ontario human rights system as required under section 57 of the Ontario *Human Rights Code*.

Section 57 of the *Code* provides:

> **Review**
>
> 57(1) Three years after the effective date, the Minister shall appoint a person who shall undertake a review of the implementation and effectiveness of the changes resulting from the enactment of that Act.
>
> **Public consultations**
>
> 57(2) In conducting a review under this section, the person appointed under subsection (1) shall hold public consultations.
>
> **Report to Minister**
>
> 57(3) The person appointed under subsection (1) shall prepare a report on his or her findings and submit the report to the Minister within one year of his or her appointment.

The Terms of Reference for the Review specify that the Reviewer will consider the following:

- Whether the redesigned Human Rights Tribunal of Ontario (HRTO) is providing quicker and direct access for applicants and a fair dispute resolution process for all parties, including respondents.
- Whether the new Human Rights Legal Support Centre (HRLSC) is effective in providing information, support, advice, assistance and legal representation for those seeking a remedy before the Human Rights Tribunal of Ontario (HRTO).

- Whether the Ontario Human Rights Commission (OHRC), in its revised role, is proactively addressing systemic human rights issues through activities such as research and monitoring, policy development, and education and training.
- Stakeholder feedback: analyze and qualify perceptions and experiences of key stakeholders, human rights advocates/experts, and the public.
- Where appropriate, the Reviewer will offer advice to the government regarding any best practices that should be supported and any advice for enhancing the effectiveness of Ontario's human rights system. Any advice developed should be cognizant of the challenging fiscal context for government and should provide corresponding costs and relative benefits.

The Ministry of Attorney General has assisted me by providing information on the human rights system and logistical support for organizing public meetings, but my Review is independent of government and the three human rights agencies (the Tribunal, Commission and Centre).

The human rights system is part of the legal system of the province since it involves administrative agencies who may be held accountable for the fairness and reasonableness of their decisions through principles of administrative law.[1] However, the human rights system involves far more than just the legal system since human rights issues, disputes, and their resolution impact the lives of all Ontarians and resonate in key economic and social sectors such as the workplace, housing or accommodation, retail, social and cultural environments. It would be beyond the scope of any review, particularly one conducted by a single individual

[1] Administrative law deals with the many ways in which government decisions, laws and actions touch on the lives of citizens and organizations, particularly through governmental agencies, tribunals, boards and commissions.

with a one-year mandate, to examine all aspects of the vast and complex provincial human rights system.

It is important therefore to point out that my mandate is limited by the words of section 57 of the *Code*. I am required to conduct a "review of the *implementation* and *effectiveness* of the changes resulting from the enactment of" the *Human Rights Code Amendment Act, 2006*. My mandate is not to conduct a review of the entire system of human rights in the province or to investigate the societal impact of anti-discrimination and anti-harassment laws. My mandate is to focus on the extent to which the *current* system is delivering against universally desirable objectives such as access to justice, transparent adjudication, timely disposition of cases, and the elimination of systemic discrimination.

The Purpose and Organization of the Report

The purpose of this Report is to provide my findings, advice and recommendations with respect to the implementation and effectiveness of the changes to the human rights system in Ontario.

In order to effectively address the many issues that were raised over the course of the Review, I have divided the Report into 8 parts. Part I includes the introduction and a brief summary of the changes to the human rights system. Part II provides a summary of the feedback I have received from individuals and various organizations during the consultation phase of the Review. Part III provides an analysis of a number of key issues related to the Tribunal, including recommendations for improvements to the Tribunal. Part IV sets out an analysis of key issues related to the Centre, including recommendations to enhance the Centre. In Part V, I discuss the Commission and its new role in the human rights system. I offer several

recommendations to help the Commission strike the appropriate balance between engaging in litigation and partnering with other organizations that promote human rights. Part VI includes a discussion of issues that impact all elements of the human rights system, including accessibility and public information on human rights. Part VII sets out my general observations and conclusions on the human rights system. Finally, Part VIII sets out a summary of my recommendations for the Tribunal, Centre, Commission and the Ontario Government. A number of Appendices follow containing information and statistics pertaining to the Report.

Evolution of Ontario's *Human Rights Code*

June 15, 2012 marked the 50th anniversary of the passage of the *Code*. Ontario's society has changed dramatically in the past half-century. Demographic, cultural and technological changes have resulted in a wholly different society today than in 1962 when the *Code* was first enacted. Whether it is the greater participation of women in the workforce, greater ethno-cultural diversity or awareness of disability and LGBT rights[2] - sometimes referred to as the "human rights revolution" - these tectonic social changes have greatly impacted our individual and collective sense of identity and mutual expectations of civic rights and responsibilities. What began as a simple idea – that individuals, regardless of their human attributes, should be treated with dignity – has evolved into a complex and sometimes controversial set of principles that inform many public and political debates.

Yet, human rights legislation in Ontario did not begin with the *Code*. The Universal Declaration of Human Rights (1948) (UDHR) is generally credited with establishing the modern framework for human rights laws internationally. The UDHR inspired and accelerated nascent domestic

[2] Lesbian, Gay, Bisexual and Transgendered rights.

human rights initiatives in Canada and abroad. In 1940s and 50s Ontario, three different statutes governed human rights: the *Racial Discrimination Act,* the *Fair Employment Practices Act* and the *Fair Accommodation Practices Act*.[3] The Ontario Human Rights Commission was established in 1961 as the successor to the Ontario Anti-Discrimination Commission (established 1958). The 1962 *Code* was the first comprehensive legislative human rights scheme in Canada. By 1977, other Canadian provinces and the federal government had enacted their own comprehensive human rights legislation.[4]

Over the years, new prohibited grounds and new forms of discrimination were recognized and added with the result that, by the late 1990s, most human rights codes in Canada prohibited discrimination and harassment based on multiple prohibited grounds in key social areas.

The current Ontario *Human Rights Code* provides protection from discrimination in the following five "social areas": employment; goods, services and facilities; accommodation (housing); membership in a vocational association; and contracts.[5] There are 17 "prohibited grounds" of discrimination under the *Code*: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed , sex, sexual orientation, gender identity, gender expression, disability, age, marital status, family status, receipt of public assistance (in accommodation only) and record of offences (in employment only). The *Code* regulates conduct (in specific areas and in respect

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[3] *Racial Discrimination Act, 1944*, SO 1944, c. 51; *Fair Employment Practices Act, 1951*, SO 1951, c. 24; *Fair Accommodation Practices Act, 1954*, SO 1954, c. 28. For an excellent summary of the development of anti-discrimination legislation in Canada, particularly in Ontario, see the seminal Ontario Human Rights Board of Inquiry decision, *Cameron v. Nel-Gor Castle Nursing Home and Nelson* (1984), 5 CHRR D/2170 (Ontario Board of Inquiry) of Professor Peter Cumming (now the Honourable Mr. Justice Cumming of the Ontario Superior Court).

[4] Nova Scotia in 1963, Alberta in 1966, New Brunswick in 1967, Prince Edward Island in 1968, Newfoundland in 1969, British Columbia in 1969, Manitoba in 1970, Saskatchewan in 1978, Quebec in 1975, and the federal government in 1977.

[5] In this Report I use the term "discrimination" rather than "discrimination and harassment", since harassment is a form of discrimination.

of the prohibited grounds). It does not regulate thought, belief or conscience. The *Code* has primacy over any other statute in Ontario and is viewed by the courts as being quasi-constitutional in nature because of its unique importance.[6]

The grounds of discrimination and social areas that are most cited in applications have remained consistent over the years. The Tribunal statistics indicate that employment is cited in 76% of applications and disability, reprisal, sex and race are the most commonly cited grounds of discrimination.[7] The breakdown of intake inquiries by social area reveals that approximately 80% of the Centre's inquiries are employment related, 10% are service related (for instance, discriminatory service at a shopping outlet) and the remaining 10% are related to all the other social areas combined.

The Preamble of the *Code* states that it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The *Code* aims to create a climate of understanding and mutual respect for the dignity and worth of each person.

Enforcement of Human Rights in Ontario prior to 2008 Code Reforms

Prior to the June 30, 2008 changes, the *Code* required that the Ontario Human Rights Commission play an exclusive role in the intake and processing of human rights complaints.[8]

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[6] *Human Rights Code*, R.S.O. 1990, c.H.19, s. 47(2). In *Insurance Corp. of British Columbia v. Heerspink,* [1982] 2 S.C.R. 145 at 158, the Supreme Court of Canada ruled that human rights laws have a special nature and that they represent public and fundamental law.

[7] The full list of statistics is presented in Appendix E to the Report.

[8] In writing this section, my focus was on the period 2003 to 2005; however, many of my observations would also be true of previous periods since the underlying human rights enforcement system remained essentially unchanged between 1962 and June 2008.

Complainants could not directly access or file a complaint with the Human Rights Tribunal of Ontario.[9]

The previous *Code* allowed any person to file a complaint with the Commission. The Commission received complaints, endeavoured to effect a settlement including through mediation, and investigated complaints. Then, the Commission either dismissed the complaint for insufficient evidence of discrimination or, if the complaint was appropriate for hearing, forwarded the complaint to a separate tribunal for adjudication.

There were important differences between the staff of the Commission, the Commissioners themselves and the Tribunal. The Commission staff accepted complaints, processed them, offered mediation and investigative services, and made non-binding recommendations to the Commissioners as to whether or not to refer a complaint to the Tribunal. The Commissioners reviewed the staff's recommendations along with submissions from the parties themselves, and made legally binding decisions about whether or not to send complaints to the Tribunal.

Under the previous *Code*, until a Tribunal was appointed, the Commission staff and Commissioners played a neutral role in exercising their functions; however, once a Tribunal was appointed, the Commission played an advocacy role at the hearing by sending a lawyer to represent the public interest and present evidence at the Tribunal that the *Code* had been breached.

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[9] Until 2003, the tribunal that adjudicated human rights complaints in Ontario was known as the Board of Inquiry (under the Human Rights Code). Historically, the Board was not independent in the manner it is now and was an ad hoc tribunal.

The previous system of human rights enforcement in Ontario afforded parties an opportunity to participate in their own dispute, but only partially. The Commission received all documents and had a limited obligation to share them with the parties. Moreover, the Commission's case disposition either gave very brief reasons for a "no tribunal" decision, or simply advised of a tribunal referral with no reasons.

Only a small percentage of cases made it to the Tribunal stage. Based on my analysis of the Commission's annual reports, in the five years prior to 2008, on average, about 9.4% of complaints completed by the Commission were referred to the Tribunal.[10] For 1998-2003, the comparable figure was 3.8%. This was because some parties agreed to settle the complaint along the way; or the Commission refused to deal with the complaint for various reasons including delay, or that an alternative legal process was available, or the Commission did not believe that the evidence warranted proceeding to a Tribunal Hearing.

The Human Rights Tribunal of Ontario is a completely separate tribunal whose function is to resolve the dispute through mediation and adjudication. It was (and continues to be) completely independent of the Commission and the parties to the complaint. The Tribunal's role is to hear evidence from the parties, to reach factual and legal conclusions about whether discrimination has occurred, and to order an appropriate remedy where a breach of the *Code* has been found.

Under the previous *Code*, three parties (the complainant, the respondent and the Commission) had automatic standing before the Tribunal. A new round of mediation was offered. If

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[10] Since 77 "special diet" complaints were filed against the Ontario Ministry of Community and Social Service in 2007-08, this average drops to approximately 6%, when the number of cases, not complaints, is considered.

settlement discussions failed, the Tribunal would commence adjudication and the Commission, acting in the public interest, would present evidence that discrimination had occurred. The Commission staff's investigative findings and the fact of referral by the Commission could not be considered as evidence that the *Code* had been breached. The Tribunal process was a fresh stage of dispute resolution that typically occurred several years after the original human rights dispute began.

Parties dissatisfied with the outcome of a Tribunal decision had a broad right of appeal based on the facts and the law to the Ontario Superior Court of Justice (Divisional Court).
At no point did the Commission or any other agency provide lawyers or legal assistance to complainants (or respondents) in the complaint process pursuant to the previous *Code*. During the intake, complaint processing, mediation and investigation stage the Commission had to be neutral as between complainant and respondent therefore it could not offer legal assistance to the parties. Parties were free to retain a legal representative at any stage of the process but there was no requirement to do so. The Legal Aid Ontario rules did not generally permit parties to obtain coverage for human rights matters. A few community legal clinics offered advice and representation to complainants based on select criteria. Accordingly, the vast majority of complainants had no legal representation whatsoever during the period that the Commission processed, mediated and/or investigated their complaints.

At the Tribunal, the Commission lawyer represented the public interest in presenting evidence and requesting a remedy. Accordingly, while complainants were entitled to have their own legal representation, most complainants relied on the Commission's lawyer to present and advance their case, and if discrimination was found, to request a remedy. Typically,

respondents, particularly organizations or businesses, would retain a lawyer to represent their interests.

Impetus for Change and Human Rights Reviews

The human rights enforcement system in Ontario under the previous *Code* – which continues to be the process model currently in place in a number of other provinces in Canada and federally – had been designed in the 1960s with a different understanding of discrimination than we have today. As authors and human rights lawyers Cornish, Faraday and Pickel explain:

> The human rights enforcement system was originally developed at a time when discrimination was commonly understood to be an individual problem arising from isolated events. Over time, it has become apparent and widely accepted that discrimination often arises from deep-rooted systemic patterns of behaviour and institutional practices that reinforce the disadvantage faced by traditionally marginalized groups within society. In conjunction with these developments, our understanding of how best to eradicate discrimination and build a culture of human rights has also evolved dramatically.[11]

Through the 1970s and 80s, the annual volume of complaints before the Commission increased, as did the diversity and complexity of the complaints. Although the Commission implemented a number of process improvements to respond to greater demands, the underlying enforcement mechanism stayed the same. By the early 1990s, there were increasing and repeated calls for the human rights system to be updated and modernized. The Commission was responsible for reducing and eliminating discrimination and promoting human rights. Yet, the majority of its resources were spent on processing, mediating and

[11] Mary Cornish, Fay Faraday, Jo-Anne Pickel, *Enforcing Human Rights in Ontario* (Aurora, Ontario: Canada Law Book, 2009).

litigating *individual* complaints. Over the years, the Commission struggled with a growing backlog of cases, resulting in lengthy delays before cases were resolved.

Across Canada, there had been a number of reviews of provincial and federal human rights systems over the years:

- Ontario Human Rights Code Review Task Force, Achieving Equality: A Report on Human Rights Reform (Cornish Report) (Ontario, 1992)

- Equal in Dignity and Rights – A Review of Human Rights in Alberta by the Alberta Human Rights Review Panel (O'Neill Report) (Alberta, 1994)
- Report on Legal Representation Models Under the British Columbia Human Rights Code (Black/Thomson legal Representation Report) (B.C., 1998)

- Report of the Auditor General of Canada, Chapter 10, Canadian Human Rights Commission and Canadian Human rights Tribunal (Auditor General Report) (Canada, 1998)

- Canadian Human Rights Act Review Panel Report, Promoting Equality: A New Vision (La Forest Report) (Canada, 2000)

- R. Brian Howe and David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000) (an academic treatise rather than a government commissioned study)

- Praxis Research and Consulting Inc., Final Report on the Public Consultations: Organization Review of the Nova Scotia Human Rights Commission (the Praxis Research Report) (Nova Scotia, 2001)

- D. Lovett and A. Westmacott, Human Rights Review: A Background Paper for the Administrative Justice Project, (British Columbia, December 2001)

These reviews concluded that there was tremendous frustration with human rights enforcement in Canada. Lovett and Westmacott summarized the problem as follows:

> Greater awareness has led to more, and more complex, human rights complaints and therefore heavier caseloads. Strict adherence to the rules of procedural fairness has decreased the efficiency and speed of complaint processing. Delays stemming from inadequate resources and time-consuming investigation procedures have generated litigation and fuelled public concern. Complainants perceive that human rights commissions place a higher priority on dismissal statistics than on the proper disposition of complaints. Respondents perceive that commissions are ineffective at eliminating

> complaints that do not warrant the further expenditure of private or public resources. The multiple roles carried out within commissions have put into question their objectivity in carrying out complaint screening functions. The futility of the investigation process for most complaints is a focus of criticism from all quarters. Human rights advocacy groups and similar organizations believe commissions should be more proactive in their efforts to eliminate discrimination and promote equality through education and other means.[12]

In 2002, the British Columbia government engaged in the Administrative Justice Reform Project, part of which set out various options for human rights reform. In 2003, the government amended the B.C. *Human Rights Code* choosing a direct access model whereby complainants could file their complaints directly with the BC Human Rights Tribunal. However, the government chose to eliminate the BC Human Rights Commission and transfer the Commission's public education functions to the BC Attorney General. The BC direct access model, which is still in place today, provides for legal advice and representation to financially eligible complainants and, in some cases, respondents via public funding to the BC Human Rights clinic.

In Ontario, in 1992 the aforementioned Ontario Human Rights Code Review Task Force chaired by Mary Cornish conducted province wide consultations and issued a major, comprehensive report setting out recommendations for human rights reform. The key elements of the Cornish Report recommendations were:

- Providing complainants with direct access to a hearing at a tribunal;
- A revitalized human rights commission known as "Human Rights Ontario" which would focus on reducing and eliminating systemic discrimination;

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[12] Lovett & Westmacott: Human Rights Review, Executive Summary.

- An expert human rights tribunal known as the “Equality Rights Tribunal” which would offer mediation and adjudication for human rights and pay equity complaints;
- A province-wide Equality Services Board offering advice and representation to human rights claimants through community-based advocacy services including via Equality Rights Centres staffed by lay advocates and strategic partnerships with community groups.

The Report also made recommendations for proactive compliance with the *Code* via initiatives in training, education and monitoring. The Cornish Report’s recommendations were never implemented by the NDP government of the day or by subsequent Conservative or Liberal governments in Ontario. However, when introducing Bill 107 in April 2006, Attorney General Michael Bryant stated that the Cornish Report provided the inspiration for the Bill.

The La Forest Report involved a major review of the federal *Canadian Human Rights Act* which had not been reviewed since its introduction in 1977. Although directed at the federal sector, because the enforcement mechanism was essentially the same as in the provinces, including Ontario, the La Forest panel attracted considerable interest receiving over 200 written and 250 oral submissions as it travelled across Canada. The La Forest Report ultimately recommended that the Canadian Human Rights Commission’s gate-keeping function end and complainants have direct access to a tribunal, with legal representation provided by community-based, publicly-funded advocacy services. The Canadian Commission’s role would be revised so that it would be responsible for conducting education and research functions, as well as investigating and initiating cases of systemic discrimination.

Based, in part, on the findings of the various human rights reviews, it appeared that the enforcement model in Ontario had the following problems:

- Delay;
- Conflict of Roles;
- Duplication of Efforts;
- Gate-keeping; and
- Inability to Tackle Systemic Discrimination

Each of these concerns was the focus of considerable debate in the period leading up to the passage of the Ontario *Act* in 2006.

Delay

Inordinate delay in complaint processing attracted the most criticism of human rights commissions. As early as 1992, the Cornish Task Force noted:

> Complainants face unacceptable delays in having their complaints investigated. It takes years from the time a complaint is filed until a decision is handed down. People against whom complaints are filed (respondents) also feel the delay is unfair and makes it more difficult for them to defend themselves.[13]

Based on statistics available from the Commission's Annual Reports, in the years just prior to the 2008 reform, it took approximately 27 months before the Commission made a decision to dismiss a case or refer it to the Tribunal.[14]

I also analysed 29 cases that were fully decided on their merits by the Tribunal in the 2006 to 2008 time period, but which were begun via complaints filed at the Commission many years

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[13] Cornish Report, 1992.
[14] See Appendix A: Commission Comparative Indicators.

earlier. My analysis, presented in Appendix B to the Report, reveals that, under the previous human rights system, the average timeline measured from the filing of a complaint was as follows: It took just over 2-1/2 years for the Commission to refer a case to the Tribunal. It took around 4 years to get to a hearing at the Tribunal; and it took 4.7 years to get to a Tribunal decision on the merits of the case.

My findings are consistent with comments made by former Chief Commissioner Keith Norton in his October 2005 report, *Strengthening Ontario's Human Rights System: What We Heard*. Norton commented on stakeholders' concerns with the slowness of the enforcement model in place at the time:

> Many stakeholders raised concerns regarding the slowness of the current compliance system. The average age of complaints at the OHRC is currently 12.1 months. Those complaints that do not settle, are fully investigated and receive a decision under section 36 of the *Code* take considerably longer: the average age of cases at the time of a section 36 decision is currently 28.8 months. Approximately 20% of complaints reach this stage. Hearings at the HRTO add an additional period of time, which may range from months to years, depending on the complexity of the case, and there may be an additional lengthy wait for the issuance of a decision following a hearing. The consensus is that even at its best, this process is simply too slow.[15]

Conflict of Roles

Human rights commissions were criticized as having too many conflicting roles. As investigators, mediators and complaints processors, absolute neutrality was required; yet as educators, policy makers and advocates for human rights compliance, Commission staff actively promoted an expansionist vision of human rights. Respondents perceived the Commission as being predisposed to favouring complainants. On the other side, complainants often saw the Commission as the main barrier to getting complaints heard at the

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[15] Ontario Human Rights Commission, *Strengthening Ontario's Human Rights System: What we Heard* (October 2005), p. 36.

Tribunal. The Commission would often appear in court across from complainants on judicial reviews defending its decision to not forward a complaint to hearing. At the Tribunal stage, the Commission which was previously impartial as between parties, was clearly adverse in interest to the respondent and appeared aligned in interest with the complainant. At the same time, the Commission did not actually represent the complainant at the Tribunal hearing, so there were also tensions between the Commission's and complainant's positions at the hearing.

Gatekeeping

Here the concern was that the Commission's discretionary decision-making was being unduly influenced by administrative, political and fiscal considerations. The Commission's decision whether to forward complaints to the Tribunal was made by commissioners in meetings without the parties present. Given the volume of complaints, it was unclear whether commissioners had adequate time to carefully consider the factual and legal issues related to the complaint. Since the Commission decision was made behind closed doors, allegations were made that the Commission's decision was influenced by factors not strictly related to the merits of the complaint such as the identity of the parties, the political stakes involved in pursuing the respondent, or the legal costs associated with mounting the commission's case at the Tribunal.[16] Given that each year around 3% to 6% of cases were being referred to a Tribunal hearing, the sense was that the referral gate was being shut (or very rarely opened) in order to reduce Commission costs, political and legal risks.

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[16] *Payne v. Ontario Human Rights Commission*, 2000 CanLII 5731 (Ont.CA).

Duplication of Efforts

The outcome of the Commission's investigation into the complaint, typically occurring over two years after the filing of the complaint, only led to a decision whether or not to forward the complaint to the Tribunal. It did not lead to an actual finding or non-finding of discrimination. At the Tribunal stage, mediation was offered again and, if the complaint did not settle, the Commission's decision to refer the case to hearing carried no weight at the actual hearing. From the parties' perspective, they had often presented their position on multiple occasions: initially, through the filing, response and reply to the complaint; at the Commission mediation; in the investigative process; in written submissions in response to the investigator's report; at mediation at the Tribunal; and finally, in testimony at the actual Tribunal hearing.

While the Commission investigation into the complaint was sometimes critical to establishing whether or not discrimination may have occurred – for instance in systemic discrimination cases or individual complex complaints - the outcome of an investigation did not necessarily advance those cases which would be based largely on credibility. Only a hearing could determine that. Accordingly, the investigation stage was not required for every case since, if the case went to the Tribunal, the parties would be repeating their positions at a hearing.

The duplication of efforts wasted time and resources for parties and the human rights system, and it also created opportunities for parties to take advantage of inconsistencies in positions taken at various stages and times during the lengthy dispute resolution process.

Improper Focus on Individual Complaints

A number of human rights reviews had suggested that commissions were inappropriately devoting resources to individual complaints rather than on systemic discrimination cases, which provided more "bang for the buck". In Ontario, during the second reading of Bill 107, Attorney General Michael Bryant, stated that 87% of the Commission's budget was spent on processing, mediating, litigating and witness statement taking around complaints, so the ability of the Commission to undertake preventive efforts to promote human rights was extremely marginalized.

In the fall of 2004 and through 2005, the Ministry of the Attorney General (MAG) of Ontario began discussions with a number of stakeholder groups about potentially reforming the province's human rights system. In October 2005, responding to the government's signals about reform, the Commission engaged in a consultation process and published a report, *Strengthening Ontario's Human Rights System*. A key finding of the consultation was that stakeholders were not satisfied with the human rights system and were looking for effective change. However, there was no clear consensus on how to move ahead with reform.

Citing these human rights reviews and the consistent calls from various quarters about the need for change, the Ontario government introduced Bill 107, the *Human Rights Code Amendment Act, 2006* in April 2006.

Bill 107 had its supporters and critics. Supporters pointed to the numerous studies and reviews that had repeatedly identified structural problems with the Commission-centric enforcement mechanism. Many supporters believed that while Bill 107 was not as

revolutionary as promised - for instance it did not comprehensively adopt the recommendations of the Cornish or La Forest Reports - on balance it represented major progress in modernizing Ontario's human rights system.

Critics of Bill 107 suggested that the traditional enforcement problem was not as broken as claimed and that the human rights system was really a victim of chronic underfunding from government. They warned that drastic reform would have many negative effects. Some complainant-oriented stakeholders suggested that removing the Commission's role in individual complaints would result in vulnerable complainants being unable to mount their own cases, particularly at Tribunal hearings, where previously the Commission lawyer took the lead in presenting evidence of discrimination. They characterized the move to direct access as "privatizing" the human rights system since complainants would have to turn to private lawyers, paralegals or other representatives for advice and representation.

Some respondent-oriented stakeholders suggested that without the Commission's important role in vetting complaints, the new direct access system would be a "free-for-all" for complainants, requiring respondents to defend themselves with lawyers at hearings over frivolous or vexatious allegations that had nothing to do with human rights. Many critics also were concerned that disengaging the Commission from its predominant role would result in an inability of any one agency to discern patterns of discrimination and coordinate initiatives in the revised human rights system.

After the second reading of Bill 107 in the legislature, it was sent to the Standing Committee on Justice Policy. The Committee held public hearings starting in August 2006 across the province. The Attorney General presented various amendments to Bill 107 in November 2006 in response to stakeholders' concerns. A notable amendment was that the Commission's independence was enhanced by making it report directly to Ontarians though the Legislature, rather than through the Attorney General of Ontario, as required under the previous *Code*. The amendments also strengthened the Commission's powers before the Tribunal.

Although the Committee's public hearings on Bill 107 were to continue into December 2006, the Liberal government used its majority in the provincial legislature to invoke closure. Critics of the Bill, many of whom were yet to appear before the Committee, accused the government of rushing the legislation through without adequate consideration. The government and supporters of the Bill countered that the policy arguments behind the legislation were well known and that the time had come to pass this historic legislation.

Bill 107 passed into law as the *Human Rights Code Amendment Act, 2006* and received Royal Assent on December 20, 2006; however, the key provisions reforming the *Code* did not come into effect until June 30, 2008. Section 57 of the new *Code* provided my mandate for the Review.

Review Process

I conducted the Review in three stages. During the first stage, I reviewed relevant human rights legislation, rules, policies, reports, studies and Tribunal decisions and met with key

decision makers in the Ontario human rights system. I then developed and distributed a Consultation Paper to interested individuals and stakeholders. The purpose of the Consultation Paper was to generate feedback that would allow me to assess the implementation and effectiveness of the changes to Ontario's human rights system since June 30, 2008. A website www.ontariohumanrightsreview.org was created to facilitate the communication of news and developments concerning the human rights review.

The second stage involved a series of public consultations with interested individuals and stakeholders via: (a) public meetings; (b) written submissions; and (c) stakeholder meetings.[17] Public meetings were held in Windsor, London, Toronto, Ottawa, Sudbury and Thunder Bay. The public meetings permitted interested individuals and organizations to make brief presentations and also allowed me and others in attendance to ask questions about the presentations.

I received over 60 written submissions from individuals, businesses and organizations commenting on the human rights system. The submissions varied in length, complexity and comprehensiveness. Some submissions chose to speak narrowly about an individual or organization's own direct experience with the system, while others chose to reflect upon a much wider set of concerns about the human rights system.

I also held approximately 25 stakeholder meetings with groups representing many different perspectives. The stakeholder sessions, usually up to 2 hours in length, permitted an organization to discuss what their particular theme or focus was with respect to the human rights system. These interactive group discussions were very useful as diverse and dissenting

[17] See Appendix C: List of Review Participants.

viewpoints sometimes emerged, even within a single organization, underscoring the challenge of policy development in the human rights system.

I appreciate the invaluable insights, comments and suggestions to improve the system that I have received from a cross section of organizations and interested individuals. Public consultations were an essential element of the Review and the input that I have received has formed the basis of my recommendations to key decision-makers in the human rights system.

The final stage of the Review is this Report of my findings and recommendations to strengthen the human rights system. My Report concludes with a series of recommendations about how to improve the human rights system but I considered it important to say something in each section about my observations, assumptions and findings to describe "how I got there". In an area as complex as human rights, there are bound to be disagreements and policy differences about the best way forward, however, a description of "what I found and why I decided what I did" is helpful, I think, to decision-makers and others who can draw their own conclusions about the human rights system.

In preparation for the Final Report, I spent considerable time analyzing the statistics associated with the Tribunal, Centre and Commission. Sometimes the statistical definitions used by the agencies changed from year to year, or were inconsistent between agencies, in part, because the agencies' case management systems were evolving between the 2008 reforms and the time of the Review in 2011-12. I believe that the Review process itself contributed to the agencies being more rigorous about their statistical methodology and tracking of information.

I found, however, that describing the revised human rights system by its statistical outputs had its limitations. Therefore, my Report describes how the human rights system has been functioning over the last few years by trying to reconcile several perspectives:

(a) The anecdotal picture described to me by hundreds of individuals and over 60 organizations, both applicant and respondent oriented, who have varying degrees of experience with the past and present human rights system;

(b) The description of the system by the three human rights agencies themselves – a self-portrait if you will - communicated to me through written submissions, in-person meetings and correspondence;

(c) The aforementioned statistical information which came from different sources including annual reports, written submissions to the Review, agency websites, and correspondence with advocacy groups; and

(d) My independent review of human rights legislation, rules, policies, reports, studies and legal decisions, all coupled with my own experience working for many years with clients in the Ontario human rights system.

My Report delves into some detail about procedural changes in the human rights system from 2008 to the present but ultimately the Report attempts to be “forward looking”. I chose therefore to focus less attention on cases that proceeded by way of the transitional provisions and Commission-referred complaints process. By the time of this Final Report, most of those cases had been completed at the Tribunal and the provisions themselves had expired. The utility of examining closed cases under now-expired provisions was marginal.

Ultimately, this Report aims to answer two fundamental questions that Ontarians involved in the human rights enforcement system want to know: Is the system working? and; How can it be improved?

PART II – SUMMARY OF CONSULTATIONS

Key Issues Identified by Participants

The general consensus among the individuals and groups that participated in the Review was that the new human rights system is working more efficiently, it is more transparent and cases are getting resolved quicker. However, the participants highlighted a number of challenges with the system.

Throughout the consultation process, the following themes began to emerge:

- The Centre is simply not able to meet all of the demand for its services. However, when the Centre provides advice and representation to clients, it offers high quality services;
- Related to the first point, there are many applicants who are self-represented at the Tribunal whereas respondents are almost always represented;
- The Tribunal has been effective at ensuring that applications are resolved relatively quickly. However, it needs to find a better way to deal effectively with applications that clearly have no merit;
- The Tribunal's forms and rules are too complex;
- More public education and information on the human rights system is needed, particularly for vulnerable individuals and in marginalized communities;
- The Commission's revised role is poorly understood by the public and it appears to have disengaged from the private employment sector;
- The Commission is not adequately involved in litigation at the Tribunal;
- The three agencies, the Tribunal, Centre and Commission are poorly coordinated with respect to each other's mandate; and

- The human rights system as a whole needs better coordination.

Brief Summary of Submissions

The following is a brief summary of the feedback provided by participants with respect to each agency.

Human Rights Tribunal of Ontario

While most participants felt that the Tribunal is more effective and efficient at moving applications through the system quickly, there was concern about the complexity and inaccessibility of the application forms and rules. People with low income, low education, linguistic differences and/or disabilities face considerable challenges with accessing, understanding and completing applications.

However, despite finding the forms somewhat complex, most participants had a positive experience at the initial stages of the application process. Preliminary motions are mostly dealt with at teleconference hearings, allowing procedural and substantive issues to be dealt with quickly and efficiently. Some participants in the respondent community suggested that the Tribunal consider ways to streamline and simplify the summary hearing process to reduce the number of meritless and duplicative applications. There was also a concern that the Tribunal was too lenient with self-represented litigants in enforcing its procedural rules. Management and trade union representatives appeared satisfied that the Tribunal had not generally permitted re-litigation of arbitral cases, but expressed residual concerns about the ability of unionized employees to bring parallel proceedings before the Tribunal.

Most participants were generally satisfied with the mediation process. Mediation occurs relatively early in the process and the mediators are helpful in resolving complaints. Tribunal members conduct mediations that are guided by a rights-based orientation and which are informed by the member's adjudicative experience and many mediations result in public interest remedies. Human rights lawyers recommended that the Tribunal focus on the provision of earlier mediation and provide a pre-hearing conference for further settlement opportunities. Some participants indicated that the emphasis should be placed on an unbiased and balanced mediation process that is satisfactory for both parties, not on a settlement at all costs approach or a financial shakedown of respondents disconnected from the human rights merits of the application. It was also suggested that the Tribunal give greater consideration to the role of unions at mediations.

For those participants that had actually participated in a hearing, on balance, they considered the hearing to be fair. The increase in case law on procedural and substantive issues has provided a body of guidance on human rights concepts and procedures. This is important for parties before the Tribunal and other administrative bodies that are increasingly grappling with human rights and *Code* issues.

Some participants noted that Tribunal Vice Chairs are skilled and experienced in human rights matters and take the time to ensure that unrepresented applicants understand the process, while ensuring a fair and impartial hearing. Human rights lawyers suggested that the Tribunal develop a clearer delineation of what role the adjudicators will play in the conduct of the hearing and a more selective use of the adjudicator's extensive power to control the proceeding.

There was a concern among experienced human rights lawyers that the Tribunal awards, particularly general damage awards, are routinely too low. They noted that this creates a number of problems, including sending a message that human rights are of limited importance. Several experienced respondent counsel disagreed, arguing that for most respondents, the loss of reputation and inability to recoup legal fees was of greater concern than the actual monetary award paid to the applicant.

Participants proposed a number of ideas to improve the Tribunal, including the publication of Tribunal-facilitated settlements at mediation, guidance for requests to anonymise decisions, increased training for adjudicators and greater assistance for persons with disabilities throughout the application process.

Human Rights Legal Support Centre

Many participants agreed that the Centre, once engaged, provides high quality legal assistance, support, advice and representation. But there was a general consensus that the Centre is currently overwhelmed by the demand for services and requires more financial resources.

A number of participants discussed the difficulties they have encountered in attempting to obtain assistance and information from the Centre. This included the inability to reach the Centre by telephone or email, long waiting periods, denial of requests for assistance, and limited legal assistance due to the Centre's staged retainer system.

Some community organizations and advocacy groups expressed concern that the Centre has assumed the gatekeeping role that was held by the Commission under the previous system.

They recommended that Centre be more transparent in the way that it determines which services it can provide to clients. Advocates for certain racialized communities and persons with disabilities suggested that the Centre was not advancing the cases of these applicants as strongly as cases involving gender discrimination.

Representatives from legal clinics in the northern regions of Ontario cited the lack of access to the human rights system as a key issue that needs to be addressed. They indicated that the Centre is not a visible resource in the north. In many Aboriginal communities, people are not aware of the Centre and the services it provides.

It was suggested that other options for publicly-supported legal representation be bolstered or established. Some submissions recommended the restoration of the option of public prosecution of human rights applications by the Commission or that representation could be offered through the legal aid system. The respondent community recommended that the government consider revamping the Centre's mandate so that its role becomes providing support to applicants and respondents. They noted that the Centre should implement more stringent eligibility criteria for accepting cases that focus on the merits of a complaint, rather than other factors.

Ontario Human Rights Commission

Many organizations and individuals expressed concern about the lack of information about the new roles and responsibilities of the Commission, especially regarding systemic discrimination. Several representatives of the respondent community were unaware of any impact that the Commission has had on human rights education among employers in Ontario.

An organization suggested that one way to address the overwhelming call volume at the Centre is for the Commission to assume the responsibility of managing public inquiries through an information hotline. By responding to public phone inquiries, the Commission could help applicants identify the appropriate respondents for their human rights case. The Commission should refer individuals filing a systemic human rights complaint to other organizations and coalitions in Ontario who are working to address the systemic issue that they are facing.

Human rights lawyers suggested that the Commission may be able to play a role in assisting in the retention and funding of expert witnesses, particularly where this is necessary for an unrepresented, impecunious applicant to bring his or her application. Proper expert testimony contributes to the efficiency of proceedings and is crucial to fair results. It was recommended that the Commission dedicate resources to a program that assists unrepresented and underfunded parties in finding and retaining expert witnesses where the case demands it.

It was widely agreed that the Commission should be more active in intervening in cases and initiating applications. Several participants expressed concern that the Commission has failed to ensure that the public interest is advanced before the Tribunal by filing its own applications or intervening in the applications of other individuals. Human rights lawyers noted that information about the Commission's inquiry power and ability to intervene in appropriate cases should be more readily available and the Commission should be more active in intervening at the Tribunal where appropriate.

Many participants appreciated that the Commission's mandate changed very drastically in the reforms; however, the overall consensus was that the Commission has not struck the proper balance in its revised mandate between policy outreach and litigation. Their view was that the

Commission is not as engaged in human rights disputes as it should be and that it has tilted too much towards a facilitative, educative role to the detriment of active engagement in human rights cases.

There was frustration among several participants that the Commission had not yet established the Anti-Racism and Disability Rights Secretariats as required in the *Code*. While some groups and individuals recommended that the secretariats be established, others were sceptical of the efficiency of the proposed Secretariats or ambivalent concerning how they would work within the Commission's structure.

System Wide Concerns and Feedback

A lack of coordination among the three agencies on public education was raised by many participants as a key issue. The three agencies were working within their individual mandates but spent less energy on how the overall human rights system could be improved. Legal clinics in northern Ontario felt that the Commission has not played a strong role in public education, particularly in small communities. Aboriginal groups and representatives in the Thunder Bay area spoke of the need for greater outreach to Aboriginal communities. They explained that many Aboriginals are reluctant to file human rights applications and need assistance in identifying human rights violations and discrimination. Advocacy groups that represent racialized and other marginalized communities reported that individuals often run into barriers in finding ways to address their discrimination. Many lack the information and confidence to assert their human rights under the new system which places too onerous a burden on applicants to advance their own case. It was recommended that a one-stop online resource for human rights information be created.

Almost all participants indicated that the human rights system requires increased funding to continue to provide quality services and provide greater assistance to victims of discrimination. One group recommended that the province take all necessary steps to ensure that there is a guaranteed allocation of sufficient resources to each of the three human rights agencies.

PART III – HUMAN RIGHTS TRIBUNAL OF ONTARIO

A. The Tribunal's Mandate and Operations

The amendments to the *Code* created a new direct access system to allow all claims of discrimination under the *Code* to be dealt with through applications filed directly with the Tribunal, rather than through the Commission. The time period by which applications had to be filed with the Tribunal was extended from six months to one year (since the last incident of discrimination).

The Tribunal is led by the Executive Chair, Alternate Executive Chairs and Associate Chair.[18] The Tribunal adjudicator composition has increased since December 2006, when the *Code* was amended. As of May 2012, the Tribunal had 22 full-time Vice-Chairs and 26 part time Vice-Chairs and members. Tribunal Vice-Chairs and members are appointed by the Ontario government typically for two to five year terms. Most, but not all, of the Tribunal members are lawyers in terms of their professional background.

Adjudicators are appointed to the Tribunal pursuant to the new *Code* requirement that they be selected through a competitive process and have experience, knowledge or training with respect to human rights law and issues, an aptitude for impartial adjudication and applying alternative adjudicative practices and procedures.

The Tribunal also employs staff that includes a Registrar, case processing officers, schedulers and adjudicative support assistants.

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[18] The Tribunal's website is www.hrto.ca.

As of January 25, 2011, the Tribunal became part of the newly designated Social Justice Tribunals Ontario cluster.[19] This cluster brings together the Tribunal and six other important adjudicative tribunals – the Landlord and Tenant Board, Social Benefits Tribunal, Child and Family Services Review Board, Custody Review Board, Special Education (English) Tribunal and Special Education (French) Tribunal. The mandate of these tribunals is to provide Ontarians with timely access to specialized, expert and effective dispute resolution in a wide range of matters.

The *Code* grants the Tribunal the power to make its own rules of procedure and the flexibility to determine how mediations, hearings and other procedures related to applications will take place.[20] The purpose of the Tribunal's rules is to ensure that the parties are provided with an opportunity to resolve the application in a fair, just and expeditious manner. The Tribunal is required to conduct public consultations before making a rule.

Applications are filed with the Tribunal using specified forms that are available from the Tribunal. When the Tribunal receives an application, it reviews it to ensure that it is complete and that the subject matter of the application is within its jurisdiction. Once the application is accepted, the Tribunal then serves the application on the respondent named in the application. Once served, the respondent has 35 days to file a response to the application.

The Tribunal may not dispose of an application that is within its jurisdiction without giving the parties an opportunity to make oral submissions and without providing written reasons. The Tribunal may defer an application if the issues are being considered in another proceeding, or

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[19] The SJTO's website is: www.sjto.gov.on.ca.
[20] See Appendix D: Tribunal Flow Chart.

it may dismiss an application, in whole or in part, if it finds that another proceeding has appropriately dealt with the substance of the application.

The Tribunal employs an active case management system to ensure that applications proceed in a fair, just and expeditious manner. The Tribunal provides the parties with an opportunity to engage in voluntary mediation. If the parties agree to mediation, a Vice-Chair is assigned to mediate the application, typically in a half-day session.[21] The Vice-Chair meets with all of the parties to discuss the application and to try and work out a resolution that all parties can accept. The mediation process is voluntary and confidential.

Where the application cannot be settled, the Tribunal will hold a hearing to decide whether discrimination has taken place. Prior to the hearing, the parties are required to identify and exchange all documents, witness statements, and material relevant to the dispute and file with the Tribunal the material that they intend to rely upon at the hearing.

At any time during the application process, the parties may file motions about procedural or substantive matters. For instance, under Rule 19A, a new Rule introduced in July 2010, at the request of a respondent (or based on the Tribunal's own determination), an application may be scheduled for a summary hearing to determine whether it should be dismissed because it has "no reasonable prospect of success."

If the application proceeds to a hearing, depending on the nature and complexity of the application, the hearing may take place over one or multiple, consecutive or non-consecutive days. The hearing involves each party, either with or without lawyers, paralegals or agents

[21] Half-day mediations became the norm at the Tribunal in July 2010.

assisting, presenting evidence and submissions to support their respective positions in the dispute. The degree of formality may vary somewhat depending on the approach taken by the presiding Tribunal member.

If the Tribunal adopts a traditional and formal approach, the parties make opening statements, examine and cross-examine witnesses, make legal arguments and provide closing statements both with respect to whether or not discrimination occurred and if it did, what remedy is appropriate in the circumstances.

The *Code* and the Tribunal's Rules permit the adjudicator to adopt non-traditional methods of adjudication. The adjudicator has the power to question witnesses and limit the evidence or submissions on any issue. If the hearing involves mediation-adjudication or "med-adj" as it is more commonly known, the parties must consent and sign the Tribunal's standard agreement that the adjudicator may engage in mediation and continue with the hearing if no settlement is reached. Fairness is the overarching requirement for any of the above approaches to the hearing. Whether through mediation or a hearing, the Tribunal works to resolve applications on the basis of the facts and the law.

Typically, the Tribunal is not in a position to render a decision immediately after the hearing because it must consider the totality of the facts and law before coming to a decision. The Tribunal may not render a decision until several months after the conclusion of a hearing. Section 43(2)2 of the *Code* requires that written reasons be provided for the final disposition of matters.

If the Tribunal finds that the *Code* has been breached, the Tribunal will make an order that it

considers appropriate to remedy the discrimination experienced by the applicant. The Tribunal has a broad remedial power to order monetary compensation, restitution or other public interest remedies to promote compliance with the *Code*. This can include ordering the respondent to pay financial compensation to the applicant, and/or making orders to prevent further human rights violations. If the Tribunal finds that discrimination did not occur, it will dismiss the Application.

Final decisions of the Tribunal may not be appealed to the court. However, parties may seek reconsideration from the Tribunal or judicial review at the Divisional Court of the Superior Court of Justice.

B. Findings and Recommendations

Based on my analysis of the feedback from participants, materials provided by the Tribunal and the Tribunal statistics, I have developed the following findings and recommendations with respect to the Tribunal's application process.

1. Efficiency of Tribunal

The *Code* reforms came into effect on June 30, 2008 (the "effective date"), 3 months, or one fiscal quarter, into the 2008-09 fiscal year. The Tribunal had three streams of cases:

- New applications – applications filed directly with the Tribunal on or after the effective date;
- Transitional applications – applications filed with the Tribunal between June 30, 2008 and June 30, 2009, based on complaints originally filed with the Commission under the previous system; and
- Commission referred complaints – complaints that were referred by the Commission to the Tribunal for a hearing before December 31, 2008.

I examined a large array of statistics concerning the Tribunal in order to comment on how the Tribunal is operating under the new *Code*. The full list of statistics is presented in Appendix E to this report.[22]

For the statistics to be meaningfully examined, it is important to appreciate the context in which the Tribunal operations have evolved and how that has affected the Tribunal's collection of statistics.

On the effective date, the Tribunal's new case management system was still in development. Accordingly, the reported data, including from the Tribunal's available annual reports after 2008-09, reflect different methods of gathering the data as well as some changes in the Tribunal's rules and processes. During 2010-11, the Tribunal made a number of process improvements and changes that affected its efficiency.

The Tribunal:

- Amended its Rules to institute a new summary hearing process under new Rule 19A;
- Moved to half-day mediations;
- Formalized adjudication-mediation at the hearing stage of the application;
- Shifted adjudicative resources from transitional applications to new applications; and
- Began to capture more detailed and accurate information on its mediation outcomes.

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[22] The types of statistics maintained by the Tribunal varied from year to year. The main sources of statistical information for the Tribunal were: 2008-2009 HRTO Annual Report; 2009-2010 HRTO Annual Report; 2010-11 SJTO Annual Report; HRTO Statistics available from its website; HRTO Response to Questions Submitted by the Accessibility for Ontarians with Disabilities Act Alliance; and HRTO's response to questions submitted by the Review.

During 2011-12, the Tribunal improved its case management system to include a new calendar function and the ability to create various queues (for mediation, merits hearings and non-merits hearings), and track the number of cases in each queue.

The Tribunal established an "application acceptance date" as the date by which the application had been filed and the Tribunal has determined whether the application was complete, within jurisdiction, should be deferred or should be scheduled for summary hearing.

Since the reforms, the Tribunal has received approximately 3,000 new applications a year. This was the expectation at the time of transition to the new human rights system. The Tribunal's caseload of active applications increased for the first three years, as the applications accumulated and progressed from intake to hearing. However by 2011-12, for the first time the Tribunal was able to close more cases than it opened.[23] For 2011-12, the number of active cases remaining was 3,302, or about the same average number of new applications received. This suggests that presently, the Tribunal is not accumulating a backlog of applications.

Mediations occur in about 1,420 cases each year with a 65% resolution rate. From the application acceptance date, it takes about 9 months to get to mediation. For 2011-12, the average length of time from application acceptance to closure was 387 days (12.7 months), with a median of 324 days (10.7 months).

[23] In 2011-12, the Tribunal closed 3,364 applications and opened 2,740. The trend continued in the first quarter of 2012-13.

As another way to gauge the Tribunal's efficiency in processing cases, I analyzed 143 new application cases that were decided on their merits since September 2010. The Tribunal provided me with timelines from filing date (not acceptance date) to the first hearing date, and from the first hearing date to the decision date on the merits. I determined that for cases that proceed to a full hearing on the merits, it takes 16.5 months from the initial application filing date (not the application acceptance date) to get to the first hearing date; and another 6.9 months from the first hearing date to the decision, for a total of 23.4 months, or just under 2 years.

In 50 cases (35% of cases), discrimination was found; in 93 cases (65% of cases), discrimination was not found. The 35% figure is somewhat lower but not inconsistent with the 40% statistic for the percentage of cases in which discrimination was found based on the Tribunal's breakdown of final decisions over the last three years. Clearly, whether the 35% or 40% figure is used, it contradicts the suggestion that the Tribunal never finds in favour of applicants or, conversely, that it always finds in favour of applicants, for ideologically driven purposes or otherwise.

The current direct access human rights system under the revised *Code* appears to be more efficient than the previous system in a number of respects.

While the volume of applications (formerly called complaints) has increased, with the Tribunal now receiving approximately 3,000 new applications a year compared to 2,400 received by the Commission in the last few years before reform, the Tribunal is not developing a backlog of

cases.[24] At the time I concluded the Review in August 2012, the Tribunal was able to close about as many applications as it received in a given year, in fact, slightly more.

Applications, including cases fully decided on their merits, are also getting resolved faster in comparison to the previous human rights regime

The average length of time to close cases at the Tribunal, including cases fully decided on their merits, is 12.7 months. Under the previous regime, the average age of all completed cases at the Commission was 12.8 months[25] but, because of the allocation of roles between the Commission and the Tribunal, the Commission's "age of completion" statistic did not include the time period from Commission referral to the date of Tribunal decision. Accordingly, the average length of time to close figures are not comparable.

The previous system was characterized by a high settlement rate; 71% of all completed cases without the necessity of a Commission decision; but for the remaining cases, the Commission decision occurred more than two years after the filing of the complaint.[26]

The improved efficiency of the current system is most evident in respect of processing cases fully decided on their merits. Under the current *Code*, on average, it takes 16.5 months to reach the first day of hearing and almost 6.9 months more to receive a decision from the

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[24] In the 5 years prior to 2008, the Commission's active caseload increased for each consecutive year, see Appendix A.
[25] Based on the 5 year period, 2003-04 to 2007-08.
[26] The average age of a case at the time the Commission made a section 36 decision under the previous *Code* was 26.8 months based on the three years 2005-06 to 2007-08.

Tribunal, therefore 23.4 months, or just under 2 years from application filing to Tribunal decision. Under the previous *Code*, by contrast, on average it took 47.6 months or around 4 years to get to a Tribunal hearing and another 8.8 months to receive a decision from the Tribunal, therefore 56.4 months or 4.7 years from complaint filing to Tribunal decision.

Accordingly, I would characterize the greater processing efficiency of the present human rights system as follows: a greater volume of cases are resolved faster without a backlog developing and, for those cases that do not settle and proceed to a hearing, they are decided much faster. Given the higher volume of fully decided cases on their merits – on average 100 final decisions annually in the present system versus 15 under the previous Code - a large body of Tribunal case law has also developed in Ontario since 2008 in respect of substantive human rights decisions.

It must be acknowledged that waiting an average of 9 months to get to mediation, 16.5 months to get to a hearing, and almost 2 years to get to a Tribunal decision is not ideal, particularly for human rights disputes. I am concerned as well that the resolution rate for mediations under the current system, which is about 65%, is lower than the 70% rate that was typically achieved at Commission mediations in the previous system. Some of my recommendations are aimed at improving these indicia; however, relatively speaking, the present human rights system is able to resolve disputes in a much more timely manner than was possible under the previous *Code*.

It must also be acknowledged that part of the reason why the revised system deals with cases more quickly is that the Commission's investigative role has been eliminated. For critics of the direct access model, this so-called efficiency gain comes at too high a cost because they see prior investigations as critical to uncovering human rights violations. The counter-argument to this perspective, pointed out in human rights reviews, is that the majority of human rights cases did not require investigation and that what was gained in investigation was lost in the incremental delay getting to a hearing.

2. Representation of Parties Before the Tribunal

The Tribunal permits applicants and respondents to be either self-represented or represented. "Represented" means that a party is represented by a lawyer, paralegal or some other individual. Lawyers may be from the Centre, the private Bar, a legal community clinic, a corporation ("in-house counsel") or elsewhere. The level of representation or self-representation at the Tribunal varies depending on the stage of the Tribunal proceeding. For instance, an applicant may file an application self-represented but then retain a lawyer for the mediation. Subsequently, the applicant may again be self-represented at the hearing. Similarly, a respondent may retain a lawyer from the start to finish of a Tribunal proceeding whereas another respondent may be self-represented initially but then retain a paralegal for the mediation and hearing.

In response to my inquiry about the level and nature of representation of parties before the Tribunal, the Tribunal provided the following information.

Representation of Parties at Mediation (2011-2012)

	Lawyers	Paralegals	HRLSC	Other	Self-Represented
Applicants	27%	4%	11%	4%	54%
Respondents	83%	1%	N/A	2%	15%

Representation of Parties at Hearings (2011-2012)

	Lawyers	Paralegals	HRLSC	Other	Self-Represented
Applicants	27%	4%	11%	4%	53%
Respondents	82%	1%	N/A	2%	15%

I note, however, that on the Tribunal's website it has indicated that the level of self-representation for new applications for 2011-12 was 70%. As well, in response to an inquiry from the AODA Alliance, the Tribunal noted that:

> Statistics on representation are somewhat difficult to gather and define since parties may be self-represented at certain points in the process and represented at others. For new applications, the HRTO gathers data on whether there is a representative listed on the file. Of the 10,274 applications that had been filed by November 16, 2011, applicants have a representative or had one at closing in 3,383 or 32.9% [or 67.10% self-represented]. This number includes all types of representatives, not just lawyers.

Out of the 143 merits cases I analyzed, applicants were self-represented in 91 cases or 64% of the time; and respondents were self-represented in 15 cases or 10% of cases, indicating that respondents retained a representative 90% of the time for full hearings.

I conclude from the foregoing that citing any one figure for self-representation or representation of parties is difficult because representation varies as an application proceeds from intake to

closing. However, for applicants the rate of self-representation appears to range from a low of 53% (at mediations and hearings) to a high of 70% (generally). Respondents are almost always represented by a lawyer from a low of 82% to a high of 90% of the time. While recognizing the imprecision of choosing any one number, for the purposes of further discussion, I choose the figure of 65% as the rate of self-representation of applicants, and 85% as the rate of representation (by lawyers) for respondents.

A number of stakeholders expressed concern at the potential for applicants to be disadvantaged by the stark difference in the level of legal representation at the Tribunal since applicants are mostly self-represented while respondents are mostly represented by lawyers. I consider the challenge of the high number of self-represented applicants in the section of the Report dealing with the Centre.

3. Screening Claims

A common sentiment among respondent-oriented stakeholders was that, while the *Code* reforms have resulted in greater Tribunal efficiency, the current regime makes it too easy for applicants to pursue meritless cases all the way to a full hearing. This is said to place an unfair burden on respondents who cannot recover costs against unreasonable applicants. Does the revised *Code* provide the Tribunal with a sufficient filter for unmeritorious applications?

In its submission, the Canadian Association of Counsel to Employers (CACE) identified this issue and suggested that the present *Code* be amended to include additional grounds upon

which the Tribunal could dismiss all or part of an application without a hearing akin to section 27(1) of the British Columbia Human Rights Code,[27] which provides:

> A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
>
> (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
>
> (c) there is no reasonable prospect that the complaint will succeed;
>
> (d) proceeding with the complaint or that part of the complaint would not
>
> (i) benefit the person, group or class alleged to have been discriminated against, or
>
> (ii) further the purposes of this Code;
>
> (e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;
>
> (g) the contravention alleged in the complaint or that part of the complaint occurred more than 6 months before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22 (3).

The Ontario *Human Rights Code*, and the Tribunal's rules made pursuant to it, provide various mechanisms by the which the Tribunal may dispose of applications in whole or in part,[28] including:

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[27] CACE also cited section 27.1 of the Saskatchewan *Human Rights Code* which provides the Saskatchewan Human Rights Chief Commissioner with the discretion to dismiss complaints on several grounds. Unlike B.C., Saskatchewan does not have a direct access human rights system. Saskatchewan maintains a discretionary gate-keeping model for its Commission, however, as a result of 2011 *Code* amendments, complaints warranting a hearing are referred to the Saskatchewan Court of Queen's Bench, rather than an administrative human rights tribunal.

***Code* s. 40** The Tribunal shall dispose of applications made under this Part by adopting the procedures and practices provided for in its rules or otherwise available to the Tribunal which, in its opinion, offer the best opportunity for a fair, just and expeditious resolution of the merits of the applications.

***Code* s. 43(2)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.

***Code* s. 45.1** The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

Rule 19A.1 The Tribunal may hold a summary hearing, on its own initiative or at the request of a party, on the question of whether an Application should be dismissed in whole or in part on the basis that there is no reasonable prospect that the Application or part of the Application will succeed.

In comparing the Ontario and British Columbia's human rights system's ability to filter out unmeritorious claims, I note that the schemes are different in that the Ontario *Code* permits the Tribunal to dispose of applications in accordance with the Tribunal's rules subject to providing the parties with an opportunity to make oral submissions; whereas B.C.'s Code specifies the grounds upon which the complaint can be dismissed *with or without a hearing*.

I find the difference between the two regimes is not so much with respect to the grounds upon which claims can be dismissed, but rather that the Ontario regime provides the additional safeguard of providing parties with the opportunity to make oral submissions prior to the potential dismissal of an application. I find that removing this safeguard, as some respondents would like, reintroduces a strong discretionary element into the Tribunal's decision-making that

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[28] Early dismissal of all or part of an application is provided pursuant to sections 34(1) and (2), 34(11), and 45.1 of the *Code*; and Rules 1.7(b), 1.7(v.1), 13.1 and 19A of the Tribunal's Rules.

is reminiscent of the Commission's discretionary ability to dismiss complaints without oral submissions under the previous *Code*. Given that the Commission was criticized in this regard, I do not recommend *Code* reforms that provide more discretionary filters to weed out unmeritorious applications.

I also find that the current mechanisms for the Tribunal to dispose of unmeritorious applications are working, particularly with the introduction of Rule 19A. The feedback that I received from respondents is not so much that the Tribunal is allowing unmeritorious applications to succeed, but rather that unmeritorious applications are entertained for too long in the system. I note that in 2010-11, 35% of the Tribunal's decisions dealt with dismissal on a preliminary basis (which includes the allegation that the application had no reasonable prospect of success) and that in 2011-12, the comparable figure was 34%. These figures provide some empirical evidence that the Tribunal is very active in assessing the prospects of early dismissal of applications.

Of course, the important perspective of applicants has also to be considered which is that the human rights system should not pre-judge the merit of applications too early; and that an important function of the system is to allow applicants, many of them self-represented, to explain their *Code* concerns to an impartial adjudicator. On the whole, I find that the Tribunal is striking the right balance between applicant and respondent perspectives when assessing whether to dismiss an application without it proceeding to a full hearing.

A related question is whether the Tribunal is inappropriately permitting legal proceedings that have been dealt with elsewhere to be re-litigated in the human rights forum. Another aspect of the changes to the Ontario *Human Rights Code* was the introduction of section 45.1 which provides that the Tribunal may dismiss an application, in whole or in part, in accordance with its Rules of Procedure, if the Tribunal is of the opinion that another proceeding has "appropriately dealt with the substance of the application."

Prior to the amendment, the legislation provided that Commission could, in its discretion, decide not to deal with the complaint where it appeared to the Commission that the complaint "was one that could or should be more appropriately dealt with under an Act other than this Act." The Commission was also authorized to dismiss complaints that the Commission determined were trivial, vexatious or made in bad faith, outside the jurisdiction of the Commission, or past the Commission's six month filing deadline.

The introduction of section 45.1 was a concern for certain stakeholder groups who feared that it would empower the Tribunal to sit as a collateral appeal body over other administrative tribunals and proceedings, particularly labour relations arbitration and grievance proceedings. These stakeholder groups viewed the language of section 45.1 as being more permissive of "multiple forums" or "collateral appeals," compared to the pre-2008 statutory language. Labour arbitrators, in particular, were concerned that the Tribunal would be empowered to review their labour arbitration decisions, and reconsider facts and legal issues from a human rights perspective that had already been decided in the grievance arbitration forum.

For approximately three years after the June 2008 *Code* reforms, the Tribunal's jurisprudence suggested that, in the right circumstances, the Tribunal would be prepared to examine whether a parallel legal proceeding had approached the human rights content of the dispute in an appropriate manner. This led to uncertainty and raised respondents' concerns that disputes could be re-litigated before the Tribunal. In October 2011, however, two important legal decisions clarified the issue. Following the Ontario Divisional Court's decision in *Trozzi*, and the Supreme Court of Canada's decision in *Figliola,*[29] the Tribunal's practice is to now to dismiss human rights applications where there is a grievance or other parallel process based on the same facts as those contained in the application.

In *Trozzi,* the Ontario Divisional Court confirmed that the Tribunal does not sit as an appellate body to supervise other Tribunals' human rights decisions, which were determined based on the other Tribunal's unique expertise and mandate. In *Figliola*, the Supreme Court clarified the test for determining whether a matter has been "appropriately dealt with" in another proceeding. In that case the Supreme Court was examining a dismissal provision similar to section 45.1 that is contained in British Columbia's *Human Rights Code.*

In the *Figliola* decision, an injured worker who disagreed with a decision of the BC Workers' Compensation Board sought to re-litigate the same facts and issues in a proceeding before the BC Human Rights Tribunal. Figliola argued that the BC Workers Compensation Board had not appropriately dealt with the human rights issues he had raised in that proceeding. The Supreme Court held that the "appropriately dealt with" provision of the BC *Human Rights Code*

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[29] *College of Nurses of Ontario v. Trozzi*, 2011 ONSC 4614; *British Columbia (Workers' Compensation Board) v. Figliola,* 2011 SCC 52.

did not authorize the Tribunal to sit as a collateral appeal tribunal over other human rights tribunals. The Court held that parties are not permitted to re-litigate the same issues in multiple forums, and set out the proper test for the BC Human Rights Tribunal to determine whether a matter has been "appropriately dealt with" by another administrative tribunal or proceeding.

The Human Rights Tribunal of Ontario released two decisions on December 22, 2011, applying the Supreme Court's reasoning in *Figliola*.[30] In the decisions, Associate Chair Wright confirmed that the Tribunal will not sit as an appeal body to other administrative proceedings. The decisions clearly reject the Tribunal's previous jurisprudence which suggested that the Tribunal could consider whether the other proceeding had properly applied human rights principles. The current test for section 45.1 recognizes that the Tribunal will not permit the re-litigation of facts and issues that have been, could have been or will be considered in another proceeding. An applicant must therefore raise their human rights issues in another proceeding where they are entitled to do so. Provided the other administrative forum is entitled to consider human rights issues and apply the *Code*, the Tribunal will not inquire further into the issues or review the substance of that administrative decision-maker's analysis.

With respect to unionized employees, the *Paterno* decision confirms that unionized employees must choose either to proceed with the grievance and arbitration proceedings available to them under a collective agreement, or forego that benefit in favour of proceeding with an application before the Tribunal.

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[30] *Paterno v. Salvation Army*, 2011 HRTO 2298 and *Gomez v. Sobeys Milton Support Centre*, 2011 HRTO 2297.

A review of the Tribunal's subsequent case law confirms that the Tribunal is appropriately dealing with these issues on a case by case basis, and is applying the Supreme Court's jurisprudence so as to avoid multiple proceedings, where appropriate.[31] From the perspective of labour arbitration proceedings, the prevailing practice of the Tribunal post-*Figliola* has been to defer or dismiss applications where a parallel grievance process is ongoing. I do not find any need to make a recommendation to the Tribunal in this area; however, I considered it important to explain why the concern around parallel proceedings developed and how it has evolved.

4. Applications

(a) Forms

Under the previous *Code*, when a complaint was filed at the Commission, there were very few forms to be filled out and the forms themselves were far simpler. The forms did not require the parties to provide specific information about their position, however, the parties were free to provide any information that they considered relevant in their chosen format. Over the years, the Commission's intake practices varied and, over some periods, the Commission offered more or less assistance to applicants wishing to file a complaint. The Commission maintained a relatively lax attitude towards the sufficiency of information before a complaint could be accepted as filed with the Commission. Accordingly, the bulk of information from complainants would typically be provided via the complainant appending an attachment to the

[31] See for example, *Jokstad v. Royal College of Dental Surgeons of Ontario*, 2012 HRTO 143; *Melendez v. City of Toronto*, 2012 HRTO 403; *Shi v. Holcim (Canada),* 2012 HRTO 416; *Violo v. Maple Leaf Sports & Entertainment Ltd.,* 2012 HRTO 641.

Commission's simple form, which attachment would be the complainant's own description of events related to the filing of the complaint. Respondents also would typically append an attachment to the Commission's response form, which attachment would provide the respondent's response to the complaint. Alternatively, the parties would populate the Commission's form, the most important part of which would ask for a description of the complaint or response to the complaint.

On the one hand, the Commission's simple forms were accessible in that it was easy to fill out the complaint (or response) since the complainant's (or respondent's) own description of events essentially constituted the bulk of the complaint (or response). On the other hand, the lack of questions in the form around what information was required left uncertainty as to the nature of the complaint, who it was being filed against, whether other dispute resolution processes had been attempted, what witnesses and evidence the parties were going to rely upon, and what remedies were being sought. Often this important information was missing from the complaint because it had never been requested and, as a result, the respondent's response was unclear or unresponsive to those issues. Eventually, under the previous *Code*, if the case did not resolve at mediation, once the Commission investigated the complaint, this information would become known to the Commission investigator and, to the extent that the investigator shared this information, to the parties. However, investigations typically occurred well over a year and, in some cases, several years after the initial filing of the complaint.

When the new direct access system was being designed, considerable attention was therefore paid to the means by which parties would provide and present their information since the parties would be filing their information directly with the Tribunal. The Tribunal's management

consulted and worked with a number of organizations, including Community Legal Education Ontario (CLEO) and plain language specialists to design forms that would strike the right balance between accessibility and adequacy of information. Given the absence of the Commission's intake and investigative functions prior to the Tribunal dealing with the complaint, it was important for the Tribunal and the parties themselves to have an enhanced level of information in order to make decisions as to how to deal with the application. A central question for me under the Review was whether the Tribunal had designed its intake processes appropriately.

An important, if obvious, insight is that everyone's use of the internet or web based technology has greatly increased even in the relatively short period from December 2006, when the *Act* was passed, to June 30, 2008, when the most important *Code* changes came into effect, to the period in which the Review was conducted, 2011-12.

To complicate matters further, the Tribunal's intake processes themselves evolved between June 30, 2008 and the time during which the Review was conducted. For instance, in May 2012, the Tribunal updated its website whereby links entitled "How to Fill Out an Application" and "How to Fill Out a Response" are prominently displayed on the home page of the Tribunal's website. These links connect the user to "SmartForms" which can be saved, printed and submitted electronically to the Tribunal. The SmartForms can be uploaded directly into the Tribunal's case management system so the Tribunal can process the forms more quickly and accurately. I understand that various versions of SmartForms have been available previously, albeit not so prominently displayed on the Tribunal's website.

It was not realistic for me to ask, and for participants to answer, which intake process they were following when providing their feedback about their experience with the Tribunal. Accordingly, the feedback that I received reflected an overall picture of the Tribunal's intake processes over time and, in particular, their accessibility.

The consensus appears to be that the forms are more complicated than necessary. Experienced lawyers and parties find the information useful but most individuals without legal training struggle with the forms. In general, the multiplicity of the forms and the duplicative information is a greater barrier than length, but that is a concern as well.

I was also reminded in the consultations that not everyone has access to a computer or the internet. The Tribunal's forms and processes must also be accessible to individuals with little or no access to a computer or the internet.

The Tribunal is aware of concerns around the accessibility of its forms and is open to improving its materials and processes. However, it is also correct to point out that some applicants experience difficulty with the forms because their complaints do not properly belong at the Human Rights Tribunal. The information requested by the forms does not correspond to or elicit appropriate information about their complaint. The Tribunal's forms therefore represent a legitimate and appropriate control mechanism against complaints that have nothing to do with *Code* concerns and should be advanced elsewhere. While I agree that the forms should legitimately constrain against applications with non-*Code* concerns, I find that many applicants with arguably valid human rights concerns still find the forms more complex than necessary.

Recommendation 1:

The forms and the means of accessing the forms both electronically and physically should be reviewed and simplified to reduce duplication and length and to increase accessibility. The Tribunal should continue working with its stakeholders, accessibility and cognitive specialists to determine how the forms and processes can be made more accessible to a broad range of users including (a) persons with disabilities; (b) persons without high-speed internet access; and (c) persons without computer or internet access.

(b) Personal Respondents

Applicants often inappropriately name individuals as personal respondents in the belief that this enhances the merits of their application against corporate or organizational respondents. The Tribunal has a practice direction concerning the naming of personal respondents that indicates that "where there is an organizational respondent who may be held liable for the alleged infringement and is in a position to satisfy any remedies ordered, the naming of individual respondents is generally discouraged". The Tribunal has cautioned that the unnecessary naming of individuals, whose conduct is not a central issue in the alleged harassment or discrimination, adds to the complexity of the case and can act as a roadblock to resolution of the dispute.

I received feedback from a number of respondents who requested that the Tribunal take steps, beyond what was in its Practice Direction, to reduce this occurrence. I agree that more can be done to improve efficiencies in this area as valuable time, expense and Tribunal resources are expended in processing the removal of improperly named personal respondents.

I encourage the Tribunal to examine ways, beyond the issuance of the existing Practice Direction, to reduce the incidence of improperly named personal respondents. For instance, the Tribunal may wish to permit applicants to name personal respondents only after applicants

have confirmed that they have reviewed the relevant practice direction; or only after they provide an explanation for their belief that the personal respondent was acting in his or her personal capacity and the corporate respondent will not accept responsibility. Similarly, the Tribunal's usual processes for dealing with this issue may be accelerated by customizing the response form to indicate whether the corporate respondent accepts responsibility at the outset for the named personal respondents' conduct and would be prepared to satisfy any remedies that may have been ordered against personal respondents. Such measures would increase Tribunal efficiency without undermining the ability of applicants to name personal respondents in appropriate circumstances.

Recommendation 2:

The Tribunal should take steps beyond its current Practice Direction to reduce the inappropriate naming of personal respondents.

(c) Service on Large Respondents

Some large respondents complained that applications are not being served in the proper part of the organization leading to less than the normal time allotted to respond to applications. The Tribunal has stated that it has responded fairly to respondents who ask for an extension of time due to having a reduced amount of time to respond to an application. In my view, this issue could be resolved via better communication between the Tribunal and large respondents particularly those that, due to the volume of clients or customers that they serve, are likely to be served with several applications in any given year.

Recommendation 3:

The Tribunal should establish a better protocol for the service of applications on large respondents. This will help to reduce delays between the receipt of the application by the Tribunal and service on the respondent.

(d) Early Disclosure

Since 2008, one of the new requirements imposed on parties at the initial stage of the application is the necessity to list important documents and witnesses. The merits of this requirement are that the parties establish early on whether and to what extent their position may be corroborated by documentary evidence and witness testimony. In practice, however, I found that this step was not all that useful because (a) formal disclosure was required at a later stage in the application after a Notice of Hearing was issued; (b) the formal disclosure provided later by the parties did not necessarily resemble the initial disclosure; and (c) many parties were side-stepping the early disclosure requirement by putting generic statements in their initial application or response that were not meaningful to the process.

I note that Recommendation 37 of the La Forest Report advocated full disclosure with the initial filing of the human right claim or response, however, with the benefit of several years' experience with this early disclosure requirement, I found, after consultation, that this requirement provided limited benefits to the parties and to the Tribunal and was not justified. Eliminating the mandatory requirement of early disclosure also reduces the amount of up front work for parties thereby making the direct access system somewhat more accessible and easier to navigate at the front end of the application process.

Recommendation 4:

The Tribunal should eliminate the requirement for applicants and respondents to identify the important documents in their or others' possession and their list of witnesses in the initial stage of the application. Instead, the Tribunal should advise parties to begin preparing this information as soon as possible as it will be required at a later stage in the application and may be more difficult or impossible to obtain as time elapses.

5. Mediation

(a) Half-Day Mediations

Mediations are a critical part of the Tribunal's dispute resolution processes. Mediations are voluntary, not mandatory. I did not receive any groundswell of support for making attendance at mediation mandatory.

I calculated the average number of mediations held at the Tribunal each year. Understandably, the number of mediations held in the Tribunal's first year after the effective date was low as only a few cases were at the mediation stage. Subsequently, however, an average of approximately 1,420 mediations occurred each year. Accordingly, approximately just under half the number of new applications received each year proceed to mediation. The Tribunal's statistics indicate that, in general, mediations have approximately a 65% chance of resolving an application.

By settling the matter at mediation, the parties receive certainty as to the outcome of the application and earlier than had they proceeded to a hearing. Moreover, the terms of settlement at mediation are crafted by the parties themselves with assistance from the mediator and the terms of settlement are not limited by the Tribunal's remedial jurisdiction.

In general, I received positive comments about the Tribunal's mediation process. Mediation, where agreed upon by the parties, occurs after the respondent files a response to the application. The Tribunal's practice is different from its counterpart in British Columbia where "early mediation" can occur after an application has been filed but before a response has been received. While this approach has its advantages, the opposite approach - requiring responses to be filed before mediation - reduces or eliminates the degree of surprise to the

applicant and also allows the Tribunal mediator a better opportunity to understand each party's position. Mediation after a response also allows the Tribunal and the parties to better gauge the relationship between the issues in the dispute and the *Code*, including with respect to obtaining public-interest based *Code* remedies. While the BC model might promote very early settlement, on balance, mediation after receiving a response better aligns with the overall objectives of mediation, which include each side having the opportunity to explain their position.

I agree with mediations being scheduled after the filing of a response. However, I consider it important that mediations be scheduled as soon thereafter as possible. All parties have an interest in attempting early resolution of their disputes and given the relatively high resolution rate at the Tribunal, it appears that dedicating more resources to early mediation, albeit after the receipt of a response, would be warranted. As aptly expressed by the Canadian Association of Counsel to Employers, "the chances of resolving the matter would likely be enhanced as the parties would not have had time to become entrenched in their positions".

Currently, on average, the Tribunal appears to be scheduling mediations around 9 months into the application process. Many stakeholders would like to see that time period reduced.

The Tribunal adopted the practice of half-day mediations in 2010. On balance, the half-day mediation format has been well received. A few organizations and individuals complained that the half-day format does not permit sufficient time for the parties to "get their stories out" before settlement negotiations begin, however, the overall sense was that half-day mediations were no less successful in resolving applications than full-day mediations and, in practice, Tribunal

members maintain appropriate flexibility with respect to extending the mediation time period if an application appears to be on the verge of a mediated settlement.

One final aspect of mediations that is worth noting is whether it is appropriate or feasible for mediations that do not resolve applications to be used as case management or hearing preparation meetings. In my view, this is not realistic, and would be inconsistent with my recommendation that early disclosure be eliminated since the parties would not typically have even exchanged disclosure and witness lists. Of course, nothing precludes a Tribunal mediator from identifying specific procedural or substantive issues that may require discussion but, it is not mandatory.

Recommendation 5:

The Tribunal should dedicate more resources and determine means by which mediations can occur as early as possible after receipt of a response.

(b) Involvement of Trade Unions at Mediation

When the Tribunal receives an application that identifies a trade union as an "affected person", the Tribunal will serve the application on the respondent as well as the union. It is then up to the union as to whether it wishes to intervene in the application since the disposition of the application may have consequences to the members of the bargaining unit. In those cases where the applicant and respondent indicate that they are prepared to attend mediation, the Tribunal will typically not have ruled on the union's intervention request, if any. Accordingly, some unions have complained to me that they have no standing at the mediation and are left to "wander the halls" if they do choose to attend the mediation. The Tribunal's perspective is that it is not a good use of Tribunal resources for the Tribunal to rule on the union's

intervention prior to mediation, particularly if the dispute as between applicant and respondent will be resolved at mediation. In any event, nothing prevents the applicant or respondent from discussing the matter with the trade union either at or outside the mediation.

This issue is one of transparency and communications. It is frustrating for a union to be served with the application, apply for intervention but not receive a decision concerning their intervention request in a timely manner and before the mediation. I also find that the uncertainty around the intervention request and the union's confusion as to its role, if any, at mediation, is frustrating for unions. I suggest that the Tribunal review its processes around when unionized individuals file applications. The Tribunal should provide a more consistent and transparent policy concerning: (a) the principles respecting intervention by a trade union; (b) when the intervention decision will be ruled on; and (c) the role of the union, if any, prior to and at mediation relative to the intervention request.

Recommendation 6:

The Tribunal should have and publicize a consistent policy that is more transparent and enforced in a timely manner in regards to union intervention requests and participation at mediation where applicants indicate that they are members of a trade union.

(c) Mediation Outcome Results

I received feedback from a number of stakeholders that the Tribunal should retain data and statistics related to the outcomes of mediations at the Tribunal. Stakeholders observed that valuable information about how human rights applications are being resolved is being lost as a result of the failure to retain this data.

Prior to the 2008 legislative changes, the Commission retained anonymised data on the resolution of complaints at mediation. It made sense that this data would be kept by the Commission, as the majority of cases were resolved at the Commission and/or mediation stage, and very few complaints proceeded to a Tribunal hearing. The failure to retain this information would have resulted in the public having little to no data on the resolution of most human rights disputes in the province. It was suggested that since many applications now result in litigation at a public hearing, after which a recorded decision is rendered, the utility of reporting on cases resolved at mediation is diminished. In my view, the value of retaining mediation data and outcomes is not diminished by the increase in reported Tribunal decisions.

There are a number of reasons why the Tribunal should retain data related to the resolution of applications at mediation. First, the availability of data related to mediation outcomes will be valuable and important when applications involve novel areas of the law, the implementation of public interest remedies, and other creative and "outside of the box" resolutions that would not necessarily be possible through an award at the Tribunal. As well, the process of capturing and publicizing mediation and settlement information on an anonymous basis would enhance the profile of mediation as a viable means of resolving human rights disputes. The availability of this information might promote the resolution of applications through mediation. Having information regarding mediation outcomes could also assist self-represented parties, who may not be aware of the types of resolutions that can be reached in a negotiated settlement. As well, applications that involve egregious and blatant evidence of discrimination are often resolved at mediation. It is important for the public to be aware of these cases and their resolution, especially where significant settlements are obtained.

Mediation outcomes and information could be summarized and made available on an anonymised basis, and any information that might identify the parties should be removed. I anticipate that once the Tribunal develops a template that captures mediation outcome information in a summary fashion, mediation statistics and outcomes can be retained without the Tribunal having to expend significant resources.

Recommendation 7:

The Tribunal should compile and publicize data and descriptive information concerning the terms and conditions of settlements achieved at mediation, albeit in a manner that guarantees parties' anonymity.

6. Hearings

(a) Active Adjudication

I received mostly positive feedback about the quality of adjudication at the Tribunal. Many stakeholders indicated that the quality of the appointments to the Tribunal was high and the reasons for decisions are well thought out and fair. At hearings, adjudicators appear to be striking the right balance between providing appropriate assistance and information to the parties and not appearing to act as advocates for any side.

The term "active adjudication" refers to the power of Tribunal adjudicators under section 43(3)(a)-(f) of the *Code* to conduct hearings in a flexible manner that includes practices that are alternative to traditional adjudication or adversarial procedures. At a hearing, a Tribunal member is entitled to exercise greater control over the proceeding so long as a hearing is conducted in a fair manner. The Tribunal's website describes its flexible adjudicative powers under the *Code* as follows:

> The HRTO adjudicator plays an active role in the hearing process with the goal of ensuring the fair, just and expeditious determination of the merits of an application. The procedure used in each hearing may vary depending on the nature of the case, the issues in dispute and the parties involved, including whether all parties are represented, or are self-represented.
>
> The HRTO's Rules of Procedure allow the adjudicator to adopt non-traditional methods of adjudication in order to best focus on the human rights issues in dispute and reach a decision about whether the Ontario *Human Rights Code* (the "*Code*") has been violated. For example, the adjudicator may, through consultation with the parties, make determinations about what the main issues are, what facts appear to be undisputed and may structure how the hearing takes place including the order in which witnesses will testify. The parties will always be able to make submissions before a determination on procedure is made.
>
> An HRTO adjudicator also has the power to question witnesses, parties or representatives, receive testimony not taken under oath, limit the evidence or submissions on any issue or limit a party from presenting multiple witnesses to testify about the same facts in issue.
>
> At the same time, however, the adjudicator is a neutral decision-maker and cannot take responsibility for identifying and leading evidence. It is up to each party to bring forward evidence to support its respective position.

When the *Code* amendments came into effect, there was some apprehension, particularly in the legal community, about whether "active adjudication" would tip into unfairness by Tribunal members directing how hearings should proceed in an improper or biased manner. I heard little evidence of this happening. I also examined judicial review decisions of the Divisional Court concerning the Tribunal's decisions, which confirmed that the Tribunal's use of its active adjudication powers has not been a concern to date.

Instead, I heard the opposite criticism; that that the Tribunal is not using its flexible or active adjudication powers *enough*. The result, in some instances, is hearings that could have been resolved more quickly and efficiently had active adjudicative techniques been employed.

The Tribunal's leadership states that it clearly encourages active adjudication; however, one reason for the disparity between theory and practice is that active adjudication does not work

in every case. For instance, parties may be represented by experienced counsel, who are already presenting the case in an effective and efficient manner, so further Tribunal direction is not required. Alternatively, the presiding Vice-Chair may recognize that certain witnesses or parties will not respond well to Tribunal intervention in the presentation of their evidence. In those instances, active adjudication may compromise the appearance of fairness of the hearing.

My examination revealed that, in practice, the Tribunal's approach to "active adjudication" is quite adjudicator dependent and very much along a spectrum. Some adjudicators are highly involved in managing the hearing (properly directing the order and volume of evidence on a given issue, establishing timelines, etc.); whereas other adjudicators are content with the more traditional approach where the adjudicator remains passive and the parties manage the presentation and flow of the hearing.

I find that while the initial recruitment and training of adjudicators has emphasized active adjudication, over time, the focus on active adjudication has not been consistent and active adjudication has not been taken up to the degree envisaged by the changes in the *Code*.

I do not advocate for active adjudication at every hearing. Ultimately, adjudicative independence and judgment must prevail. However, there appears to be considerable room for growth in the practice of active adjudication that would fulfill the legislative promise of the *Act*, yet preserve fairness.

The Tribunal should consider canvassing its members to determine whether it is possible to identify those circumstances where a hearing, or parts of a hearing, may be expedited by

active adjudication. Some identification of those circumstances and opportunities for active adjudication would assist the Tribunal and parties to develop a more principled and predictable approach to active adjudication that moves it more towards a mainstream practice at the Tribunal. Alternatively, it may be worthwhile for the Tribunal to maintain an internal practice to require adjudicators to explain why active adjudication could not be employed in a hearing. These steps would further encourage active adjudication consistent with the *Code* reforms with the ultimate goal of more efficient yet fair hearings.

Recommendation 8:

The Tribunal should make greater efforts to promote active adjudication at its hearings. Specifically, the Tribunal should identify mechanisms at the internal Tribunal level, whether through research, training, mentorship or the identification of best practices concerning the circumstances in which a hearing, or parts of a hearing, can be expedited via the application of active adjudication. Active adjudication should be further encouraged at the Tribunal, while maintaining adjudicator independence and flexibility.

(b) Anonymization of Applications

Advocates representing persons with disabilities, particularly individuals with mental health conditions, suggested that they face critical barriers to accessing the human rights system due to the very high bar set for anonymous or redacted processes at the Tribunal. Certain applicants fear pursuing an application, not because their complaint has no merit, but because of the stigma attached to others knowing about their condition or circumstances through the public nature of the Tribunal's decisions. In order to address the concerns of these applicants and their advocates, the Tribunal should consider making an order concerning anonymity of the applicant in its interim and final decisions in exceptional circumstances.

Rule 3.11 of the Tribunal's Rules of Procedure permits the Tribunal, where it considers it appropriate, to make an order to protect the confidentiality of personal or sensitive information. The Tribunal's practice has been to consider any request to keep the name of a party or other information confidential as an exception to the general principle that the Tribunal's process should be open and transparent in accordance with the province's legal system.[32]

VandenBroek cited the Tribunal's decision in *C.M. v. York Region* (at para. 20):

> An open justice system is a fundamental principle of a free and democratic society, so that the actions of those responsible for interpreting and enforcing the law may be subject to public scrutiny. Moreover, the principles enshrined in the *Code* are quasi-constitutional rights which are recognized as particularly significant in Canadian society. It is important for there to be public scrutiny when respondents [are] found to have violated these rights and also when accusations of discrimination are made by applicants but not upheld. I agree with the respondents that it is a serious matter to be accused of breaching the *Code*, which may also cause stress and stigma. Without good reasons for doing so, parties should not make or defend allegations from behind a veil of anonymity, assured that they will not be identified if they are found not credible, their allegations are rejected or they are held to have violated the *Code*. Effective public scrutiny of this human rights system depends, in part, upon knowing how the Tribunal addresses the particular parties before it. Openness and free expression are of fundamental importance in our legal and human rights systems.

I find that the Tribunal's approach to balancing anonymity requests with openness is sound. Requests for anonymity must be approached on a case-by-case basis. However, the underlying issue of accessibility can be advanced and fear of stigma reduced by the Tribunal providing some guidelines about what circumstances may warrant anonymity. Tribunal decisions that have supported anonymity include those involving children and individuals suffering from an acute mental health crisis.[33] Undoubtedly, a large number of applicants are before the Tribunal precisely because the nature of their disability, sexual orientation, record of

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[32] *VandenBroek v. Villa Otthon*, 2012 HRTO 1011 (CanLII).
[33] *S.D. v. Grand River Hospital*, 2010 HRTO 1653 (CanLII).

offences, gender identity or other ground, has caused them to be stigmatized. Selecting some prohibited grounds over others as being more worthy of protection through anonymity orders is not only going to offend non-prioritized groups but counter-intuitively feeds into the very stigma that the applicant is seeking to avoid. Still, in many cases, the concern over stigma is real and should not be dismissed based on a flood-gates argument.

The Tribunal is correct to point out that guidance may be found through its decisions rather than through a guideline, however, it may not be possible for all applicants, particularly self-represented ones, to access the Tribunal's case law. Some guidance through a practice guideline in respect of Rule 3.11 would be more transparent, accessible and better address the concern directly.

Recommendation 9:

The Tribunal should develop and publicize a guideline to describe the circumstances in which the Tribunal would likely issue an order providing for the anonymity of an applicant.

7. Remedies

(a) General Damages Awards

I received feedback from several stakeholder groups and individuals that Tribunal awards, particularly the general damages awards, are routinely too low.

Low general damages awards create a number of problems. First, they send a message that human rights and breaches of the *Code* are of limited importance. The fundamental denial of dignity occasioned by a breach of the *Code* and the resulting injury to feelings and self-respect call for meaningful compensation. The Tribunal has acknowledged that damages awards that

are too low trivialize the social importance of the *Code* by creating a licence fee to discriminate.

Second, low damages awards impose a barrier on access to justice at the Tribunal. Access to justice is denied when it is not economically feasible or worthwhile to pursue one's rights through the human rights system. Applicants will be deterred from pursuing valid and worthwhile human rights claims when they can predict from the outset that it will cost more to pursue their human rights application than they are likely to receive in compensation, even if they are successful before the Tribunal.

Finally, there is a risk that potential applicants may choose to pursue their human rights claims before the courts, where possible, in order to obtain a greater award of damages in the civil context. One of the purposes of the Tribunal is to provide an efficient, inexpensive and expert forum for adjudicating human rights issues. Low damage awards may have the unintended and undesirable effect of discouraging claims before the Tribunal and causing claimants to pursue civil remedies before the courts, where such a forum is available to them. In keeping with the Tribunal's purpose, higher compensatory awards will encourage applicants to pursue their human rights claims before the Tribunal, as it will be efficient and economically worthwhile to do so.

The 2006 legislative changes to the *Code* removed the $10,000 limit on compensatory awards for mental anguish before the Tribunal. This *Code* reform constituted an acknowledgement from the legislature that the $10,000 cap on mental distress awards was artificial, and that there may be appropriate instances where an award greater than $10,000 for mental distress

is appropriate. Under the previous system, the Tribunal also had the power to make an award of general damages, and typically did so as a separate head of damages from those awarded for mental suffering.

Under the current provisions, pursuant to section 45.2 of the *Code*, the Tribunal may make *any order* directing the party who infringed the *Code* to pay compensation to the applicant for the loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect. In light of the removal of the $10,000 limit and the trend towards a global compensation figure, it was anticipated that the range of damages awarded by the Tribunal would increase following the legislative changes.

In my view, however, the range of damages awarded by the Tribunal has not increased as anticipated since 2008. A review of the Tribunal's jurisprudence suggests that damages awards in the range of $500 to $15,000 are typically being awarded, and that exceptional higher damage awards of $25,000 to $40,000 have been awarded in serious cases involving sex discrimination, termination of employment, and/or multiple intersecting grounds of discrimination.[34] In my view, with general damages awards of $5,000, $10,000 and $15,000 corresponding to low, medium and high damage awards on average it does not appear that the current range of damages awards from the Tribunal constitutes a significant departure from the pre-2008 jurisprudence on remedies. It appears that but for a few exceptional cases, the monetary awards for successful applicants are not fundamentally different than before Bill 107.

I agree that the range of damages awarded by the Tribunal is a matter to be determined by Tribunal jurisprudence on a case by case basis, as the law evolves in this area. Nevertheless,

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[34] For instance, see *Farris v. Saubach Ontario Inc.*, 2011 HRTO 979 and *S.H. v. M[…] Painting*, 2009 HRTO 595.

there appears to be a widening gap between the Tribunal's insistence that human rights awards should be meaningful, and the actual monetary compensation that is awarded in most instances. In order for Tribunal awards to be meaningful, I recommend that the Tribunal significantly increase the range of damages that are awarded to successful applicants.

Many respondents, particularly individuals and organizations with limited resources, will not share the perspective that monetary damages awards at the Tribunal are routinely too low. In the consultation process, a number of experienced respondent counsel disagreed that Tribunal awards were out of step with court awards for general damages. They reminded me that, for most respondents, loss of reputation and inability to recoup legal fees were of greater concern than the actual monetary award paid to the applicant. It was also suggested that higher damages may also invite a more aggressive defence strategy at mediations and hearings or encourage judicial reviews. However, having considered respondents' perspectives on this issue, I remain of the view that the current low damage awards will result in the Tribunal losing credibility as a serious forum in which issues of fundamental importance are resolved.

Recommendation 10:

The Tribunal should reconsider its current approach to general damages awards in cases where discrimination is proven. The monetary range of these awards should be significantly increased.

(b) Public Interest Remedies

In our legal system, human rights cases have always been seen as transcending the private interests of the parties and carrying a public interest dimension.[35] Under the previous *Code*, the Commission represented the public interest in every case that proceeded to the Tribunal. However, in the new system, it was feared that the public interest component would be lost in the dispute between the applicant and respondent. In particular, there was a concern that the Tribunal may not award public interest remedies as frequently in the absence of the Commission's presence at a hearing.

Section 45.2(1) 3 of the *Code* provides the Tribunal with the jurisdiction to award remedies for future compliance with the *Code*, or what are more commonly referred to as "public interest remedies." In its *Applicant's Guide*, the Tribunal defines such a remedy as "an action that the respondent can be ordered to take to prevent similar discrimination from happening in the future."[36] Examples of such remedies include an order to change current practices, retain an external consultant to help develop anti-discrimination and harassment policies in the workplace, or require human rights training for staff and management.

A public interest remedy may be requested by an applicant in the application form itself. Section 10 of the form directs an applicant to set out the remedies he or she is asking for, which includes separate sections for monetary compensation, non-monetary remedy, and a

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[35] See *Heerspink, supra* note 6.
[36] "Applicant's Guide to Filing an Application with the HRTO" *Human Rights Tribunal of Ontario*, at p. 12, online: Human Rights Tribunal of Ontario <http://www.hrto.ca/hrto/sites/default/files/New%20Applications1/ApplicantsGuide.pdf>.

remedy for future compliance (or public interest remedy). However, even if an applicant does not request a public interest remedy, the Tribunal may order one on its own initiative, and is empowered to do so by section 45.2(2)(b) of the *Code*.

As noted above, the *Applicant's Guide*, available on the Tribunal's website, sets out a brief description of what a public interest remedy is and provides some examples. However, the *Respondent's Guide* does not address public interest remedies, and the *Plain Language Guide* only briefly mentions remedies for future compliance.[37] Curiously, while the Tribunal uses language similar to the *Code* when referring to remedies for future compliance in its *Applicant's Guide* and *Plain Language Guide*, decisions of the Tribunal tend to use the simpler language of systemic or public interest remedies. I believe some clarity and consistency of language and raising the prominence of public interest remedies in the various *Guides* would assist parties before the Tribunal.

I attempted to gauge the extent to which the Tribunal is awarding public interest remedies. I reviewed 143 new applications that were identified by the Tribunal as decided on their merits since September 2010. In 50 cases (35% of cases), discrimination was found; in 93 cases (65% of cases), discrimination was not found. I determined that in 60% of the cases in which discrimination was found (i.e. 30 cases) the Tribunal ordered some form of public interest remedy. In 11 of those 30 cases, the Tribunal ordered human rights training only. In the

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[37] "Respondent's Guide" *Human Rights Tribunal of Ontario*, online: Human Rights Tribunal of Ontario <http://www.hrto.ca/hrto/sites/default/files/New%20Applications1/RespondentsGuide.pdf>; "Information on the Process for Resolving Human Rights Applications before the Human Rights Tribunal of Ontario" *Human Rights Tribunal of Ontario*, at p. 10, online: Human Rights Tribunal of Ontario <http://www.hrto.ca/hrto/sites/default/files/New%20Applications1/PlainLanguageGuide.pdf>.

remaining cases where a public interest remedy was ordered, such orders included that the respondent retain a human rights expert to consult on drafting and implementing anti-discrimination and anti-harassment policies; cease and desist from particular actions or policies that were found to be discriminatory; and amend policies to correct for discrimination.

Of course, there are many factors that determine whether the Tribunal will award a public interest remedy in a given case, including the nature of the case, the parties, whether the parties are represented, whether a public interest remedy is requested, or whether the Tribunal determines of its own initiative that a public interest remedy is appropriate. Since the Tribunal awards public remedies in about 60% of cases where it finds discrimination, I find that under the direct access system following the *Code* reforms, public interest remedies are routinely awarded at the Tribunal.

However, I am concerned about the lack of Tribunal reasons in cases where discrimination is found, but pubic interest remedies are not awarded. For the 20 cases (40%) where discrimination was found but where the Tribunal did not order any public interest remedies, in only one case did the Tribunal provide reasons as to why no public interest remedy was ordered. In this case, the Tribunal declined to order the public interest remedy sought by the Applicant because the Respondent already had sufficient policies in place. It is unclear why, in the other 19 cases, no public interest remedy was ordered. Was one not requested by the applicant? Did the Tribunal consider but ultimately decline to order a public interest remedy? Did the Tribunal ignore its consideration of public interest remedy altogether?

I believe that in cases where discrimination is found, but where the Tribunal declines to order a public interest remedy, it should not remain silent in its reasons for decision. The Tribunal's

silence could be misinterpreted as the Tribunal simply failing to give adequate consideration to the issue. Imposing a positive obligation on the Tribunal to provide such an explanation would provide greater transparency to the Tribunal's reasoning process on this important question. It would ensure that the public interest component of the remedy was specifically addressed in the Tribunal's reasons.

Recommendation 11:

In cases where discrimination is found but no public interest remedy is ordered, the Tribunal should provide some explanation in its reasons for decision.

Recommendation 12:

The Tribunal should update and revise its current Guides to better identify and explain the nature of public interest remedies that may be ordered against a respondent where discrimination is found.

8. Reconsideration

To appreciate the Tribunal's handling of reconsideration requests, it is necessary to understand the differences between reconsiderations, appeals and judicial reviews. Reconsideration involves an administrative tribunal taking a second look at its own decision. The reason a tribunal may wish to do so is to correct decisions in certain limited circumstances before the tribunal loses authority to deal with the legal matter. Appeals, on the other hand, involve an entirely different body, typically at a higher administrative or judicial level, reviewing the tribunal's decision to determine whether it was legally valid. Judicial reviews, as the name implies, involve a judge or a court of law also reviewing the legal validity of a tribunal's decision but typically on much narrower grounds than an appeal, thereby increasing the likelihood that,

even upon judicial review, the tribunal's decision will be upheld. The current Code provides that Tribunal decisions are subject to reconsideration and judicial review, not appeal.

Parties who are dissatisfied with a final decision of the Tribunal may request a reconsideration decision, however, reconsideration requests are rarely granted given the exacting requirements of Rule 26.5:

26.5 A Request for Reconsideration will not be granted unless the Tribunal is satisfied that:

a) there are new facts or evidence that could potentially be determinative of the case and that could not reasonably have been obtained earlier; or

b) the party seeking reconsideration was entitled to but, through no fault of its own, did not receive notice of the proceeding or a hearing; or

c) the decision or order which is the subject of the reconsideration request is in conflict with established jurisprudence or Tribunal procedure and the proposed reconsideration involves a matter of general or public importance; or

d) other factors exist that, in the opinion of the Tribunal, outweigh the public interest in the finality of Tribunal decisions.

For the three fiscal years, 2009-10, 2010-11 and 2011-12, the Tribunal issued 66, 103 and 140 reconsideration decisions respectively. The number of reconsideration decisions is significant given that, on average, the Tribunal has issued just over 100 final decisions per year in its first few years of operation following 2008. Yet, only a very small number of reconsideration requests are successful.

It appears that many parties are pursuing reconsideration requests where there is no reasonable prospect that they would be able to satisfy Rule 26.5 or where the basis for the reconsideration request is really about the unreasonableness or unfairness of the decision - in which case the appropriate legal recourse is judicial review before the Divisional Court. Of

course, I am well aware of the many reasons why parties are unwilling or unable to pursue judicial review applications in court – court costs and legal complexity being paramount – and why unsuccessful parties would rather simply file a reconsideration request. However, it appears that considerable Tribunal resources are being directed to processing groundless reconsideration requests when those resources could be better directed elsewhere, such as at mediations or hearings. The Tribunal's reconsideration power arises from section 45.7 of the *Code*, which permits any party to request reconsideration and the Tribunal to grant the request consistent with its Rules; therefore, the prospect of reducing the number of inappropriate reconsideration requests seems to lie with the Rules themselves.

I believe that the finality of the Tribunal decisions should be encouraged and that reconsideration requests should not be seen by litigants as an alternative to judicial review applications, which appears to be happening at present. Accordingly, I suggest that parties making reconsideration requests be provided by the Tribunal with a better understanding of the differences between reconsideration and judicial review and further, that parties making reconsideration requests explicitly indicate that understanding before proceeding with a reconsideration request. The goal of the exercise would be to reduce the number of groundless reconsideration requests, which in turn saves the Tribunal and requesting party's time and resources. Undoubtedly, there will continue to be reconsideration requests that are totally groundless but if the number of such requests can be reduced, I believe that some progress will be made and valuable Tribunal resources saved.

In the consultations, I heard from many individuals who believed that it was utterly unfair that the adjudicator who rendered the original decision should be the one assigned to decide their

reconsideration request. It was clear to me that many of these individuals did not understand the nature of a reconsideration request or the difference between a reconsideration request and an appeal. Understandably these individuals felt that it was grossly unfair for an adjudicator to sit in judgment of and reconsider his or her own decision. I suggest that this problem may be addressed through the provision of more information from the Tribunal on the nature of reconsideration requests.

Recommendation 13:

The Tribunal should provide a better explanation in its Rule(s), forms or other materials concerning how reconsideration will be granted. The explanation should include how the criteria for reconsideration are different than what may apply to applications for judicial review. The Tribunal should require a party making a reconsideration request to formally acknowledge they have reviewed this information (which would be an enhanced level of information than what currently exists) before proceeding with a request for reconsideration.

Recommendation 14:

The Tribunal should provide applicants with information about why the same adjudicator that rendered the original decision may be assigned to rule on the reconsideration decision. This information could be attached as a Practice Direction to any final decision on the merits when the decision is served on the parties.

9. Practice Advisory Committee

The Tribunal has established a Practice Advisory Committee that serves as a resource for consultation and feedback about the Tribunal's policies, practices, rules, practice directions and services. Presently, all eight members of the Committee are lawyers. They were selected based on the Tribunal's request for expressions of interest from individuals who appear regularly before the Tribunal on behalf of applicants and respondents. Some stakeholders

expressed concern that the Committee is made up of lawyers only. While the present membership of the Committee attempts to reflect the diversity of the individuals and groups who use Tribunal services, there is no diversity in their professional backgrounds. This appears to conflict with the Tribunal's stated goal of receiving diverse viewpoints about its services. I suggest that that while it is understandable that lawyers predominate on the Committee by virtue of the sometimes technical legal work demanded by the terms of reference, there should be an opportunity for paralegals or qualified lay persons to participate in the Committee as well. They are likely to bring an important alternative perspective on the policies and procedures of the Tribunal that will enhance its accessibility.

Recommendation 15:

In its next round of recruitment for Practice Advisory Committee members, the Tribunal should appoint a qualified paralegal or layperson. If necessary, the Terms of Reference of the Tribunal's Practice Advisory Committee should be amended to accommodate this change.

10. Social Justice Cluster

As indicated earlier, as of January 25, 2011, the Tribunal became part of the newly designated Social Justice Tribunals Ontario (SJTO) cluster that brings together the Tribunal and six other adjudicated tribunals.[38] The SJTO is the second cluster of adjudicative boards and tribunals formed under the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*.[39]

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[38] The other tribunals are the Landlord and Tenant Board, Social Benefits Tribunal, Child and Family Services Board, Custody Review Board, Special Education (English) Tribunal and Special Education (French) tribunal.
[39] The first cluster is the Environment and Land Tribunals Ontario (ELTO) which brings together five Ontario tribunals and boards which adjudicate matters related to land use planning, environmental and heritage protection, property assessment, land valuation and other matters.

In the SJTO's first annual report, Michael Gottheil, Executive Chair, described the rationale behind clustering as follows:

> The concept of clustering adjudicative tribunals, rather than amalgamating them as has been done in other jurisdictions, is unique to Ontario. It brings together a specific group of adjudicative tribunals within a single organization, but maintains each tribunal's unique statutory mandate and membership.[40]

In conducting the Review, I did not hear much commentary from stakeholders about the implications of the Tribunal becoming part of the SJTO. This is understandable as the general public and most stakeholders would not be privy to the internal reorganization that has taken place and it's still early days in the development of the clustering initiative. However, I'm encouraged by comments from the leadership of the SJTO that clustering is seen primarily as a means to foster "best practices" and not a cost cutting exercise. An early report on the clustering initiative set a similar tone:

> The broad goal of clustering is to improve the quality of services offered to the public by sharing resources, expertise and administrative and professional support. More specifically, clustering is a mechanism that is intended to safeguard the retention and development of the unique areas of expertise within each tribunal while at the same time permitting the sharing of best practices within the cluster. Clustering is not the merging or integration of different tribunals into one generic agency. Clustered tribunals can share a wide range of best practices. The determination of what is appropriate to share is left to each individual tribunal. These best practices can range from dispute resolution processes to case management and internal tribunal governance. What is critical is that the sharing or alignment of services should be done in a way that permits the continuing use and application of each tribunal's particular area of expertise. One of the greatest challenges facing administrative tribunals and governments in general is the question of how to best coordinate and deploy scarce public resources while at the same time ensuring the retention of specialized expertise and tribunal independence. Increasingly, clustering is understood as an effective and appropriate way of addressing this challenge. While clustering is intended to result in a more effective use of existing resources, it is not an exercise designed to cut costs or "rationalize" levels of service.[41]

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[40] SJTO Annual Report 2010-2011 Annual Report, p. 2.
[41] Kevin Whitaker, Final Report of the Agency Cluster Facilitator for the Municipal and Land Planning

In my view, the Tribunal's placement in the SJTO cluster presents opportunities for the following initiatives which I would encourage the SJTO and the Tribunal to pursue.

Greater regional presence – I heard feedback from the public that the Tribunal's felt presence and scheduling of mediations and hearings in locations outside the major centres is limited.[42] I understand that some of the tribunals in the SJTO cluster, like the Landlord and Tenant board, have a longer history in communities that may be presently less serviced by the Tribunal. Either through cross-appointment of members to different tribunals in the cluster or through physical and/or administrative sharing of facilities, I anticipate that the Tribunal could achieve a greater presence "on the ground" throughout Ontario.

Economies of scale and best practices use of technology - I received suggestions that the use of technologies, such as video conferencing, is still under-utilized by the Tribunal. I understand that telephone conferencing for motions and other interim steps before the Tribunal is already widely practiced. I heard some concerns about the limitations of telephone mediations but, for the most part, stakeholders did not complain about the Tribunal trying to take advantage of technology to make itself accessible both regionally and logistically to various communities. I believe that the economies of scale of the SJTO would permit it to

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Tribunals (August 2007). At the time of his report, Mr. Whitaker was Chair of the Ontario Labour Relations Board. In May 2010, he was appointed a judge of the Superior Court of Justice of Ontario.

[42] Tribunal mediations and hearings are conducted in Windsor, Sarnia, London, St. Catherines, Toronto, Kingston, Ottawa, Sudbury, North Bay, Timmins and Thunder Bay.

undertake better research about implementation and use of technology for all tribunals in the SJTO including the Tribunal.

Dovetailing somewhat with the above suggestions, the SJTO cluster also presents better opportunities for **identifying best practices in making the Tribunal more accessible and centralizing accessibility expertise and administration, and tracking progress**. ARCH Disability Law Centre made a number of suggestions in this regard. I expect that a balance is to be struck between administering accessibility and accommodation initiatives through the SJTO versus delivering them at the Tribunal, but the initiatives suggested by ARCH that I found innovative were:

Using some form of centralized Accessibility Office at the SJTO to:

- Publicize the types of accommodations available at tribunals.
- Provide support to Tribunals, and provide training for tribunal members about conducting barrier-free hearings.
- Establishing a feedback and dissemination system so that information and best practices do not remain localized; and
- Maintaining a list of interveners or interpreters, available on short notice, who have proper accreditation and are recommended by the community.

I believe that the Tribunal's use of SJTO as a platform will also address the criticism that is sometimes heard that the Tribunal is somehow operating outside the margins of a proper administrative agency and is implementing an ideologically driven agenda. I do not consider this criticism justified and I hope that my Report goes someway to dispelling myths about what the Tribunal's work entails but, regardless, the Tribunal's inclusion in the SJTO will make it more difficult to suggest that the Tribunal marches to its own tune. The Tribunal's placement in

the SJTO cluster is a positive development for human rights in the province if the vision of human rights specialization and sharing best practices is maintained.

Recommendation 16:

The SJTO should research, identify and implement a series of policies and best practices that would allow the Tribunal to utilize the SJTO as a platform to achieve greater regional presence, use technology more effectively and improve accessibility for its services.

PART IV - HUMAN RIGHTS LEGAL SUPPORT CENTRE

A. The Centre's Mandate and Operations

The *Human Rights Code Amendment Act, 2006* created a new agency, the Human Rights Legal Support Centre, that commenced operation on June 30, 2008.[43] The Centre provides free assistance and legal services, such as advice and representation,[44] to individuals who believe they have faced discrimination, contrary to the *Code*. The Centre does not have a mandate to provide support to respondents. The Centre is funded by MAG but is independent of government.

The Centre is an independent agency headquartered in Toronto with staff in Guelph, Windsor, Thunder Bay, Ottawa and Sault Ste. Marie. It has an Executive Director and approximately 25 lawyers (21 full-time and 4 part-time), 10 paralegals and 15 other personnel on staff. The Centre is guided by a Board of Directors appointed by the government of Ontario.

The Centre is mandated to provide advice and assistance respecting the infringement of *Code* rights, and to provide legal services relating to the making of applications, proceedings before the Tribunal, as well as applications for judicial review, stated case proceedings, and the enforcement of Tribunal orders.

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[43] The Centre's website is www.hrlsc.on.ca.
[44] Advice refers to the Centre providing guidance to a client about a legal issue; whereas representation refers to the Centre not only providing advice, but also advising the Tribunal and the other parties that the Centre is the client's legal representative and as such, is authorized to act on the client's behalf in negotiations and legal proceedings.

The revised *Code* established the Centre with the following provisions:

Objects

45.12 The objects of the Centre are,

(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;

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

Provision of support services

45.13 (1) The Centre shall provide the following support services:

1. Advice and assistance, legal and otherwise, respecting the infringement of rights under Part I.

2. Legal services in relation to,

i. the making of applications to the Tribunal under Part IV,

ii. proceedings before the Tribunal under Part IV,

iii. applications for judicial review arising from Tribunal proceedings,

iv. stated case proceedings,

v. the enforcement of Tribunal orders.

3. Such other services as may be prescribed by regulation.

Availability of services

(2) The Centre shall ensure that the support services are available throughout the Province, using such methods of delivering the services as the Centre believes are appropriate.

The Centre carries out its operations in a number of ways:

- a telephone helpline that provides options for callers to obtain legal information by listening to recorded information and/or speaking to a Human Rights Advisor.
- A website, www.hrlsc.on.ca, that provides information about the *Code* and all aspects of the Centre.
- An office in Toronto that provides in-person assistance on a scheduled appointment basis.
- Staff located in various legal community clinics in Guelph, Windsor, Thunder Bay, Ottawa and Sault Ste. Marie.

The Centre's services are offered in English and French. Staff of the Centre can also offer direct service in over 10 languages and additionally offer service in 140 languages through interpreter services.

The Centre does outreach through collaboration with partner organizations to bring its services to the attention of communities that are likely to experience discrimination.
Such activities include:

- Placing lawyers at selected community legal clinics in each part of the province.
- Establishing province-wide partnerships with Ontario's community legal clinics and with Student Legal Aid Services to augment the Centre's services.
- Developing public legal education resources to assist self-representing claimants.
- Establishing training and referral linkages with community partners. working with immigrant, disability-rights, injured worker, Aboriginal and other communities

The Centre also actively participates in the media to comment on developments in human rights law and to bring attention to the Centre's services. The Centre files Annual Reports with the Attorney General of Ontario.

The Centre is not part of Legal Aid Ontario and does not use a financial means test to determine which applicants or potential applicants to assist. Accordingly, the Centre assists applicants or potential applicants regardless of their income. As noted above, the *Code* requires the Centre to establish policies and priorities for the provision of services based on its financial resources. Due to limited resources, the Centre is not able to meet current demands and has prioritized providing its services, especially full legal representation, to applicants who are particularly disadvantaged and who would face heightened barriers in navigating the

human rights process without legal assistance. The transparency and appropriateness of the Centre's criteria for assistance and representation were major issues for stakeholders due to the large number of individuals who are unable or unwilling to retain a paid legal representative such as a lawyer, paralegal or agent.

The Centre's Eligibility for Legal Support Services and Case Selection Criteria[45] state:

> *Eligibility for services* means that the applicant is generally eligible for services but does not mean that any particular level or amount of service will be provided to the applicant.
>
> *Legal support services* includes the initial intake procedure and interview, summary information and advice, assistance with application completion, assistance with preparing for mediation, representation at mediation before the Tribunal and representation at hearings before the Tribunal.
>
> In determining the extent of the legal services that the Centre will offer to an applicant, the Centre will consider:
>
> - The nature of the application
> - The capacity of the applicant
> - The nature of the respondent
> - The existence of any intervenor
> - Any other additional factors the Centre may consider relevant

Accordingly, the Centre offers its services on a discretionary basis and reserves the right to select which applicants it will advise and represent. If the Centre determines that a potential application is without merit, or is outside of the Tribunal's jurisdiction, the Centre will not provide assistance, although it may refer would-be applicants to another appropriate service or forum. The Centre's ability to turn away clients based on a negative assessment of the merits of their case or for other reasons is criticized by several stakeholders who characterize the Centre as the "new gatekeeper" in the revised human rights system. Below, I deal with

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[45] See the Centre's website www.hrlsc.on.ca for a full description of the Centre's eligibility criteria.

whether this criticism is fair and whether it is appropriate for the Centre to decline services to applicants.

The Centre's Service Delivery Model

The Centre has adopted an "unbundled" model of providing legal services. This means that the Centre will provide stage by stage legal assistance to applicants and prospective applicants during various stages before, during and after the Tribunal process. This may include assisting individuals with completing a Tribunal application form, providing representation during settlement negotiations, providing representation at a mediation or hearing, or providing assistance related to the enforcement of settlements and Tribunal orders. According to the Centre, the level of support that is provided to applicants depends on a number of factors, including the needs of the individual, the merits of the claim and the complexity of the evidentiary and legal issues.

At the filing stage, the Centre assists prospective applicants by providing them with detailed self-help assistance with respect to completing the Tribunal application forms. The Centre's staff encourages prospective applicants to complete the application forms on their own by providing self-help advice over the phone and through on-line resources. The Centre developed an "application clinic" to assist individuals who need general assistance but not extensive one-on-one advice. The program has been offered in Toronto and Thunder Bay. Where applicants are assisted with completing the application themselves, they are encouraged to contact the Centre at later stages in the litigation process, so as to obtain possible representation at mediation or the hearing. At the same time, the Centre has

developed criteria in order to identify individuals who may require full representation in completing and filing their application.

The Centre provides assistance short of representation to individuals at the pre-application stage. This involves negotiating resolutions prior to or in lieu of filing an application. For example, the Centre may assist a prospective applicant with preparing a formal request for disability-related accommodations to an employer or service provider and negotiate the implementation of the requested accommodations. The Centre doubled its resources for early intervention after 10 months of operation.

The Centre also provides services at the mediation stage and at the hearing stage, as it is often difficult for many self-represented parties to navigate these processes. This includes the creation of a pro bono panel of lawyers to provide no-cost representation at mediations.

Practically, “unbundled services” means that at various points during the application process before the Tribunal, the applicant may be represented by the Centre, be self-represented, or represented by an entirely different representative. However, in a typical situation, a client of the Centre is given legal assistance in filing their application and full representation at the mediation. If the matter does not settle at mediation, and the applicant meets the Centre’s criteria, the applicant will receive full representation at hearing.

The Centre’s Assistance to Applicants

In 2011-12, the Centre:

- assisted 12,562 new individuals by providing *Code*-related legal assistance at one or more stages of the human rights enforcement process;
- provided in-depth legal services to 2,399 new individuals at one or more stages of the human rights enforcement process;
- represented 278 clients at Tribunal mediations; and
- represented 219 clients at Tribunal hearings, which includes 91 cases fully argued on the merits.

The Tribunal's data suggest that the Centre represents 12% of applicants before the Tribunal.[46]

It is difficult to determine the degree to which applicants before the Tribunal have been assisted by the Centre because not all applicants contact the Centre for advice or representation. Some applicants receive advice from the Centre and later file applications with the Tribunal. Other applicants receive advice and/or representation for the first time from the Centre well into the Tribunal process, for instance, at mediation or hearing. As discussed above in Part III, the Tribunal has only recently begun to track whether and how applicants and respondents are *represented*. The Tribunal does not track whether and how many applicants have received *advice* from the Centre. The result is that the Centre and the Tribunal are each able to provide some information concerning the Centre's assistance to applicants but there is important information that remains unclear, or that may only be determined by inference; in particular, what percentage of Tribunal applicants have been assisted, at one time or another, by the Centre?

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[46] See the earlier discussion of "Representation before the Tribunal" in Part III dealing with the Tribunal.

Service Delivery Challenges

The key areas of challenge for the Centre include:

- Operating in an environment where the demand for its services far exceeds its ability to provide services;

- Finding the right balance between assistance and representation, and providing the right level of assistance at the right stage along the dispute resolution process; and

- Co-ordinating and collaborating with the Commission and Tribunal in order to more effectively meet the needs of the public with respect to the human rights system.

Of course, these challenges are interrelated and overlapping and many other operational issues arise from these challenges. To the extent that the Centre is unable to meet demands for its services, it must constantly make decisions about which clients it can and cannot assist and with respect to what criteria. If the Centre puts too many resources into providing advice to applicants so that they can better advocate for themselves, it leaves fewer resources for representing applicants at mediations and hearings, two stages in the Tribunal process where representation can make a difference to the success of a case. If the Centre devotes significant resources to early settlement (i.e. before an application is filed), it takes away resources from assisting applicants with cases before the Tribunal. When the Centre does outreach into various communities about its mandate, it inevitably increases the demand for its already stretched services. And if the Centre and Commission do not effectively coordinate their respective roles - for instance with respect to human rights educational materials, media activities or advocacy within marginalized communities - each agency duplicates services at a time when the public is still unclear about the revised roles of the three agencies in the human rights system.

Putting the Centre's Challenges into Context

To view the Centre's challenges in context, I find it necessary to clarify three issues that have been raised about the Centre's mandate and operations.

1. The Centre was never intended to provide human rights applicants with free, unlimited legal representation throughout the Tribunal process.

2. The Centre's use of criteria to determine which clients to assist is consistent with the approach recommended by the Cornish and La Forest Reports.

3. The Centre's ability to turn away clients based on an assessment of the merits of their case does not make the Centre the "new gatekeeper".

The Centre was never intended to provide human rights applicants with free, unlimited legal representation throughout the Tribunal process.

A few advocacy groups, such as the Accessibility for Ontarians with Disabilities Act Alliance (AODAA) and the Metro Toronto Chinese and Southeast Asian Legal Clinic (MTCSALC), have suggested a key component of the Ontario government's move to a direct access system was its promise that *every* complainant would receive publicly-funded (i.e. free) legal representation *throughout* the Tribunal process (i.e. from filing to a hearing on the merits). These groups have repeated these claims in the media and widely circulated the view that the Centre's selective and unbundled approach to client representation represents a fundamental breach of that 2006 government promise. These groups have also suggested that the Centre's more limited approach to representation is a repudiation of the recommendations in the Cornish (1992) and La Forest (2000) reports, which the government claims were the inspiration for the direct access *Code* reforms. While these groups concede that the legislation *as passed*[47] does

[47] See the beginning of this Chapter for the relevant sections of the current *Code* pertaining to the Centre. The provisions clearly permit the Centre to determine what mix of support and representation services it should provide and how to provide them across the province.

not require the kind of unconditional representation outlined, they suggest that I should hold the government to account for the earlier promise made.

I reviewed the evolution and implementation of the *Code* provisions that relate to the Centre and its operations. The historical record contradicts the claim that the government intended to provide, let alone fund, free legal representation to all human rights claimants throughout the Tribunal process. Common sense dictates that such a promise would be unprecedented as no Ontarian has ever received a guarantee of unconditional, unlimited government funding for legal representation throughout a legal proceeding.[48] It would also vault human rights claimants into an exceptional category, from a situation where they received no publicly-funded representation to unlimited, free representation throughout.[49] Still, in order to address the view that the Centre is in breach of this alleged government promise, I traced the evolution of the provisions in Bill 107 concerning the Centre.

The government's proposals for providing legal support services in the human rights system were set out in public documents during the legislative process. When Bill 107 was introduced in April 2006 it contained the following provisions:

Legal and other services

46.1 (1) The Minister may enter into agreements with prescribed persons or entities for the purposes of providing legal services and such other services as may be prescribed to applicants or other parties to a proceeding before the Tribunal.

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[48] Even Ontarians who qualify for publicly-funded legal representation under Legal Aid Ontario rules, for example with respect to family law or criminal proceedings, must first meet stringent criteria, most notably, a financial means test and then too representation is limited through the Legal Aid certificate system.

[49] Under the previous *Code*, complainants received no publicly funded legal representation whatsoever. It is a myth that the Commission represented complainants under the previous *Code*. The confusion stems from the fact that, in the small minority of cases where the Commission had referred a complaint to the Tribunal – and only after that point - the Commission sent one of its lawyers to represent the public interest (not the complainant) at the Tribunal. Since the Commission's position at the Tribunal overlapped significantly with the complainant's, the complainant's need for separate representation by a lawyer, paralegal or agent was usually unnecessary.

Same

(2) An agreement under subsection (1) may provide for the payment for the services by the Ministry.

The compendium which accompanied the bill stated:

> A key component of the modernized human rights system would be an integrated system of information, support and legal assistance. A range of support and services would be available where required and to those who need it.

True, as the AODAA has pointed out, government members stood up in the legislature and made claims that could be interpreted as promising full representation throughout. For instance:

Then Attorney General Michael Bryant (sponsor of Bill 107):

> "We would ensure that, regardless of levels 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."[50]

David Zimmer:

> "Just in case you're not aware, I want to point out that the Attorney General in the Legislature has made a clear and unequivocal commitment to amend the bill to ensure that everybody who has a complaint before the tribunal does receive legal support has a lawyer attached to their case to see the case through with them."[51]

However, throughout the spring, summer and fall of 2006, the Ministry continued consultations on the bill and several legislative hearings were conducted by the Legislature. The Ministry also established an Implementation Advisory Committee to provide advice on, among other things, the legal support model. Following these consultations and hearings, and on the

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[50] April 26, 2006, Ontario Legislature, First Reading of Bill 107.

[51] August 10, 2006 Standing Committee on Justice Policy, Thunder Bay.

advice of the Implementation Advisory Committee, the Attorney General indicated the intention to propose motions to amend section 46.1 of the bill.

On November 15, 2006 the Attorney General appeared before the Standing Committee on Justice Policy to outline the proposed amendments to the bill. A news release and backgrounder were released that same day outlining the proposed changes.

The news release stated, in part:

> Proposed key government amendments to Bill 107, the Human Rights Code Amendment Act, 2006, include:
>
> - Entrenching a range of legal support services for those seeking a remedy at the Human Rights Tribunal of Ontario, including the creation of a new publicly funded Human Rights Legal Support Centre

The backgrounder included the following:

> Proposed amendments to entrench a range of legal support services include:
>
> - Establishing in legislation a Human Rights Legal Support Centre
> - Clarifying and ensuring that a range of legal support services would be provided, such as information, advice, assistance and legal representation
> - Confirming public funding for the Human Rights Legal Support Centre
> - Providing that the services would be available, where needed, across the province
> - Providing that any person who is, has been, or may be an applicant seeking a remedy at the Tribunal would be eligible for services.

On November 29, 2006 the motion to amend section 46.1 was passed by the Committee. Hearings on Bill 107 were concluded that day and the bill was reported, as amended, to the House on November 30. The bill received Royal Assent on December 20, 2006.

My examination of the legislative record concerning the creation and operation of the Centre suggests that the government always conceived of the Centre as an independent, but publicly

funded, agency that would provide applicants with a *range* of legal supports concerning their applications. However, no commitments were made that advice and representation would be *unconditional* and *unlimited.* It strains common sense to think that any government would provide a select group of Ontarians with free, unconditional and unlimited legal representation. And I assume that the groups that persist in this claim are aware of how unrealistic such a government commitment would be. Therefore, I believe that the point is made for strategic advocacy reasons to underscore their belief that the Centre has delivered so far below expectations. First, the Centre has enough challenges, many of which are the subject of fair criticism, without it being held to unrealistic expectations. Second, but more importantly, I found that a number of vulnerable Ontarians, particularly from the disabled community, have embraced the myth of the promise of unconditional representation; and they are labouring under the misapprehension that the government has reneged on an important commitment. A few individuals I met, and I presume there are others, were disappointed and angry with the Centre to the point that they were giving up on approaching the Centre for assistance, often without really understanding what the Centre's mandate involved. I hasten to acknowledge that at least until November 2011, the challenges in accessing the Centre's telephone lines were very real, and would be particularly acute for vulnerable Ontarians. Some of their frustration with accessing the Centre is entirely understandable. Still, the claim of *unconditional, unlimited* representation is inaccurate. It is also unnecessary. Conceding that the Centre does not have to help *all* applicants does not detract from the position that it should help *more* applicants than it presently does. Ultimately, the claim is counter-productive to Ontarians who continue to need assistance from the Centre.

The Centre's use of criteria to determine which clients to assist complies with the approach recommended by the Cornish and La Forest Reports.

I find that the Cornish Report (1992) and La Forest Report (2000) *did not* recommend that all complainants receive full public funding and legal representation throughout. In fact, the Cornish Report recommended that several options for help should be provided including through Equality Rights Centres "primarily staffed by lay advocates and some lawyers". These Equality Rights Centres should "endeavor to serve everyone with a claim under the *Code*, but will be able to prioritize their caseload depending on resources and the importance and complexity of the case. They will also assist people to find other services and resources."[52] Instead of suggesting unlimited representation by lawyers throughout the Tribunal process, the Cornish Report recommended a range of options to furnish assistance to human rights claimants depending on various criteria.

The La Forest Report (2000) recommendations, aimed at the federal human rights sector but relevant to Ontario, come somewhat closer to suggesting full funding throughout. However, the recommendations themselves acknowledge that there may not be resources for all human rights claims and recommend criteria upon which services can be provided:

> In our view, all claimants who need assistance should receive it from the Clinic and we strongly recommend that the Clinic should have sufficient resources to represent all claimants. However, if contrary to our recommendation there are not enough resources for all claims, we would recommend criteria for deciding which claimants receive funded counsel. One approach to ensuring that the Clinic assists those who need it most would be to use means testing. Individuals who could afford their own representation would be required to do so. The problem with this approach is that if the test were based only on gross income, a person with little discretionary income might be deterred from bringing a valuable claim because of the cost. Therefore, any limits established by the Clinic should take into account not only the means of the claimant, but also the nature of the claim, its complexity and whether it promotes the advancement of equality. Cases that

[52] Cornish Report, p. 56.

> are clearly without a chance of success might be given lower priority. The criteria should be such that representation is usually provided. The Clinic should have some discretion about who it helps, though it should not duplicate the Commission's process for deciding which claims it should join.[53]

Having reviewed the Cornish and La Forest recommendations, I find that the Centre`s use of criteria for determining which clients to assist essentially corresponds to the recommended approach. However, in order to have actually fulfilled the Cornish and La Forest Report recommendations concerning legal assistance to human rights claimants, it appears that the government would have had to provide far more funding to the revised direct access human rights system.

The Centre is not the new "gatekeeper" in the human rights system

Some advocacy groups have suggested that the Centre is the new "gatekeeper" in the revised human rights system because of the Centre's aforementioned policy to not provide representation to applicants with cases that, in the Centre's view, lack merit. The groups suggest that, even though theoretically these applicants have other options – they can try to retain private lawyers, paralegals or other representatives – practically the likelihood of this happening is remote for financial and other reasons. If applicants have no affordable alternative representation or try to represent themselves at the Tribunal, it severely compromises their ability to continue with their human rights applications at the Tribunal. The argument goes that this is akin to what many complainants experienced under the previous *Code*, when the Commission determined that there was insufficient evidence of discrimination and refused to forward a case to the Tribunal.

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[53] La Forest Report, recommendations 80-85.

I do not consider the "gatekeeping" analogy apt. First, under the previous *Code*, the Commission's decision to not forward a complaint to the Tribunal put a definitive end to the complaint.[54] Since the complaint could not be heard by the Tribunal, the complainant did not even have the choice to appear self-represented before the Tribunal. There simply was no Tribunal hearing. However, under the revised *Code*, the Centre's decision to decline representation has no legal impact on whether the application is filed or proceeds at the Tribunal. The applicant, represented or self-represented, has an absolute right to file an application assuming he or she meets the Tribunal's criteria. The Centre does not control any gate to the Tribunal.

Second, the attraction of the "gatekeeping" analogy is diminished when the differences between the Tribunal's previous and current powers and procedures are recognized. Under the previous *Code*, the Tribunal's powers and processes were far less accommodating of self-represented parties. Since the *Code* reforms, however, the Tribunal's processes are more transparent, the Tribunal provides more general information to parties, and the Tribunal has more flexibility to employ non-traditional methods to run a hearing, all of which make it somewhat easier for self-represented parties to meaningfully participate in a hearing. A recent series of decisions has further highlighted the fact that self-represented parties are entitled to receive assistance from an adjudicator to allow them to fairly present their case, which may include directions on procedure, the nature of the evidence that can be presented, the calling of witnesses, the form of questioning, requests for adjournments and evidentiary issues.[55] I

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[54] Subject only to the complainant's right to seek a reconsideration decision from the Commission; and, if that is unsuccessful, to seek a court order by way of judicial review requiring the Commission to reconsider or reverse its decision. The likelihood of success was rare.

[55] Agarwal, Ranjan, Paper delivered at the Ontario Bar Association *Annual Update on Human Rights: Keeping on Top of Key Developments*, Toronto, June 10, 2011) [unpublished], at 10-11, citing *Toronto Dominion Bank v.*

recognize that applicants can find it difficult to navigate through what is still a complex, legal Tribunal process, particularly at the hearing stage; however, the Tribunal changes go some distance in ameliorating the prospects of applicants who have been turned down for assistance by the Centre. The statistic that 44% of applicants who were successful in their cases before the Tribunal were self-represented provides some corroboration that the Tribunal system is not as impossible to use for self-represented applicants as critics claim; and that the Centre's decision to decline representation does not necessarily impair applicants from proceeding before the Tribunal.

Third and finally, the "gatekeeping" characterization side-steps the real issue of whether, in a publicly funded system, the Centre *should* represent applicants whose cases do not have merit. Presumably, the argument that the Centre should represent all applicants rests on the view that "merit" is a debatable proposition. If taken to the extreme, the Centre would only represent applicants with clearly winnable cases. "Clearly winnable" is far different than "meritorious." Sometimes cases with merit take considerable effort to uncover and/or present. Particularly in the field of human rights, cases that appear to lack merit *today*, because they challenge the very norms of traditional society, may be precisely the types of cases that the Centre should bring forward. Shouldn't the Centre represent all applicants and leave it to the Tribunal to decide the merits of the case? Attractive as this argument seems, it runs headlong

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Hylton, 2010 ONCA 752, *Audmax Inc. v. Ontario Human Rights Tribunal*, 2011 ONSC 315, *Balbontin v. Joyce Fruit Market Ltd.,* 2012 HRTO 727, *Stickle v. Grafton Fraser*, 2011 HRTO 493 and *Marques v. Hurley Corporation*, 2011 HRTO 1566.

into two difficulties. One is that the Centre is publicly funded. It simply does not have the resources to represent all applicants; therefore, amongst its criteria for providing representation it is entirely appropriate that merit is a strong consideration. Two, there are a number of applicants whose cases have no merit no matter how liberally that concept is interpreted. If the Centre provided representation to applicants with no viable case at the Tribunal, it would be doing a disservice to the human rights system and advancing no public policy objective.

Advocates for applicants are correct to point out that the Centre's policy of not representing all applicants leaves a number of applicants floundering. But a number of those applicants' cases lack merit. Other applicants have some merit to their cases but are able to hire a lawyer. Still others may have been represented by the Centre at mediation but are self-represented thereafter because their expectations were unrealistic. To suggest that the Centre is the new gate-keeper mischaracterizes not only the legal differences between the previous and current human rights regime, but also the resource and practical constraints facing the Centre. In my view, so long as the publicly funded Centre is taking a broad and contextual view of what constitutes a meritorious case, it is on firm ground in declining representation of applicants with cases lacking merit.

The Challenge of Self-Represented Applicants

The significant number of self-represented applicants at the Tribunal is one of the overall challenges identified by many stakeholders in the revised human rights system. As discussed below, it is not only an "applicant issue" but also a respondent one as well. I have chosen to deal with self-represented applicants in the context of the Centre's mandate because of the

Centre's statutory role in representing applicants and, to that extent, its role in reducing the number of self-represented applicants before the Tribunal.

The available data suggest that around 65% of applicants are self-represented at the Tribunal, whereas respondents are represented by a lawyer 85% of the time.[56] The challenge of self-represented applicants must be seen in context with regard to the rates of self-representation across the legal court system, the administrative tribunal system, and with respect to the unique aspects of the human rights system.

The high rate of self-represented litigants is not unique to the Ontario human rights system and has been documented in other parts of the Ontario legal system.[57] The reasons for self-representation across the court system have predominantly to do with the unaffordability of lawyers and limited Legal Aid funding. Other factors include an individual's choice to not to hire a lawyer, a belief that his or her matter does not require a lawyer, a lack of lawyers in certain geographical regions including rural locations, or a lack of trust in lawyers.[58] Additionally, with the proliferation of legal education information available on the Internet, self-represented litigants may choose to inform themselves and go it alone.[59]

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[56] See the section on "Representation before the Tribunal" in Part III of the Report which deals with the Tribunal.
[57] While statistics on the number of unrepresented litigants in Ontario have not been comprehensively collected, a 2005 study indicated that 43.2% of applicants in the Ontario Family Court in 2003 were self-represented, and that on average between 1998 and 2003, 46% of litigants in the Ontario Family Court were self-represented. See: "Background Paper" *The University of Toronto Faculty of Law Middle Income Access to Civil Justice Initiative Steering Committee* (2011), at pp. 15-16, online: <http://www.law.utoronto.ca/documents/conferences2/AccessToJustice_LiteratureReview.pdf> ["*Middle Income Background Paper*"]
[58] *Background Paper*, note 2 above, at pp. 9, 10, 16 and 17.
[59] See, for example: Professor Lorne Sossin, "Listening to Ontarians" Report of the Ontario Civil Legal Needs Project (Toronto: The Ontario Civil Legal Needs Project Steering Committee, 2010) at pp. 5, 24, 27, 28, online, Law Society of Upper Canada: <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf>.

Many of these factors also hold true in the administrative justice system. However, the administrative justice system is seen as far more open to self-representation than courts. Indeed, for many administrative tribunals, it is assumed that the parties before the Tribunal will be self-represented, or represented very rarely by counsel.[60] Still, the great diversity of administrative tribunals makes it difficult to compare rates of self-representation across agencies.

The high rate of self-representation is also not a result of the *Code* reforms. Indeed, as I discuss earlier, applicants, or complainants as they used to be known in the previous human rights system, were never provided with publicly funded access to legal advice and representation. It is just that the Commission played so dominant a role in the previous system that complainant counsel's role in the advancement of the case was more limited. In the revised system, the Centre finds itself a victim of high expectations. Since, for the first time in Ontario, the Centre's mandate was to offer free advice and representation to human rights applicants or potential applicants, when the Centre was only able to represent a relatively low percentage of applicants before the Tribunal, criticism was bound to follow.

The general concerns about litigants trying to represent themselves in legal proceedings include:

- Understanding and navigating the court procedure and litigation process
- How to best articulate their legal position and present their case

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[60] The other six Tribunals in the Social Justice Ontario cluster come to mind including the Landlord and Tenant Board. I can also think of the Licence Appeal Tribunal or appeals of employment standards decisions before the Ontario Labour Relations Board.

- Knowledge of the law and their legal rights
- Concern that the opposing side may take advantage
- Proceedings may take longer
- Filing of incomplete court documents
- Relying on judges or adjudicators for assistance, which may lead to a concern of bias or partiality
- Relying on opposing counsel for assistance[61]
- But, with respect to human rights cases, there are additional concerns including:
- The power imbalance between parties is exacerbated because many applicants tend to come from already disadvantaged groups
- There is a public-interest dimension to human rights proceedings where the importance of the proceeding transcends the private interests of the parties
- Human rights cases can be extremely complex dealing with novel situations and involving constitutional or competing principles of law that sometimes require resolution by appellate courts
- Parties, including respondents, are not permitted to recover costs in human rights proceedings

Accordingly, the problem of high numbers of self-represented applicants in the human rights systems is a serious one. How much responsibility should the Centre bear in ameliorating the so-called self-represented "problem"? My view is the Centre bears some but not all the responsibility for tackling this complex phenomenon which is, in fact, occurring across the legal system. It is easy to criticize the Centre for *representing* only 12% of applicants before the

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[61] *Middle Income Background Paper*, note 2 above, at pp. 19-20.

Tribunal, forgetting that it also provides *advice* to many more applicants. But it is far more difficult to state what the appropriate rate of Centre representation of applicants *should be*, bearing in mind real world funding constraints and public policy arguments such as:

(a) the Centre should not represent clients with unmeritorious cases;
(b) the Centre should not represent applicants who could otherwise afford a legal representative;
(c) representation is not the only or necessarily most important service that the Centre provides; it also provides advice to applicants who represents themselves before the Tribunal and provides alternative options for clients dealing with legal problems not amenable to a human rights solution;
(d) as part of the administrative justice system, and now part of the SJTO cluster, there is an expectation that self-representation of applicants is the norm, and legal representation the exception;
(e) the Tribunal's procedures under the revised *Code* are designed to be accessible to self-represented litigants; and
(f) applicants who are self-represented can still fare relatively well.

With respect to the last point, I reached this conclusion based on reviewing 143 Tribunal cases decided on their merits. The Centre represented 14% of all applicants in the 143 cases. The Tribunal found discrimination in 50 cases (35%); and no discrimination in 93 cases (65%). Out of the 50 cases in which the applicant won, the Centre represented 34% of applicants; while

out of the 93 cases in which the applicant was unsuccessful, the Centre represented 3% of applicants.

What do these statistics mean? I could draw the conclusion that an applicant is more likely to lose *because* the Centre has refused the case, and that had the Centre provided representation, the case would have been won; however, I could also draw the conclusion – and I prefer this approach – that the Centre is selecting meritorious cases for full hearing and declining involvement in the rest. Indeed, the Centre explicitly states that its role in a publicly funded system is to provide representation to applicants that have meritorious human rights cases and, for those applicants that do not, to give them proper advice and direct them out of the human rights system.

The insight that arises from my analysis of the 143 Tribunal cases is that, while representation by a lawyer (from the Centre or otherwise) can make an important contribution to the success of a case before the Tribunal, it may not be as important a factor as has traditionally been believed. Out of the 50 cases in which applicants won, they were self-represented in 44% of them. This is a significant percentage of self-represented applicants who successfully argued their own case. Of course, we should also not *overstate* the case for self-representation keeping in mind that, in the 93 cases in which applicants lost, they represented themselves 72% of the time. The conclusions I draw are: (a) applicants fare relatively better with legal representation at Tribunal hearings; however (b) applicants who are self-represented can still fare reasonably well.

Based on the feedback that I received from applicants *and* respondents about the high number of self-represented applicants and bearing in mind the competing considerations above, my overall conclusion is that the number of self-represented applicants is still too high and that the status quo is unacceptable. The Centre must make process improvements and the government must fund the Centre sufficiently so that it can represent significantly more than the 12% of applicants than it presently does before the Tribunal. I believe that applicants with meritorious cases who cannot otherwise find legal representation and who would be unable to navigate the Tribunal's processes are not having their needs met.

Just as I have criticized the suggestion that the Centre was supposed to help every applicant unconditionally, so too am I critical of the Centre's low representation rate of applicants before the Tribunal. I do not believe that such a low rate of representation is consistent with the equilibrium envisaged in Bill 107 whereby the Centre would at least partly address the power imbalance inherent in a direct access system where the parties are primarily responsible for advancing their own case.

Given the Centre's 85% success rate at resolving applications at mediations, it is in everyone's interest that the Centre attends more mediations. Furthermore, given that there is a trend towards "mediation-adjudication or "med-adj", it appears that the Centre's greater presence would enhance the prospects of resolution of hearings.[62]

[62] The Centre reports that in 2011-12, of 91 Tribunal merits-based hearings, almost one-third were converted to mediation-adjudication hearings at the start of or during the hearing.

With respect to Centre's provision of *advice* rather than *representation* to applicants, the situation appears more positive. In 2011-12, the Centre provided 12,562 individuals with Code-related summary legal advice; and assisted 2,399 new clients with in-depth legal advice concerning a Tribunal application. Given that the Tribunal had 3,302 active cases that year, the number of applicants or potential applicants assisted by the Centre appears significant.

Putting the Centre's challenges into context is important to understanding how the Centre can improve its services to the public. With respect to operating in an environment where the demand for its services exceeds its ability to provide those services, I make some findings and recommendations regarding process improvements below. But I also note that the Centre has already been quite innovative in its service delivery, therefore process improvements alone will not sufficiently address the service delivery gap. Only a significant infusion of government funds can improve that. In Part VI, which deals with system-wide issues, I make some recommendations with respect to budgetary allocations in the human rights system that could assist in that regard.

B. Findings and Recommendations

1. Quality of Service

The Centre sees itself as only coming through its start-up period now, some four years into its operations. The Centre described logistical and administrative challenges associated with moving from two temporary office locations to permanent office space, and moving from basic file tracking and intake systems to more sophisticated case management and communications

systems. However, from day one, the Centre has fulfilled its primary mandate of assisting applicants and potential applicants as they navigate the human rights system. Therefore, the Centre's main accomplishment, as a brand new agency, has been to provide a public service that is unprecedented and unique in Ontario: free assistance and legal services to individuals who believe they have experienced human rights discrimination.

The Centre has implemented a variety of process improvements to enhance its service delivery model resulting in it being able to provide more services to applicants than what its initial budget and design projected. For instance, while the Centre was projected to provide representation to applicants at 134 mediations annually, it did so in 278 cases; and while it was projected to provide representation to applicants at 33 hearings, it did so in 91 hearings on their merits.[63] Between 2008 and 2012, the Centre modified its manner of providing legal services once it became clear that the Centre did not have sufficient resources to provide full representation to all individuals with a meritorious claim who requested the Centre's assistance.

2. The Centre's Telephone System

The Centre has improved its telephone system. Parties who phone the Centre now have the option of obtaining automated human rights information over the phone prior to or instead of speaking to a Centre Human Rights Advisor. The Centre reports that many callers choose to receive automated information without then seeking the advice of a Human Rights Advisor.

[63] Using 2011-12 figures.

Annually, the Centre has answered tens of thousands of telephone inquiries from the public dealing not only with inquiries within its mandate, but also with non-human rights matters. The number of inquiries[64] that the Centre responds to annually reveals that approximately three-quarters of the inquiries are in relation to human rights concerns; but about one-quarter have nothing to do with human rights and may have to do with other kinds of legal disputes or problems. However, Centre staff still endeavour to direct the inquiry to an appropriate agency or other legal resource.

Since late 2008, when the Commission closed down its public telephone line, the Centre has essentially been the public's "go to" agency for human rights questions. The Tribunal maintains telephone access but, as an adjudicative agency, it must remain neutral and is not in a position to provide legal advice to the public.[65]

To date, the Centre's Human Rights Advisors have not been able to keep up with the demand for services. Accordingly, telephone callers experience wait times before speaking to an Advisor and some calls are not answered. For those inquiries that are answered and that warrant further discussion, a telephone interview with a lawyer is typically set up. Several participants in the Review expressed frustration with difficulties accessing the Centre by telephone and/or the delays involved in speaking to a Centre lawyer. Some concluded that the Centre was unable or unwilling to provide them with assistance. The Centre is acutely aware of its limited capacity to meet the demand for its services and has responded with several process improvements to its service delivery model. I describe some of the Centre's efforts

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[64] Inquiries consist of telephone inquiries from individuals, office walk-ins and referrals from other agencies and legal clinics.
[65] The Tribunal provides basic general information about its own procedures that does not constitute legal advice.

and examine whether process improvements alone can make a significant difference or whether it really comes down to a question of resources and more funding for the Centre.

The Centre's statistics[66] concerning call volume and telephone wait times indicate that for the first three years of its operation, the Centre was only able to answer a little more than half of the calls it received. Then too, callers experienced significant telephone wait times before calls were answered.

Fiscal Year	Calls offered	Calls answered	Calls not answered	Answer rate	Telephone Wait Times
2011-12	36,238	20,226	16,012	66%	8 minutes +
2010-11	41,736	23,673	18,063	57%	12-17
2009-10	38,579	21,871	16,708	57%	N/A
2008-09	26,934	13,121	13,813	49%	N/A

In 2011-12, the Centre entered into a partnership with Osgoode Hall Law Faculty to place six law students at the Centre to assist with intake, beginning in September 2011. Law students participating in an intensive education program in human rights receive training to provide telephone information and human rights advice throughout the year to the Centre's callers and prospective applicants. In November 2011, MAG provided $100,000 in one-time funding to cover the cost of purchasing and implementing a new telephone intake system. These two factors improved the Centre's answer rate in the 4th quarter.

For January to March 2012, the last quarter of 2011-12, after the Centre's new telephone system was installed, the wait times were 6:19 minutes for service in English, and 9:52

[66] I examined a large array of statistics in order to determine how the Centre is operating under the new *Code*. The full list of statistics is presented in Appendix F to the Report. 2011-2012 was the first full fiscal year since the implementation of the Centre's new case management system. The Centre was able to capture certain additional statistics, all of which are provided in Appendix F.

minutes for service in French.[67] The response rate has continued to improve in the current fiscal year. In the first quarter of this year, April 1 to June 30, 2012, the Centre has reported that it received 7,221 telephone inquiries and answered 6,089, a response rate of 84%.

The answer rate for 2011/12 can be split into two parts: *old* phone system (44%) and *new* phone system (79%).

4th Quarter	Calls offered	Calls answered	Calls not answered	Answer rate
Jan 1- Mar 31, 2012	11,655	9,317	2338	79%

While the Centre has been able to answer more telephone calls from the public since November 2012, the increased volume of inquiries has had the effect of significantly increasing wait times for an initial in-depth interview with a Centre lawyer.

As of July 2012, the Centre reported that the average wait time had doubled in 2012 and that individuals with non-urgent matters were required to wait as long as 4 months before having an interview with a Centre lawyer. The Centre acknowledges that the delay is a serious problem and unacceptable and is taking steps, such as reassigning personnel, to address the problem.

In the context of a publicly funded agency providing services to the public, it is difficult to specify what telephone or other wait times for the Centre should be. For many callers with human rights concerns, which include persons with disabilities, waiting on the phone for longer than 10 minutes to speak to a representative may result in them hanging up. If this happens on more than one occasion, they may conclude that the Centre is not accessible and unable to

[67] French calls comprise 1.4% of incoming inquiries to the Centre's telephone intake lines.

help them. If, relatedly, they get through to the Centre, explain their circumstances which warrant an in person interview, but the first opportunity for that meeting is more than a month away, I once again believe that many applicants, or potential applicants, will be discouraged, some permanently, from utilizing the legal services of the Centre.

I encourage the Centre and the MAG, which funds the Centre, to investigate wait time protocols for comparable public agencies keeping in mind the particular vulnerability of many callers who use the Centre's services. The Centre has made a number of process improvements in the past to improve wait times and I anticipate that the Centre will continue to explore ways in which this can be accomplished.

Recommendation 17:

The Centre should:

(a) Reduce telephone wait times to levels that are consistent with comparable public service organizations.

(b) Advise and update callers on hold on the telephone about wait times.

(c) Reduce wait times to less than 30 days for initial interviews by a Human Rights Advisor for non-urgent inquiries.

3. Duty Counsel Service at Mediation

The Centre has provided free assistance and legal services to thousands of Ontarians who believe they have experienced an infringement of their human rights. The Centre's 85% settlement rate at mediation is about 20% better than the Tribunal average settlement rate at mediation. I heard no evidence in my consultations that the Centre was exerting undue

pressure on its clients to settle cases at mediation; therefore, I conclude that the Centre is doing a good job of resolving cases at mediation.

In 2009, the Centre instituted a duty counsel service for mediations in Toronto whereby a Centre legal representative (lawyer or paralegal) attended the Tribunal 3 days a week and assisted self-represented applicants who were involved in mediations. The Centre representative would not necessarily negotiate on the applicant's behalf at mediation but would provide advice on various aspects of the mediated matter. The Centre reports that many self-represented applicants had unrealistic expectations for their cases and the Centre made an important contribution, separate from the Tribunal mediator, in advising the applicant of what would likely happen if the matter proceeded to a hearing. The Centre believes that the program resulted in a higher rate of settlement at Tribunal mediation than had the program not existed.

The program was cancelled, however, in 2009 because the Centre had difficulty extending the program to centres outside Toronto, in part, because the lower volume of mediations and economies of scale for mediations outside of Toronto made it difficult for the Centre to justify sending a legal representative to act as duty counsel, when those staff resources could have been directed to actually representing applicants at mediations and hearings.

I do not agree that the challenges associated with extending this duty counsel service outside Toronto should result in the Toronto service being cancelled as well. It may well be that the greater volume of cases to be mediated on a daily basis in Toronto present less of a scheduling challenge for the Centre to send one or more legal representatives to offer this service.

Outside of Toronto, I see this as a coordination issue. If the Tribunal can advise the Centre that it has a group of mediations scheduled warranting the Centre sending a legal representative to act as duty counsel at the mediations, the likelihood of the mediations being resolved is enhanced, and the applicant is better informed of her rights.

The Centre has a strong record of resolving cases at mediation when it represents applicants. Although the duty counsel program may involve the Centre providing advice and not necessarily representation to applicants during mediation, the assistance will likely be welcomed by the Tribunal and respondents alike as self-represented litigants often have unrealistic expectations of what is achievable at mediation and this tends to reduce the likelihood of settlement. Having the Centre provide advice to applicants at mediations including those scheduled outside Toronto would increase the Centre's regional presence and reduce the number of cases headed towards hearing.

Recommendation 18:

The Centre and Tribunal should coordinate to reinstitute a Centre Duty Counsel service to assist applicants at mediations. The Centre should not decline to conduct the program in Toronto because of difficulties associated with extending it to other regions. However, if the difficulties are primarily associated with coordination with the Tribunal, greater efforts at coordination between the two agencies should occur.

4. Public Interest Remedies

The Centre states that it achieved public interest remedies in about 70% of decisions where it represented a successful applicant before the Tribunal.[68] In my analysis of 143 cases decided on their merits, I found that in 20 of those cases, a Centre lawyer represented applicants. In

[68] Based on litigating applications before the Tribunal in 2010-11.

17 of those 20 cases, the Tribunal found discrimination; and in 12 out of those 17 cases, or 70%, the Tribunal awarded public interest remedies. Therefore the Centre's claim is consistent with my independent analysis. When I examined the 143 cases to determine the overall rate at which the Tribunal awards public interest remedies, regardless of whether the applicant was represented by the Centre, the figure is 60%.[69] Therefore, the 70% figure for the Centre is 10% better than what I found to be the Tribunal average. Examples of public interest remedies achieved by the Centre include orders:

- Requiring a service provider to retain a qualified consultant to review practices and make recommendations concerning accommodation of children with disabilities in all programs; and
- Requiring an employer to retain an independent human rights expert to develop a human rights policy and a procedure for harassment complaints.

The Centre's ability to achieve public interest remedies as part of settlements (as opposed to decisions) is even better - 75% - based on 2010-11 figures. These statistics suggest that the Centre is pursuing and obtaining public interest remedies at a higher than average rate for cases were discrimination has been found.

5. Regional Presence

Section 45.13(s) of the *Code* requires the Centre to "ensure that [its] support services are available throughout the Province, using such methods of delivering the services as the Centre believes are appropriate." Over 60% of inquiries to the Centre are from outside the Greater Toronto Area (GTA). Although the Centre, headquartered in Toronto, has a toll free number that is accessible anywhere in the province, it does not have the resources to maintain regional

[69] See discussion of Public Interest Remedies in Part III, dealing with the Tribunal.

offices. Instead, the Centre assigns a staff lawyer to legal community clinics in Guelph, Windsor, Thunder Bay, Sault Ste. Marie and Ottawa. These staff lawyers play an important role in several ways: they provide the Centre with a local presence allowing the Centre to be more responsive to diverse communities; they conduct outreach to outlying areas which often have no awareness of the Centre's services; and they provide training for lawyers in legal clinics to provide representation in Tribunal cases that would otherwise be referred to the Centre.

During the consultations, it became apparent that having a Centre lawyer working in the local community made a significant difference to applicants, potential applicants, lawyers and others with an interest in human rights issues. In Thunder Bay, for instance, the Centre lawyer was doing significant outreach to Aboriginal communities as well as liaising with local groups in the area that had human rights concerns. While I would leave it up to the Centre to determine which areas in the province have the greatest need for the placement of additional Centre lawyers, such an initiative would go a long way to ensuring that the Centre's support services are *truly* "available throughout the Province" as is required by the *Code*.

Recommendation 19:

The Centre should expand the placement of Centre staff in legal community clinics outside Toronto.

PART V – ONTARIO HUMAN RIGHTS COMMISSION

A. The Commission's Mandate and Operations

The amendments to the *Code* refocused the mandate of the Commission.[70] In the post-2008 human rights system, the Commission's role in individual complaint processing is ended. The Commission no longer accepts complaints from members of the public. Instead the Commission is focused on the policy aspects of human rights, and on trying to foster respect for human rights within the community as a whole. The Commission may still initiate its own applications before the Tribunal and intervene in other applications.

Section 29 of the *Code* states that it is the Commission's duty to promote and advance respect for human rights in Ontario, to protect human rights in Ontario, and to identify and promote the elimination of discriminatory practices.

The *Code* sets out the types of activities the Commission should engage in, for example:

- Develop and deliver programs of public education and information to promote awareness of human rights and to prevent and eliminate discrimination.
- Research discrimination and make recommendations on preventing and eliminating discrimination.
- Promote and assist groups and individuals to alleviate human rights-related tension and conflict.
- Approve policies designed to help Ontarians understand human rights.
- Bring applications to the new Tribunal in cases where there is a public interest.

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[70] The Commission's website is www.ohrc.on.ca.

- Report to the people of Ontario on human rights and on the Commission's activities.

A central question for the Review is whether the Commission, under its new mandate, is striking the right balance between its educative and policy making function, and its strategic involvement in litigation before the Tribunal and courts.

Transition to New Role

I had meetings with the Chief Commissioner, Commissioners and staff of the Commission. The consensus was that in the previous system the Commission was unable to get to the important task of human rights organizational change because it was so busy with processing individual complaints.

> All our time pre-Bill 107 was spent on screening complaints and the backlog was 3-4 years. During that delay the witnesses would disappear. Now, rather than reacting to the complaints process, we are proactive – OHRC Commissioner

The Commission was enthusiastic about several of the ground breaking initiatives it had undertaken since the *Code* reforms, in particular, an initiative on mental health and human rights which was one of the largest consultations held to date; work related to non-biased policing and cultural change; and the publication of a cutting-edge Policy on Competing Human Rights.

The Commissioners suggested that in the old system there was always a need to find a complainant, whereas now the Commission was working directly with and in organizations to improve human rights compliance. The transition to the new human rights enforcement model had been difficult on the Commission, in particular, its staff. While each human rights agency experienced unique challenges due to the *Code* reforms, from an institutional perspective, the Commission was the most deeply affected because its former core activity of processing

individual complaints was removed entirely, and replaced with an equally important but less tangible and measurable objective: addressing systemic human rights issues through research, policy, education, training and strategic litigation.

On a more practical level, in the transition to the new human rights system and shortly thereafter, the Commission had to deal with major layoffs, redeployment and reorganization of its unionized and non-unionized staff, elimination or reduction of its mediation, investigation and legal branches, related budget cuts and redefinition of its institutional identity. In a short period, the Commission went from being the most important human rights body in the province to arguably the least understood of the three human rights agencies. The Commission lost many long serving staff and remaining staff had to cope with the opportunities and challenges presented by the Commission's new mandate. All of this was difficult for an organization that for 45 years had essentially operated under the same model.

B. Findings and Recommendations

By the time of the Review, it appeared that the Commission had embraced its revised mandate but that it was still dealing with the challenges of implementation. The Commission identified several current challenges including:

- Dealing with the public's lack of understanding of its revised role under the *Code*
- Difficulty staying on top of developments in Tribunal cases since the Commission no longer played an active role in most applications
- Doing "more with less" in relation to the "bottomless pit" of public education, policy formulation and outreach

- Measuring success and being accountable with respect to reducing or eliminating systemic discrimination
- Seeking the right balance between cooperation and litigation strategies to effect positive human rights organizational and cultural change

1. Highlights of Commission's Activities

I had several opportunities to gauge the Commission's activities based on:

- The Commission's written submissions to the Review
- Chief Commissioner Barbara Hall's presentation and participation in a public meeting of the Review in Toronto on February 24, 2012
- Various meetings with the Chief Commissioner, Executive Director, Commissioners and staff
- The Commission's Annual Reports, particularly since the 2008 Code Reforms
- The Commission's description of its initiatives, activities and operations on its website; and
- Individual and organizational stakeholders' impressions of the Commission's activities

Under its revised mandate, the Commission has engaged in a number of initiatives aimed at addressing systemic discrimination. This has included negotiating voluntary compliance initiatives with respondent groups, and engaging in policy development, legislative reform activities, and education and outreach initiatives.[71]

[71] The Commission provided a full description of its initiatives and activities from 2008 to 2012 in its written submissions to the Review. Also see the Commission's Annual Reports available online at the Commission's website www.ohrc.on.ca.

In its voluntary compliance initiatives, the Commission has worked to implement an agreement with the Ministry of Education related to the Ministry's safe schools legislation, and has provided policy guidance to the Ministry on issues such as discipline and equity, anti-bullying, and the development of an anti-discrimination curriculum, as well as human rights training for Ministry and school board representatives. Along with other respondent groups, the Commission has also engaged in compliance initiatives with the Toronto Police Service and the Toronto Police Services Board in order to address systemic human rights in those organizations.

In the legislative arena, the Commission has provided input on the accessibility standards regulations to the *Accessibility for Ontarians with Disabilities Act, 2005* and has advocated for amendments to the *Election Act* which have improved the accessibility of polling stations and election materials. The Commission has advocated for legislative reform that would increase the accessibility of the electoral process for candidates with disabilities. The Commission has also made recommendations aimed at promoting and protecting the human rights of foreign domestic workers.

The Commission has been active in the development of human rights policies and guidelines. In 2010, for example, the Commission launched a new reference guide entitled "Anti-racism, Anti-discrimination for Municipalities" which provides guidance for municipalities on human rights issues. In 2009, the Commission began to seek public input on a Human Rights Mental Health Plan, which would include steps to address systemic human rights concerns. As part of the Plan, the Commission made submissions to two provincial consultations, produced a

consultation paper, launched an online survey and held public meetings in what would become its largest consultation ever. In September 2012, the Commission presented its consultation findings in a major report, *Minds that Matter: Report on the Consultation on Human Rights, Mental Health and Addictions.* The Report will form the basis of a new policy on human rights and mental health. The Commission is working with others involved in the mental health field to identify priorities and raise awareness in this area.

The Commission has been actively engaged in research and consultations related to human rights issues in rental housing as well as other social areas, one example being the Commission's work related to eliminating the discrimination caused by unwarranted accreditation or other requirements placed on persons born, educated or trained abroad.

In the area of LGBT rights, the Commission recommended the recent *Code* amendment which provides protection against discrimination based on gender identity and expression.[72] The Commission also made submissions to the College of Physicians and Surgeons of Ontario on human right issues related to sexual orientation, gender identity, marital status and sex. The Commission is working with community groups to promote gay-straight alliances in public schools, and supported the government of Ontario's initiatives in passing Bill 13, *Accepting Schools Act, 2012*.

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[72] *Toby's Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression), 2012,* S.O. 2012 C.7.

The Commission is actively engaged in outreach and education initiatives, and has collaborated with the other human rights agencies. For example, the Commission has provided training for staff at the Centre on Commission policies, litigation strategies, case conferencing and Commission initiatives. The Commission is also a member of the Tribunal's external advisory group, which provides advice on the Tribunal's policies and procedures. The Commission is also an active member of the Canadian Association of Statutory Human Rights Agencies (CASHRA). In August 2010, Barbara Hall, Chief Commissioner of the Commission, was selected as President of CASHRA.

It is clear based on a review of the Commission's activities and operations that the Commission has remained very active since the *Code* reforms; however, the consensus of the feedback that I received suggests that the greater public and many stakeholders remain unclear or skeptical about the Commission's activities and whether they are being targeted in the right areas to accomplish the Commission's revised mandate.

I commend the Commission for remaining a vibrant agency with many accomplishments in the post-reform period, particularly on the policy formulation and institutional partnership front; however, based on the public consultations and my independent examination of the Commission's activities, two interrelated problems remain regarding how the Commission has interpreted and implemented its revised mandate: (1) the Commission has relied too heavily on partnership and cooperative strategies to accomplish its objectives, virtually excluding the initiation of applications at the Tribunal; and (2) the Commission's operations appear to be somewhat disconnected from the greater public, the private employment sector and the other human rights agencies (the Tribunal and the Centre).

My findings and recommendations concerning the Commission are aimed at addressing the two problems identified above and the areas in which the Commission experienced challenges with its revised mandate: too little litigation at the Tribunal; failure to establish the Anti-Racism and Disability Secretariats; inaccessibility to the public; little engagement with the private sector; and poor coordination with the Tribunal and the Centre.

2. Litigation and Intervention

Section 29(1)(i) of the *Code* states that it is a function of the Commission to "make applications to the Tribunal under section 35". Under s.35, the Commission has the power to initiate an application at the Tribunal; and under s.37, it can intervene in applications with the applicant's consent. The Commission initiated three applications at the Tribunal in July 2009, under section 35 of the *Code*, dealing with discrimination in public transportation services because of disability against Hamilton, Sudbury and Thunder Bay transit providers. These applications settled in 2011.

The Commission intervened in a case before the Tribunal on the preliminary issue of the definition of services[73] and at the Ontario Court of Appeal in an important case involving the denial of disability benefits to people with addiction-related disabilities.[74]

The Commission has also successfully intervened in cases involving racial profiling,[75] inmate care in custody and accommodation of religious observances.

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[73] *Seberras v. Workplace Safety and Insurance Board,* 2012 HRTO 115.
[74] *Tranchemontagne v. Ministry of Community and Social Services*, [2006] 1 S.C.R. 513, 2006 SCC 14.
[75] *Phipps v. Toronto Police Services Board,* 2009 HRTO 1604; *Maynard v. Toronto Police Services*, 2012 HRTO 1220.

I queried the Commission as to why, in the four years since reform, it had initiated so few applications at the Tribunal. The Commission responded that commencing applications only makes sense if other efforts to resolve human rights disputes failed. With its revised mandate, the Commission has made significant progress on many of its initiatives without having to resort to litigation. This theme was reflected in the Commission's written submission to me which identified "partnership" as the common theme running though most of its initiatives:

> The OHRC is a relatively small organization – about 50 people. The only possible way we can make a genuine impact on the lives of more than 13 million Ontarians is by working with partners that help us expand our reach. More than ever, we are reaching out to communities, looking for input, listening to concerns, raising awareness and trying to find solutions.

Commissioners explained that they have debated and held divergent views on the appropriate balance between litigation and cooperative strategies to effect positive change. To date, the consensus at the Commission has been that collaboration with respondents is more effective than confrontation. I believe that several factors are responsible for this approach:

Once the Commission becomes involved in a human rights dispute, respondents are often more amenable to complying with human rights laws and the need to initiate applications at the Tribunal disappears. Increasing Commission-initiated applications and interventions raises resource allocation issues. Litigation is expensive and unpredictable and the Commission has needed to make difficult strategic and financial decisions around which approach will best reduce or eliminate systemic discrimination.

The infrequency of Commission-initiated litigation has a compounding effect whereby the importance of the Commission pursuing the right issue and the right respondent is elevated

and the reputational costs of "getting it wrong" are increased. This has heightened the Commission's reluctance to initiate or intervene in Tribunal applications.

In the pre-Bill 107 era, when the Commission was involved in all cases at the Tribunal, the Commission was sometimes seen as "the enemy" of respondents, including employers, businesses, organizations and industry. The Commission was regarded as the "human rights police" that only came around when respondents got themselves into trouble. The Commission's post-reform stance represents a different approach where the Commission is going to greater lengths to get buy-in and achieve organizational change. Litigation is seen as a last resort that, if used unwisely, could result in the Commission setting the clock back on much of the progress it has achieved.

Together these factors appear to have resulted in the Commission almost never choosing to file an application at the Tribunal to advance its mandate under the revised Code.

Similar factors appear to apply to the Commission's relatively low rate of intervention in applications since 2008. Section 37 of the Code provides the Commission with the ability to intervene in an application in two circumstances:

> 37. (1) The Commission may intervene in an application under section 34 on such terms as the Tribunal may determine having regard to the role and mandate of the Commission under this Act; [and]
>
> (2) The Commission may intervene as a party to an application under section 34 if the person or organization who made the application consents to the intervention as a party.

The Commission reports that it intervened in 73 applications since the *Code* reforms. I note, however, that since multiple applications were sometimes related to one case, the effective

number of cases was approximately 30. Given that the Tribunal receives around 3,000 new applications a year and that the Tribunal has opened 11,196 new applications and closed 8,036 from June 30, 2008 to March 31, 2012, it appears that the Commission has intervened in less than 1% of applications at the Tribunal. This low intervention rate is consistent with the overwhelming impression of the public as conveyed to me that the Commission is simply not litigating in any significant way at the Tribunal.

Unlike British Columbia which went to a direct access system in 2003 but eliminated its human rights commission, Ontario chose to preserve its Commission under the Bill 107 reforms but to revise the Commission's role. Ontario followed the recommendations of the Cornish Report and La Forest Report to reorient the Commission to championing human rights in the province without the burden of mandatory involvement in each and every individual human rights case. However, that did not mean abandoning strategic litigation in select applications with systemic dimensions – particularly where an individual or group of individuals would have great difficulty in obtaining justice without the Commission's involvement.

Notably, the Cornish Report proposed that the Commission have the power to "investigate and initiate key, systemic cases where necessary and to seek broad remedies" and to "investigate, file and pursue systemic discrimination complaints before the Tribunal."[76] Similarly, the La Forest Report recommended that the Canadian Human Rights Commission be empowered by the Act to initiate claims and join claims brought by other individuals and organizations.[77]

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[76] Cornish Report, p. 34 and p.75.
[77] La Forest Report, p. 66.

Another reason why the Commission should be more actively engaged at the Tribunal is to incrementally reduce the high rate of self-represented applicants at the Tribunal. As discussed earlier, in the last 4 years since the *Code* reforms, the Centre has only been able to represent (as opposed to give advice to) 12% of all applicants before the Tribunal. If the Commission took on a greater responsibility of representing applicants with cases (a) involving the public interest; (b) involving a systemic deprivation of rights; and (c) where the applicants would otherwise have difficulty advancing and proving their case, I anticipate this would make a small but strategically important contribution towards reducing the high number of self-represented applicants in the system.[78]

The Commission was preserved, in part, not only to promote human rights through education and outreach, but also through inquiries, applications and interventions. During the second reading of Bill 107, the Attorney General introduced amendments that enhanced the Commission's powers in the area of conducting investigations, intervening in and bringing applications if, in the Commission's opinion, it was in the public interest.

The Commission cannot champion human rights without becoming more involved in litigation at the Tribunal, specifically by initiating cases against recalcitrant respondents.

Recommendation 20:

The Commission should develop a litigation strategy at the Tribunal focused on cases where applicants would have difficulty advancing and proving a systemic deprivation of rights. The Commission should initiate applications and intervene at the Tribunal consistent with this strategy.

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[78] Earlier in the Report, I estimated that 65% of applicants who appear before the Tribunal are self-represented.

3. Public Interest Applications

Some of the organizations I met with expressed concern that the Commission would be unaware of many human rights disputes and cases with systemic dimensions, since the Commission is no longer involved in individual applications before the Tribunal. While the Commission obtains copies of applications from the Tribunal and has the ability to initiate applications in the public interest, I agree that the Commission on its own may not necessarily be able to ascertain which potential cases warrant its involvement.[79] Currently, individuals and groups are free to contact the Commission through its website and ask the Commission to initiate a case at the Tribunal in the public interest. However, there does not appear to be an established process for doing so. Having a written, established process would assist community groups to determine in advance whether such a request is worth making; and would also assist the Commission in responding to such requests in a more transparent way.

Whereas my earlier recommendation concerning the Commission developing a litigation strategy partly fulfils this objective, that recommendation only speaks to the criteria by which the Commission would decide upon the request; it does not describe the process, format or timeframe by which the Commission would receive, assess and respond to such requests from the public, or who might be eligible to make such requests. I appreciate that opening up the Commission to such requests from the public raises capacity and resource concerns. It also raises a concern that the process will be abused by potential applicants who have been declined representation from the Centre and who are unable or unwilling to receive

[79] Section 38 of the Code requires the Tribunal to disclose to the Commission, upon the Commission's request, copies of applications and responses filed with the Tribunal. Section 45.4 allows the Tribunal to refer any matters arising out of a proceeding before it to the Commission.

representation elsewhere. I make two suggestions to assist in this regard. First, I do not suggest that individuals be eligible to make such requests. Limiting the requests to groups would presumably require the request to be coming from more than one person although some verification of the *bona fides* of the group may be necessary. Second, I do not suggest that the Commission's refusal be subject to appeal or other internal or external formal review process. That would be too cumbersome and would impose too heavy an administrative burden on the Commission. Ultimately, the point of this proposal is that it would encourage greater engagement between the Commission and equity-seeking groups and also permit the Commission to deal with requests from those groups to initiate public interest litigation in a more principled and transparent way.

Recommendation 21:

The Commission should have a process based on established criteria whereby community organizations can request the Commission to initiate a public interest application.

4. Publicly Accessible Telephone Line

The Commission closed down its incoming public telephone line in December 2008, approximately 6 months after the major *Code* reforms came into effect. The timing was related to the fact that, until December 31, 2008, the Commission was still involved in making decisions on whether or not to refer complaints that had originated under the previous *Code* to the Tribunal. Subsequently, the Commission has been accessible only through email, mail and its Facebook page. The Commission reports that after it receives an inquiry, it contacts the individual or group and regular communication is established. The reason that the Commission eliminated its incoming public telephone line is that the Commission would have

to devote resources to answering inquiries from the public, the majority of which would relate to individual human rights complaints, which the Commission is no longer involved in. The Commission is concerned that significant resources would be expended on essentially referring callers to the Centre, Tribunal or other agencies and that only a small percentage of calls would truly be within the Commission's revised mandate.

I understand the Commission's concerns but, as a public service agency, I believe the Commission must be accessible by telephone to the public. In the public consultations, many individuals and groups expressed frustration at being unable to contact the Commission and several of these stakeholders were quite aware of the Commission's revised mandate. The optics of a human rights agency not being accessible at first instance by telephone are also poor. Not having a public telephone line appears incompatible with the Commission's mandate to promote human rights, which would presumably require that it be easily accessible to the public. Further, not everyone has a computer or email or is comfortable in that medium. A telephone call with a live person is often a more efficient way to provide and receive information quickly, rather than in writing. The Commission's decision to eliminate its incoming telephone line has left the mistaken impression that the Commission has closed itself off from the public and that it has become a human rights "think-tank". When I met with the Commissioners, there were mixed views about telephone access but the challenge appears to be how to handle the significant volume of calls that will ensue, many of which will likely be outside the Commission's mandate.

Many public agencies employ a telephone answer system that initially provides callers with information and then allows them to choose from a number of options including speaking to a

staff person. The Centre's public telephone line, for instance, has a message that first briefly describes the three agencies in the Ontario human rights system and then permits the caller to choose from a number of options including speaking to a Human Rights Advisor. The Commission could likewise address the concern about callers contacting the wrong agency by having a clear and robust initial message about the Commission's mandate.

Recommendation 22:

The Commission should re-establish its incoming public telephone line.

5. Anti-Racism and Disability Secretariats

The revised *Code* provides for the establishment of Disability Rights and Anti-Racism Secretariats. The purpose of these Secretariats is to operate as advisory groups within the Commission's existing structure. To date, the government has not appointed any individuals to the Secretariats and the Commission has not pushed for the establishment of these Secretariats.

The functions of the Secretariats are enumerated at s. 31.3(4) and 31.4(4) of the *Code* and are as follows:

a) to undertake, direct and encourage research into discriminatory practices that infringe rights under Part I of the *Code* on the basis of racism and related grounds and disability related discrimination and to make recommendations to the Commission designed to prevent and eliminate such discriminatory practices;

b) to facilitate the development and provision of programs of public information and education relating to the elimination of racism and the elimination of discrimination on the basis of disability; and

c) to undertake such tasks and responsibilities as may be assigned by the Chief Commissioner.

I received conflicting feedback from stakeholders regarding the value and practicality of these Secretariats under the *Code*. Some participants expressed frustration that the Commission had not yet established them as required by the *Code*. The AODAA also recommended that the Disability Rights Secretariat be instituted and provided with an expanded mandate to investigate, resolve and prosecute disability-related complaints under the *Code.* Conversely, other stakeholders expressed scepticism as to the efficiency and function of the proposed Secretariats, with some stakeholders expressing doubt about the benefit or value of the Secretariats within the Commission's existing structure. During the consultation process it was pointed out that forms of discrimination are typically complex and intersecting; compartmentalizing "disability" or "race" apart from other prohibited grounds of discrimination presents difficulties, and may inadvertently create a perception of "hierarchy" of grounds of discrimination, which is undesirable and may be problematic where limited resources and funding is concerned.

I note that the broader purpose and mandate of the Commission as a whole, mirrors or duplicates and expands upon the functions of the Secretariats. The functions of the Commission are set out at s. 29 of the Code. Among numerous other functions, the Commission's mandate is to:

a) undertake, direct and encourage research into discriminatory practices and to make recommendations designed to prevent and eliminate such discriminatory practices; and

b) develop and conduct programs of public information and education to promote awareness and understanding of, respect for and compliance with the Code and prevent and eliminate discriminatory practices that infringe rights under Part I of the Code.

The *Code's* explicit inclusion of Disability Rights and Anti-Racism Secretariats underscores the intention of the legislature to promote the elimination of discriminatory practices in these areas.

It is also a reflection that disability and race are among the grounds most commonly cited in applications. But there has been no progress by the Commission or by government to implement the Secretariats. Indeed, I found that there was little enthusiasm on the Commission or the government's part to establish these Secretariats due to the aforementioned concern about duplication of roles and the appearance of setting up a hierarchy or pecking order of groups warranting protection under the *Code*.

In my view, the fact that significant anti-racism and disability initiatives at the Commission have continued, despite the lack of these Secretariats, is significant. For example, in 2010 the Commission, the Toronto Police Service and the Toronto Police Services Board completed their three year Human Rights Charter Project. The Project arose out of the need to address human rights complaints being made to the Tribunal about police. The Project included work on human rights issues in recruiting, selecting, promoting and retaining staff, police learning, accountability, service to the public and public education.[80]

With respect to disability rights, the Commission's major initiative in human rights and mental health that culminated in the *Minds that Matter* report is an example. The Commission has also been working to address concerns raised by persons with mental health disabilities about the adverse effect of interactions with police along with related provisions of the *Mental Health Act*.

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[80] The Project Charter is available on the Commission website at: http://www.ohrc.on.ca/en/resources/news/corrections

I agree that the Secretariats are duplicative of the Commission's broader function and mandate and may, in fact, complicate Commission initiatives in these important areas.

First, I note that the function and activities undertaken by the Secretariats are *at the direction of* the Chief Commissioner. It appears that if a disagreement should arise between a Secretariat and the Chief Commissioner, the Chief Commissioner's direction would prevail. Also, under section 31.5 of the *Code*, the Chief Commissioner has the power at any time to establish whatever advisory groups she considers appropriate to advise the Commission about the elimination of discriminatory practices. Accordingly, it is not as though the Commission is disempowered from instituting an ad-hoc anti-racism or disability advisory group if the particular need arises.

I am also of the view that it is awkward and duplicative for there to be *permanent* advisory groups within the Commission's structure based on select prohibited grounds. I agree with the concerns expressed by stakeholders that the Anti-Racism and Disability Rights Secretariats inadvertently create a perception of a hierarchy of rights and may result in an unequal allocation of funding as between different advisory groups representing various marginalized groups. Also, counter intuitively, the establishment of Anti-Racism or Disability Rights Secretariats may lead to the perception or reality that the Chief and Commissioners have less responsibility themselves to tackle anti-racism and disability rights, since this would be responsibility of the Secretariats. Finally, in an already fiscally constrained environment, I am concerned about the incremental costs and bureaucratic resources expended in setting up and supporting two new Secretariats with up to six members each, all within a consultative Commission structure. Ultimately, I am concerned that these Secretariats may end up being

more trouble than they are worth and detract from the accountability of the Chief and Commissioners to tackle anti-racism and disability rights head on.

Recommendation 23:

The *Code* should be amended to eliminate the Anti-Racism and Disability Rights Secretariats.

6. Initiatives in the Private Employment Sector

I received feedback from stakeholders that the Commission was not sufficiently engaged with the private employment sector. Stakeholders were of the view that the Commission has not sufficiently engaged in education, voluntary compliance, or other initiatives with private sector employers, despite engaging in this work with public sector employers. Other private employment sector stakeholders observed that the Commission is not visible in their sphere and is difficult to access by telephone.

To be fair, the Commission has done valuable work in publishing *Human Rights at Work*, in partnership with the Human Resources Professionals Association of Ontario. *Human Rights at Work* is an important educational resource for private sector employers. In addition, the Commission has expanded Human Rights 101, an e-learning tool for employers and employees, which is now available in four languages. As well, among other initiatives, the Commission is engaged in a consultation process in order to develop a policy on mental health disabilities, which will, in part, identify and address barriers faced by persons with mental health disabilities in private sector employment. Although the Commission is to be commended for these initiatives, more should be done to engage with private sector employers, with respect to both human rights education and strategic litigation.

Three out of four cases at the Tribunal are in the social area of employment. It is therefore critical that the Commission increase its visibility and credibility with private sector employers. The Commission should consider taking on initiatives related to human resources practices, and engage in education and voluntary compliance initiatives with private sector employers to advance human rights. The Commission should also consider initiating litigation aimed at addressing systemic discrimination in employment practices. This strategic litigation could address systemic discrimination in hiring and promotion practices, especially those faced by new Canadians, persons with disabilities, and racialized Ontarians. The Commission should also consider engaging in strategic litigation and education work with respect to the discrimination and other human rights abuses faced by domestic and foreign migrant workers, and others with irregular immigration status, as they are among the most vulnerable groups and unlikely to be able to mount cases before the Tribunal without the assistance of the Commission.

Recommendation 24:

The Commission should engage in more initiatives in the private employment sector.

7. Advice for Respondents

Several stakeholders claimed that the revised human rights system is structurally unbalanced since applicants receive advice and representation from the Centre free of charge and regardless of income; whereas respondents, including personal respondents and small businesses, have no institutional support whatsoever. Respondents typically turn to lawyers for advice and representation but this is expensive and lawyer fees cannot be recovered in the current human rights regime. The classic response to why the Centre helps applicants only is

that often, those seeking recourse through the human rights system are the more vulnerable and marginalized members of society. This is well documented, for instance, in the high rates of unemployment of persons with disabilities or of Aboriginal descent.[81] In general, employees have less bargaining power than employers. Tenants, likewise, have fewer resources than landlords.

Another response relates to the evolution of legal representation issues for complainants as between the previous and present *Code*. Under the previous *Code*, complainants typically did not have to retain counsel once their complaint was forwarded to the Tribunal by the Commission. Only a small number of hearings occurred at the Tribunal each year, but when they did it was not necessary for complainants to retain a representative since the Commission sent a lawyer who argued in the public interest that discrimination had occurred. Under the revised *Code*, however, the Commission is not involved in individual cases, therefore, the rationale for the Centre's mandate is that applicants, particularly those who would not be able to represent themselves or retain representation, should have the support and representation of the Centre if their cases warrant it. It is also in the public interest to promote equality and provide redress for discrimination. The elimination of discrimination is a benefit to society as a whole. In order to maintain this public policy objective, that function must be a part of the human rights system regardless of the model.

While the above two reasons are valid, several stakeholders also pointed out that it is nevertheless in *everyone's* interests that respondents also receive expert and timely advice with respect to human rights disputes, particularly if proactive advice could prevent human

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[81] For a broader discussion see Law Commission of Ontario, *Vulnerable Workers and Precarious Work Interim Report*, August 2002, available online at www.lco-cdo.org.

rights disputes from festering, resulting in applications being filed at the Tribunal. For instance, if an employer was advised that firing an employee for being ill may constitute disability discrimination, the employer may hesitate or refrain from doing so – or may proceed with termination but only after inquiring into its human rights obligations. Similarly, if a co-op housing provider learned that it may have to accommodate an apparently disruptive tenant with mental health issues, it may not evict him; or may do so, but only after determining that further accommodation would result in undue hardship. Either way, the likelihood of human rights disputes developing into applications may be reduced or eliminated altogether. While the costs of this proactive summary advice would have to be considered, it may save much greater costs down the line and in other parts of the human rights system. I believe that many would-be respondents want to do the right thing but are sometimes ignorant or unclear about their human rights obligations. These respondents or potential respondents may be unable or unwilling to obtain legal advice resulting in the aggravation of a human rights dispute. The human rights system would be enhanced if respondents or potential respondents were able to access a service providing telephone and internet based summary advice. I propose that a human rights compliance unit be established within an agency of the human rights system.

Immediately, practical problems arise. Where would the funds come from to support respondents? Wouldn't those funds come from sources that could otherwise have supported applicants? Which agency would assist? The Tribunal must remain neutral, therefore the only logical candidates to provide advice would be the Centre or the Commission. The Centre, as currently administered, is dedicated entirely to assisting applicants or potential applicants, therefore a human rights compliance/assistance practice would present a fundamental conflict for the Centre or fit very awkwardly within its operations. That leaves the Commission as the

only viable candidate to offer such advice, unless a fourth agency is created – which would lead to further confusion and an unnecessary proliferation of human rights agencies in the province.

In my view, the establishment and operation of a human rights compliance-oriented practice within the auspices of the Commission is warranted for several reasons.

I heard from Commission staff that some respondents contact the Commission wanting summary advice. These organizations or individuals are prepared to do the right thing but require more information. In the staff's view, pointing respondents to the right policy or providing summary advice would make an enormous difference. It could mean the difference between a quick and simple resolution to a human rights problem and an ongoing dispute that is litigated for years at the Tribunal collectively costing the parties and the three human rights agencies hundreds of thousands of dollars.

I also believe that the public's overall image of the human rights system, and that of the Commission's in particular, will be enhanced since both applicants and respondents will be offered support, albeit asymmetrically, under this recommendation. Public support of the human rights system is crucial and linked to the government's political and financial support of the human rights system.

Challenges will no doubt abound with this proposal. Managing respondents' expectations may be difficult. Commission staff cautioned that they are not able to provide legal advice, but distinguishing between legal advice and summary compliance advice or information may be quite difficult. The last thing the Commission needs is for respondents to become frustrated

with the Commission's inability or unwillingness to provide advice about a respondent's particular human rights problem.

Another problem is that the Commission could be placed in an apparent conflict if it provides summary advice and finds itself at a later time on the opposite side of a respondent who sought advice. The Commission would have to set very clear guidelines that any compliance advice it provides is *general human rights information only* and does not constitute legal advice or prejudice the Commission in any way from initiating or intervening in an application on the opposite side of a respondent who may have contacted the Commission's compliance advice unit.

It is beyond the scope of this report to identify all the opportunities and challenges presented by the proposed human rights compliance unit at the Commission. However, I believe that such an initiative is entirely appropriate to the Commission's revised mandate under the *Code*. At first glance, it is an initiative that will be attractive to respondents but on greater reflection it is an initiative that will help members of the applicant and wider community as well, since proactive compliance with human rights laws is in everyone's best interest.

Recommendation 25:

The Commission should establish and maintain a unit that would offer telephone and/or internet based summary advice and information to assist respondents comply with their human rights obligations.

PART VI - SYSTEM-WIDE ISSUES

Under the *Code* reforms that came into effect in 2008, there are three human rights agencies with distinct mandates. At its simplest, the Tribunal decides human rights cases, the Centre helps applicants and the Commission promotes human rights. Yet, despite this separation of responsibilities, there is only human rights system, not three. What was clear from my consultations was that all three human rights agencies need to be better coordinated with respect to each other and also with respect to the human rights system as a whole. I make some findings and recommendations to assist in that regard.

A. Findings and Recommendations

1. Commission Complaints and Transitional Cases

(a) Commission Complaints Not Transitioned to Tribunal

Under the previous *Code*, the Commission decided which complaints would be referred to the Tribunal for a hearing. This continued until December 31, 2008 when the Commission referred its final group of complaints.

As of April 1, 2008 (i.e. 2008-09), the Commission had 4,199 cases. It received 702 new complaints between April 1 and June 30, 2008. Assuming the Commission neither closed nor referred any cases between April 1 and June 30, as of the effective date, the Commission had 4,901 cases. The Commission completed 2,090 complaints by December 31, 2008, which includes 201 complaints that were referred to the Tribunal, therefore the number of remaining cases that could have been transitioned to the Tribunal was 2,811 pursuant to s.53 of the revised *Code*.

The Tribunal received 1,926 transitional cases by June 30, 2009, the deadline for applicants to transition cases over to the Tribunal. The Commission sent three letters advising each complainant of the steps they needed to take to transfer their files. A total of 885 cases expired without the complainant taking any further steps when the option to transition ended on June 30, 2009. The Commission reported that 750 cases remained with the Commission as of that date. Accordingly, 135 cases or 2.7% of the initial 4,901 cases were unaccounted for in terms the transition from Commission complaints to Tribunal applications.

(b) Transitional Cases

Perhaps the earliest example of coordination that was required between agencies in the new system involved the Tribunal's handling of transitional cases from the Commission. Transitional applications are applications filed with the Tribunal between June 30, 2008 and June 30, 2009, based on complaints originally filed with the Commission under the previous system pursuant to s.53 of the *Code*.

The Tribunal received a total of 1,926 Transition cases: 1,151 in 2008-09 and 775 in 2009-10. The Tribunal closed 278 cases in 2008-09, 919 in 2009-10, 448 in 2010-11 and 198 in 2011-12. As of the end of 2011-12, 85 remain open. Of these open cases:

- 11 were pending final decision
- 26 were deferred pending the outcome of some other process
- 43 were at the mediation or hearing stage
- 5 were combined with s.34 (new) applications

Mediations involving transitional cases had a resolution rate of approximately 45%, significantly lower than the 65% resolution rate for new applications. As of the end of 2010-2011, the Tribunal had issued 608 final decisions involving transitional cases.

In my consultations, I heard very few comments (either positive or negative) about transitional cases. The Tribunal suggested that the reason the resolution rate at mediation was relatively low is that these cases had, in many instances, been open at the Commission for a long time and the availability of an expedited hearing process at the Tribunal likely reduced the attraction of settling the application at mediation.

For the most part, the transitional cases were assigned to a dedicated team of Vice-Chairs who systematically attempted to resolve the cases and, based on anecdotal information that I received, did a good job of balancing efficiency with fairness. Ultimately, however, in part because the Tribunal did not deal with transitional cases via the same case management system that it did new applications, and because transitional cases were still a "work in progress" during the time of my Review, the Tribunal was unable to provide me with the kind of statistical or qualitative analysis that would allow me to make a more objective determination of how these transitional cases were handled by the Tribunal.

Now that the transitional cases have almost all been dealt with at the Tribunal, it would be an appropriate time for the Tribunal to prepare a comprehensive report on the transitional case process. The report would contain some of the information and statistics that have already been presented in my Report, but the report should go further and answer additional questions that would indicate whether the transitional cases were handled in an appropriate manner at the Tribunal and provide the Tribunal with some best practices gleaned from dealing with a relatively high volume of cases in an expedited manner.

The questions that I would want answered and that would be germane to the Report are:

- The number and disposition of transitional cases in respect of each fiscal year;
- The resolution rate of transitional cases at mediation and an identification of factors, that, in the Tribunal's view increased or decreased the resolution rate;
- The number of reconsideration decisions and judicial review applications arising from transitional cases and whether any such requests or applications were successful (which would answer, to some extent, whether the transitional cases were perceived by the parties to be handled fairly); and
- The case management and dispute resolution techniques employed by the Tribunal for transitional cases that would be of benefit to the Tribunal in respect of its regular stream of s.34 applications.

Recommendation 26:

The Tribunal should submit and make publicly available a Report concerning its handling of transitional cases that would be of benefit in respect of its handling of regular s.34 applications.

2. Meetings of the Tribunal, Centre and Commission

It surprised me to learn that there are no meetings held annually amongst the three human rights agencies and/or the MAG to discuss the human rights system. True, the agencies and the MAG discuss matters informally and meet regularly; but there is no formal mechanism to ensure this is happening. Also true is that the Tribunal's Practice Advisory Committee has representatives from all three agencies who attend Committee meetings; however, the role of that Committee is only with respect to the Tribunal's practices and procedures, not other aspects of coordination between the agencies. All three agencies receive their funding from

MAG and submit annual business plans to MAG. MAG appears to be the logical coordinator for meetings to focus on better coordination in the human rights system.

Recommendation 27:

The Ministry of the Attorney General should facilitate meetings of the leadership of the Tribunal, Centre and Commission at least twice a year to focus on better coordination in the human rights system.

3. Tribunal to Highlight the Commission's Role

One of my overall findings is that the Commission's revised role is poorly understood and that there is a lack of coordination between the three agencies concerning what each can do to assist the public in understanding the other's role.

The Tribunal does refer to the Commission on the Tribunal's website in a limited way, including:

> The Tribunal's Application and Response forms request information as to whether a complaint was ever filed with the Commission based on the same subject matter. These forms also advise the parties that a copy of their application or response must be filed with the Commission.

The Tribunal's Guides for Applicants and Respondents, at various points, advise parties that, if they want general information about discrimination and the *Code*, they can visit the Commission's website, which has information about human rights law and policy and that an e-learning resource is available.

The problem, however, is that this information concerning the Commission's presence and role is not prominent enough (the references to the Commission are too sparse and occur too late in the material); and the Tribunal does not adequately explain the Commission's revised role including with respect to: having human rights policies or materials that may relate to the

subject matter of an application; or the Commission's role in potentially intervening in or initiating applications that deal with alleged systemic discrimination.

Recommendation 28:

The Tribunal should, on its website and materials, better and more prominently explain the role of the Commission, particularly in terms of the Commission's policies and its role in potentially intervening in or initiating applications that deal with alleged systemic discrimination.

4. Commission to Provide a Link to Tribunal Decisions

I believe that one of the simplest ways in which the Commission's educative role could be enhanced is for the Commission to provide a link on its website to Tribunal decisions. This suggestion is consistent with breaking the silo mentality that to some extent has characterized the operation of the three human rights agencies under their revised mandates. I note that the Tribunal provides the following description of how its decisions can be accessed:

> Decisions of the Human Rights Tribunal of Ontario are available from a number of sources:
>
> - Decisions released after January 1, 2000 can be accessed free of charge through the Canadian Legal Information Institute.
> - Paper copies are available from the Ontario Workplace Tribunals Library, which is open to the public at 505 University Avenue, 7th floor, Toronto.
> - Decisions are also available from: Canadian Human Rights Reporter and Quicklaw for a fee or subscription.

I do not consider the Commission providing a link to the Tribunal's home page as a satisfactory alternative to a direct link to the Tribunal's decisions, since further navigation would be

required; however, this is an issue that is best left for the Commission to decide. The idea is to assist users in quickly accessing relevant human rights decisions that would inform their particular issue.

Recommendation 29:

The Commission should provide a link on its website to provide access to Tribunal decisions.

5. Coordination of the Commission's Receipt of Pleadings from the Tribunal

The Commission and the Tribunal need to be better coordinated in order for the Commission to monitor cases before the Tribunal. Presently, pursuant to s.38 of the *Code*, at the request of the Commission, the Tribunal must forward a copy of each application and response filed with the Tribunal. The Tribunal is performing this task; however, the practice has evolved over time, starting with the delivery of hard copies.

The current practice is that on a weekly basis, all new complete applications and responses are uploaded to a directory on the Commission's system. From time to time, the Commission also makes requests for specific information. Such requests are handled on an individual basis.

I find that the method by which these pleadings are being shared does not appear to be as efficient as possible from a systemic perspective. The Commission's perspective is that if it could receive the pleadings electronically from the Tribunal with some form of database characterization or coding intact, it would reduce the onerous task at the Commission end of extracting key information from the pleadings. The Tribunal, now part of the Social Justice cluster, is concerned that the Commission not have or not be seen to have access to the

Tribunal's case management system, particularly since the Commission is often a party before the Tribunal. From my viewpoint, it appears that insufficient attention has been paid by the Tribunal and Commission to resolving their differences over the "sharing of pleadings" issue.

Recommendation 30:

The Tribunal and Commission should coordinate more closely to fulfill the *Code* objective of the Commission receiving pleadings filed with the Tribunal; and the Tribunal should assist the Commission by eliminating duplication of effort in terms of capturing and analyzing the critical information contained therein.

6. Tabling of Annual Reports

Under the *Code*, all three human rights agencies are required to submit annual reports of their activities. The Centre and the Tribunal must make their reports to the Attorney General. The Attorney General is required to submit the annual reports to the Lieutenant Governor in Council who is responsible for tabling the report before the Legislative Assembly. The Commission submits its annual report directly to the Speaker of the Legislative Assembly.

The Centre must submit an annual report to the Attorney General within four months after the end of its fiscal year. The Centre's fiscal year ends on March 31.

The Tribunal must provide its annual report to the Attorney General no later than June 30 of each year.[82] The Commission must submit an annual report of its affairs to the Speaker no later than June 30 of each year. The Commission must give a copy of the annual report to the Attorney General at least 30 days before it is submitted to the Speaker.

[82] The Tribunal's annual report for 2010-11 is included in the annual report of the Social Justice Tribunals cluster.

The Ontario government's Agency Establishment and Accountability Directive also sets out requirements for annual reports. Under the Directive, all agencies, except advisory agencies, are required to submit an annual report to the responsible minister within 120 days of their fiscal year end, unless otherwise specified in legislation. Agencies, such as the Tribunal, that do not have a governing board, must submit the report to the minister within 90 days of their fiscal year end. The ministry must table annual reports in the Legislative Assembly within 60 days of receiving the report.

The Standing Committee on Government Agencies of the Legislative Assembly of Ontario recommended in its Report on Agencies, Boards and Commissions, dated March 2010, that the Human Rights Tribunal's Annual Report should be tabled in the legislature as soon as practicable. However, in examining the annual reports of the three agencies, I determined that while the Commission released its annual reports in a timely manner, the public availability of the annual reports of the Centre and the Tribunal was delayed. The Ministry indicated that it had a high volume of annual reports to be tabled with the Legislature. The Ministry recognizes that there has been a delay in tabling annual reports of the human rights agencies and, over the course of the Review, MAG tabled all submitted reports with the legislature, thereby making them public. The Ministry has committed to timely tabling of all future annual reports. The timely tabling of the human rights agencies' annual reports is an important accountability mechanism that allows the public and their elected representatives to determine how these publicly funded agencies are operating. I consider a recommendation necessary to underscore the importance of making these annual reports public in as timely a manner as possible.

Recommendation 31:

The Attorney General should table the annual reports of the Human Rights Legal Support Centre and the Human Rights Tribunal of Ontario in the Legislative Assembly within 60 days of receiving the report, as provided for in the Agency Establishment and Accountability Directive.

7. Aboriginal Engagement with the Human Rights System

The Review received feedback from several stakeholder groups and individuals that persons of Aboriginal ancestry are not engaging with the Ontario human rights system, and in turn, that the human rights system is not responding effectively to the needs of Aboriginal communities and individuals. At the same time, Aboriginal people in Ontario experience discrimination on a frequent basis. The Review heard the following submission on the daily reality of racism and marginalization experienced by Aboriginal people in that stakeholder's community:

> Racism is so entrenched in the lived experience of Aboriginal people in Thunder Bay that they often do not correctly identify an incident as a violation of their basic human rights, or, they are so disempowered that there is a feeling of hopelessness to be able to change a situation or hold someone accountable for the discrimination. A substantial number of Aboriginal people are marginalized and don't have a lot of hope that there is an opportunity to make right some of the injustices and violations of human rights that they experience. So many of these situations happen on a daily basis and have become a part of the lived experience of Aboriginal people. Whether it's being followed at a retail store, being denied access to timely and adequate health services, keeping an appointment to see a vacant apartment only to be told that it is now rented, or not being offered a suitable employment opportunity, Aboriginal people are discriminated against on a daily basis.[83]

The lack of engagement between Aboriginal communities and the Ontario human rights system has long been noted. The Cornish Task Force (1992) heard from stakeholders that

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[83] Submission of the Thunder Bay Urban Aboriginal Advisory Committee and Thunder Bay Urban Aboriginal Strategy.

Ontario's human rights system at that time was "woefully inadequate" in preventing institutional and systemic violations of the human rights of Aboriginal people. The Cornish Report identified as areas of concern the disempowering effect of the human rights system which forces Aboriginal people to participate in a process that is not their own and the lack of access to the human rights system, given the system's low visibility and the lack of confidence in the system by Aboriginal people.

It would be incorrect and unfair to suggest that no efforts have been made by the human rights agencies to address discrimination faced by Aboriginal persons. Focusing on the present, both the Centre and the Commission have undertaken activities aimed at increasing access to the human rights system by Aboriginal people. The Centre has prioritized outreach to Aboriginal people and Aboriginal communities. To this end, the Centre has met with stakeholders from a number of Aboriginal associations and service providers, and sought to form relationships with these groups and offer public legal education opportunities. The Centre has an Aboriginal issues committee that has worked to develop service guidelines for individuals who self-identify as being of Aboriginal ancestry. One of the Centre's staff lawyers is designated as an Aboriginal Services and Outreach Coordinator. As well, the Centre has hired an Aboriginal lawyer as a permanent staff member, based in Thunder Bay. The Centre has also identified the need to provide more locally based services, and would like to expand its services in particular to northeastern Ontario communities. The Centre also supports the development of an Aboriginal-led agency or increasing funding to existing Aboriginal organizations to increase delivery of human rights legal services to Aboriginal people *by* Aboriginal people.

The Commission has also sought to increase its engagement with Aboriginal communities and individuals through education and relationship-building activities. In its most recent 2011-12 annual report the Commission notes that it has undertaken activities such as delivery of a one-day human rights training session for staff of the Union of Ontario Indians in North Bay; meeting with the Nipissing First Nation to take part in a two-day educational workshop focused on preparing First Nations governing authorities for the repeal of section 67 of the Canadian *Human Rights Act,* as well as providing training on the introduction to the Ontario *Human Rights Code;* meeting with Nishnawbe-Aski Legal Services Corporation in Thunder Bay, and delivering a presentation at the Indigenous Bar Association annual conference in Ottawa. The Commission is also participating in the proceedings of the Truth and Reconciliation Commission of Canada. As well, a number of Commission publications, such as the Policy and Guidelines on Racism and Racial Discrimination, address issues such as the racial profiling of Aboriginal people, and the racism and discrimination experienced by Aboriginal communities and individuals.

The consultations revealed that many stakeholders, particularly those in northern Aboriginal communities saw my Review as an opportunity to remind the key players in the human rights system, as well as Ontario government, of the unique ongoing and historical systemic barriers faced by Aboriginal people. Increasing Aboriginal people's access to the human rights system therefore requires not only increasing legal services and public legal education opportunities for Aboriginal people, but it also requires a strategy focused on capacity-building and eliminating the systemic barriers that prevent Aboriginal people from bringing forward human

rights complaints.

The Review recommends the development of a coordinated strategy by the Commission and the Centre to increase the engagement of Aboriginal peoples in the Ontario human rights system. I acknowledge that the Centre and the Commission have already recognized greater Aboriginal engagement in the human rights system as a priority area, however, it does not appear to be the case that, following the *Code* reforms, the two agencies have *coordinated* their efforts to determine what initiatives, within their respective mandates, would effectively advance the strategy. For instance, I believe it would make sense for the Centre to identify a group of complaints from Aboriginal persons with regards to the same respondent or a similar issue and have the Centre approach the Commission to consider bringing forward a Commission-initiated application at the Tribunal. I can also envisage a situation where the Commission and Centre each have their own Aboriginal outreach and engagement activities which may involve training and education with respect to the human rights system. It would make sense for the Centre and Commission not to duplicate efforts.

With respect to the actual elements of a coordinated strategy to increase Aboriginal engagement in the Ontario human rights system, in my view, they should include:

- Identifying the key barriers that have historically prevented and continue to prevent persons of Aboriginal ancestry from utilizing the *Code* to address discrimination and racism;
- Ensuring that Aboriginal communities and individuals are aware of their rights under the Ontario human rights system, the system's enforcement methods and the availability of legal services through the Centre and the Commission;

- Providing human rights education and training initiatives to Aboriginal associations and representatives in conjunction with Aboriginal-led service providers;
- Increasing the capacity of Aboriginal-led service providers to deliver legal services and/or provide assistance and support in accessing the human rights system;
- Developing legal and other strategies aimed at eliminating and preventing discrimination against Aboriginal people, whether through targeted legal action in applications before the Tribunal, and/or through other Code mechanisms such as public inquiries, education and training; and
- Determining whether the Commission should develop a separate Policy and Guidelines on Discrimination and Racism faced by Aboriginal Persons, as a distinct policy from the Commission's present Policy and Guidelines on Racism and Racial Discrimination. Such a policy may offer guidelines and standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the Code, specifically with respect to the prevention of racism and discrimination vis-à-vis Aboriginal people and communities. This policy could also identify statistics and data related to discrimination against Aboriginal people, and provide an important contextual framework for understanding the historical and present day human rights and socio-economic issues faced by Aboriginal people and communities.

Recommendation 32:

The Commission and Centre should coordinate on a strategy to increase the engagement of Aboriginal persons in the human rights system.

8. Human Rights Costs Regime

The Tribunal does not currently have the explicit power under the *Code* to order unsuccessful parties to indemnify successful parties for their legal costs. The Supreme Court's decision in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 ("*Mowat*"), effectively states that without a clear legislative grant of authority, human rights tribunals are not able to order costs.[84]

I have concluded that there is an absence of empirical evidence on the effect that a costs regime, or the absence of a costs regime, has upon the strategic decision-making of litigants. Many of the groups and individuals that made submissions to the Review presented various assumptions about how costs regimes affect decision-making in litigation, and some presented anecdotal evidence, but no submissions contained empirical evidence with a sufficiently large sample size to facilitate an informed recommendation one way or the other. I have not been able to identify such empirical data in Canada. After much reflection, and as I am cognizant of the importance of this issue not only to the human rights system, but to the wider administrative justice sector in Ontario and Canada, my recommendation is to maintain the status quo for now, but to encourage the MAG to investigate and report back on the merits of a costs regime for the Tribunal based on empirical data from applicants, respondents and others in the human rights system, including the three human rights agencies.

Court Systems

[84] Although s.17 of the *Statutory Powers Procedure Act*, RSO 1990, c S.22 ("*SPPA*"), permits administrative tribunals to award costs where the conduct of a party has been unreasonable, frivolous or vexatious, or a party has acted in bad faith, the Tribunal has not made rules of procedure for such an award of costs as required by s. 17(2)(b) of the *SPPA*.

I heard oral submissions and reviewed written submissions about the costs issue from a wide variety of stakeholders and interested members of the public. Many of these submissions drew comparisons between the human rights process and other legal processes in Canada.

The civil justice system in Ontario requires unsuccessful litigants to indemnify successful litigants for a portion of the successful litigant's legal expenses. There are a number of commonly cited policy rationales for this approach. The most predominant rationale is that a party vindicated at trial should not be made to bear all of its own costs in arguing what turned out to be a meritorious position. Conversely, the party that argued an unmeritorious position should not avoid responsibility for putting the other side to considerable and ultimately unjustified, expense.[85]

Some of the other policy rationales cited for the existence of a costs regime in civil litigation include:

- to encourage settlement
- to deter frivolous actions and defences
- to discourage unnecessary steps in litigation
- to encourage parties to make or accept reasonable settlement offers
- to sanction behavior that increases the duration and expense of litigation[86]

Broadly speaking, these policy rationales can be summarized as an effort to control errant behavior on the part of litigants. Errant litigation behavior is seen as bad for the civil justice

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[85] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 SCR 371.
[86] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 SCR 371.

system as a whole, and unfair to parties on the receiving end, and there is a public interest in controlling it.[87]

The Tribunal is not equivalent to the civil courts. It is a specialized administrative tribunal charged with applying the *Human Rights Code*, a quasi-constitutional statute. The principles that shape civil procedure are not necessarily the same principles that should motivate procedural reform at the Human Rights Tribunal.

In criminal procedure, there is no statutory provision for costs, although costs have very rarely been awarded based on the common law. There are several rationales commonly cited for this, one being that an accused person is presumed innocent and cannot be faulted for defending his or her innocence. Another related rationale is that where an individual's liberty interest is at stake there is a risk that any costs regime that imposed costs on accused persons would run afoul of s. 7 of the *Charter*. From the Crown perspective, there are policy reasons for not subjecting prosecutorial discretion to the risk that costs might be awarded.[88] The public interest in prosecuting crimes against society would not be served if prosecutions were never commenced or abandoned due to fear of an adverse costs award.

The Tribunal, and the entire human rights system post-2008, is also not analogous to the criminal courts. However, the human rights system is arguably more akin to the civil justice system than it is to the criminal system. Although, like the criminal system, a similar public interest informs the human rights system – unlike purely private disputes. There is no

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[87] Agarwal, Ranjan, The Costs of Human Rights Complaints: Should Litigants Be Indemnified for their Legal Costs In Human Rights Proceedings?, Ontario Bar Association, Annual Update on Human Rights: Keeping on Top of Key Developments, June 2011.
[88] *R. v. Brown*, 2009 ONCA 633

dedicated state prosecutor in the human rights system – it is up to each applicant to advance his or her case as a party, whether or not the application was brought in the public interest. The onus is initially on the applicant to demonstrate a *prima facie* case of discrimination and then the respondent to rebut that assertion. The burden of proof in human rights matters is also on the civil standard of a balance of probabilities ("is it more likely than not?"); rather than the "beyond a reasonable doubt" standard used in criminal proceedings. Like the civil system, wrongs are primarily addressed in the human rights system through the payment of damages by the respondent and the making of mandatory or prohibitive orders – there is no liberty interest at stake in human rights proceedings.

Other Human Rights Systems

Moving towards a human rights costs regime would not be unprecedented. Most jurisdictions in Canada do make provision for some form of costs orders in human rights matters. Only Ontario, New Brunswick, and the federal jurisdiction are silent with regard to costs, and following *Mowat*, it is highly likely that the Ontario Tribunal is not currently able to order costs.[89] In any event, the Ontario Tribunal's own jurisprudence has ruled out the possibility of making costs awards under the regime as presently constituted.

British Columbia, Manitoba, Saskatchewan, Northwest Territories, Nunavut, and Yukon, provide for costs in matters where a claim was frivolous or vexatious.[90] Ontario could theoretically do the same under the authority of the *SPPA*, except the Ontario Human Rights Tribunal has not enacted rules of procedure for costs. The jurisdictions that do allow costs in

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[89] *Supra*, note 4 at p.3.
[90] See, for example, *Human Rights Code*, RSBC 1996, c 210, s 37(4); *The Human Rights Code*, CCSM c H175, s 45; *Saskatchewan Human Rights Code,* SS 1979, c S-24.1, s 29.8.

cases of frivolous or vexatious conduct by litigants, primarily establish this power directly in their respective human rights codes.

In Alberta, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, and Saskatchewan, human rights tribunals can award costs on a discretionary basis.[91]

Other Administrative Decision-Makers

The Tribunal is part of the shifting landscape of administrative law in Canada. The Tribunal has been part of the Social Justice Tribunals Ontario cluster since 2011. The other tribunals within the cluster are:

- Child and Family Services Review Board
- Custody Review Board
- Landlord and Tenant Board
- Ontario Special Education (English) Tribunal
- Ontario Special Education (French) Tribunal
- Social Benefits Tribunal

The majority of these Tribunals do not order costs. The Landlord and Tenant Board, however, does order costs, though not on the same model as the civil justice system. Rule 27 of the Landlord and Tenant Board's rules of procedure provides that pursuant to s. 204(2) of the *Residential Tenancies Act*, the Board may order a party to an application to pay the costs of

[91] See, for example, *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 32(2); *Human Rights Act*, RSNS 1989, c 214, s 34(8).

another party. These costs may include an amount for (a) representation/preparation fees; and (b) other out-of-pocket expenses.

Where the Board orders a party to pay the representation/preparation fees incurred by another party, these fees are not to exceed $100 per hour for the services of a paid agent or legal representative. The total amount ordered for representation/preparation fees is not to exceed $700 in respect of the proceedings as a whole. The Landlord and Tenant Board treats costs awards as a discretionary matter, similar to the approach taken by several human rights tribunals in other jurisdictions in Canada.[92]

As an administrative decision-maker, the Tribunal is not alone in lacking a costs regime, even outside the Social Justice Cluster. For the example, the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") does not make costs awards, and neither does the Ontario Labour Relations Board. On the other hand, the Landlord and Tenant Board does award costs, as discussed above. The Ontario Municipal Board ("OMB") also makes costs orders.
Some administrative regimes have what can be described as asymmetrical costs rules. For example, in an unjust dismissal complaint brought under the *Canada Labour Code*, the jurisprudence has confirmed that costs are available to a successful complainant as part of a "make whole" remedy, but not to a successful respondent.[93]

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[92] Landlord and Tenant Board: Interpretation Guideline on Costs: http://www.ltb.gov.on.ca/en/Law/STEL02_111885.html.

[93] CLC adjudicators have in the past held that, "one of the purposes of costs is to ensure that the award is not reduced because the employee is required to pay legal fees" [*Wilson v. Mowachaht/Muchlat First Nation*, [2000] C.L.A.D. No. 147 at para. 21]. See also, this argument in favour of asymmetrical costs provisions in human rights regimes: Froc, Kerri A., "Mowat v Canada – The difference costs make to access to justice and the human rights culture in Canada" Touchstones, The CBA Standing Committee on Equality Newsletter (June 2011) online: Canadian Bar Association <http://www.cba.org/cba/newsletters-sections/pdf/2011-06_equality_mowat.pdf>.

There are numerous ways to highlight the similarities and differences between the interests at stake in each of these tribunals' particular areas of jurisdiction. However, drawing comparisons between different tribunals has limited utility in determining whether or not the Human Rights Tribunal of Ontario should have a costs regime. One issue is that it is not clear that the approaches that other tribunals take with regard to costs are actually effective for those tribunals.

Like the Tribunal, the Landlord and Tenant Board often serves litigants who are often economically and socially marginalized and who are ill-equipped to represent themselves. However, the Landlord and Tenant Board is not routinely dealing with the fundamental rights of parties.[94] The Workplace Safety and Insurance Appeals Tribunal (WSIAT) is likewise often serving marginalized persons, but does not have a costs regime. Impecunious injured workers who retain counsel to proceed at the WSIAT are often out of pocket substantially, even if successful in appealing a negative benefit entitlement decision. The Ontario Municipal Board (OMB) is often dealing with very well-financed private parties and municipalities using public funds. Its approach to ordering costs is arguably informed by the capacity of the parties that routinely appear at the OMB to pay costs.[95]

Applicants' Perspectives

I heard from many applicants and advocates for applicants during my public consultations across Ontario and by way of written submissions. The one concern that was overwhelmingly emphasized from the applicants' perspective was the fear that any costs regime at all would

[94] As defined by the *Charter*, housing is not a fundamental right, though it is in other jurisdictions around the world.
[95] OMB Decision PL050290 Jan 30 2009.

discourage some victims of discrimination, particularly the most marginalized and vulnerable, from bringing applications.

What concerned many from the applicants' perspective was that the potential applicant will fear a negative outcome on the merits of his or her case, and the possibility, even a remote one, of having to indemnify the respondent would effectively discourage an applicant from bringing a claim in the first place. In this sense, the imposition of a costs regime would impede access to justice.

However, the *lack* of a costs award may also impede access to justice by making it harder for individuals to retain counsel. Counsel may be reluctant to take human rights matters on a contingency-fee basis, or a deferred payment basis, if there is no prospect of an award of costs from which to satisfy all or part of the lawyer's fees. A costs regime for applicants may encourage more lawyers to represent applicants and thereby increase access to justice. This is especially true in the human rights regime where awards are routinely in the less than $5,000 range.

Overall, the most consistently expressed concern from applicants was that a costs regime of any kind, even the sort of muted costs regime in place at the Landlord and Tenant Board or in Small Claims Court,[96] would have a chilling effect on access to justice and would dissuade some people with legitimate claims from coming forward.

The less expressed view was that a costs regime would allow parties to not be out of pocket for engaging in a legitimate legal dispute. This minority view was that without a costs regime,

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[96] *Courts of Justice Act*, RSO 1990, c C.43, s. 29.

the pursuit of human rights issues may be uneconomical since the cost of legal fees would eclipse any damages award, and that would also dissuade some people with legitimate claims from coming forward. A particular asymmetrical model of a costs regime was proposed whereby applicants would recover costs if they were successful on the merits, whereas respondents would not recover costs unless the applicant's conduct was wholly unreasonable. Costs in this model would all be subject to the Tribunal's discretion. This model was said to respond to most of the policy concerns.

Respondents' Perspectives

I also heard from many respondents and respondents' advocates. Overall, respondents did not present a unanimous position on the issue of costs. Some noted that 81% of respondents retained counsel and that legal costs may be more of an issue for respondents than for applicants, who are often self-represented.[97]

In addition, it was noted that many respondents are public institutions and that their legal costs in responding to applications with no reasonable prospect of success are borne by all taxpayers. In particular, police forces, government employers, and government funded agencies such as the Workplace Safety and Insurance Board (WSIB), and the Toronto Transit Commission, receive a large volume of human rights applications. These types of respondents are virtually always represented by counsel and incur legal costs in responding to applications.

[97] See the section on the nature of representation before the Tribunal in Part III of the Report dealing with the Tribunal.

Many respondents held the view that it was unfair that the mandate of the Centre was to assist only applicants, and that there was no assistance provided to respondents. Respondent advocates noted that respondents are not a homogenous group. There are large corporations and government entities that are named as respondents, but there are also sole-proprietorships, family businesses, and landlords who rely on rental income for their basic living expenses. These respondents often have limited means to retain counsel and are not able to access the Centre.

The overall tenor of these submissions was that there was unfairness in the system when one side of the litigation can benefit from state-funded support, while the other side must shoulder the burden of litigation on its own. Concerns were expressed that an applicant's strategic decision-making may be modified by the existence of externally-funded support. For example, some applicants with Centre representation may refuse reasonable settlement offers if they are confident that they will not bear even their own costs in proceeding to a hearing. A suggestion from respondents was that in the absence of a support centre for respondents, a costs regime of some kind would work towards alleviating this alleged asymmetry at the point at which no discrimination was found.

Many respondents and respondents' advocates, however, were equivocal about a human rights costs regime, and preferred the status quo. The essential position of these respondents was that procedural tools and orders at the Tribunal would be more effective in controlling and limiting applications with dubious merits or involving unreasonable applicants. Indeed, as discussed in Part III, the Tribunal has introduced procedural measures such as the Summary Hearing process in an attempt to address this issue. Some respondents also questioned the

practicality of trying to enforce Tribunal costs orders against impecunious applicants. The proposed asymmetrical model of costs described earlier, whereby applicants would recover their costs if they are successful on the merits but respondents would not, was seen by a group of experienced respondents' counsel as manifestly unfair.

Finally, the Tribunal's perspective about administering a costs regime should be factored into the mix. Would the time and resources involved in making costs rulings be warranted? As some respondents pointed out, if the point of costs orders is to rein in unreasonable behavior could the Tribunal not accomplish this via procedural rulings instead? If Ontario introduced costs into its human rights system, shouldn't it also then consider settlement offers, which would also add a layer of complexity to costs rulings?

Conclusions

Virtually all of the submissions I heard on the issue of costs cast the pros and cons in terms of what *may* happen. Applicants *may* be reluctant to bring applications if there was a risk of an adverse costs award. Respondents *may* be more likely to make reasonable settlement offers if there was a risk of an adverse costs award. Lawyers *may* be more likely to represent parties if there was a prospect of recovering legal fees out of a costs award.

There is simply a dearth of empirical evidence about the effect that a costs regime would have on parties' decision-making in human rights litigation. Whether the proposed costs regime is modeled on the civil justice system, the Landlord and Tenant Board model, or the models employed by other human rights jurisdictions, it remains unclear what impact, if any, costs would have on access to justice and the elimination of systemic discrimination in Ontario.

Ultimately, the question of whether it would be sound policy to introduce a costs regime comes down to whether such a regime would serve the objectives of the *Code*. Would a costs regime increase access to justice? Would it serve the overall objective of eliminating discrimination in Ontario? At the moment, there are many assumptions about how this may play out, but no hard data. The necessary data would need to take into account several different scenarios:

- at what point would costs become an issue in human rights litigation, at the outset of an application, after motions or Requests for Orders, after mediation, or only if the matter proceeds to a hearing?
- would costs be capped as is done at the Landlord and Tenant Board and Small Claims Court?
- would costs be reserved for matters with no reasonable prospect of success, or would costs follow the cause in every case as in the civil system?
- if the Centre represented more applicants than it presently does, how would this affect the variables for a costs regime? And would the Centre or its clients be partially or fully responsible for paying the costs?
- would costs be discretionary or mandatory?
- would costs be asymmetrical (only applicants can receive their costs, as is done under the Canada Labour Code)?

These scenarios all require empirical data in order to make a properly informed recommendation as to whether the imposition of a costs regime in Ontario's human rights system would be good policy, and if so, what form such a regime should take. Rather than make a recommendation in favour of, or against, a costs regime, I am making a call for further research, data collection, policy analysis and preparation of a report. Out of the several

candidates who may be able to undertake this important assignment, MAG appears to be the most appropriate. I do not want to put an unrealistic timeline for completion of this project; however, I would anticipate that, if properly executed, it may take up to 18 months to complete the task. I am also mindful that, following the completion of the Review and with the hope and expectation that my recommendations will be adopted, the human rights system may be facing a period of change, particularly in respect of the Centre's ability to assist and represent more applicants.

I believe it is time that the question of a costs regime at the Ontario Tribunal not be put off any further. My recommendation to study the problem further should not be interpreted as a recommendation to do nothing or do very little over a very long time. The costs issue is an enormous challenge in the human rights system and unless it is approached properly, the costs of litigating human rights issues will continue to be a major consideration as to whether cases go forward.

The Question of Fees in the Human Rights System

Stakeholders provided conflicting feedback as to the value of introducing fees into the human rights system. The concerns raised about fees being a barrier to access to justice, or conversely, a legitimate control mechanism were similar, but not identical to the concerns related to costs.

Applicant stakeholders were concerned that fees would present a barrier to low-income applicants. It was suggested that even very modest fees would present a barrier to

marginalized applicants. Further, it was unclear what purpose fees would serve, because they would not be significant enough to generate a revenue stream for the Tribunal.

A few respondent stakeholders were marginally in favour of introducing fees into the human rights system, believing that fees would, if properly calibrated, represent a reasonable check on applicants filing frivolous or repetitive claims.

Overall, however, there did not appear to be much interest in introducing fees in to the human rights regime, because they were not seen as a substitute for costs. Standardized fees are predictable and that is likely a point in their favour. However, fees do not relate to the merits of the application, they do not help defray legal representation costs and are probably too low to deter unreasonable conduct. In other words, fees do not aim to fulfill the policy objectives of costs. If a filing fee were to be introduced, consideration should be given as to *when* fees should be imposed in the Tribunal applications process. At the entry point of application filing? Or at a later stage in the proceeding, such as a fee related to the scheduling of a Tribunal hearing, or to file a reconsideration request? There are advantages and disadvantages to each approach. I anticipate that the larger policy issue is related to costs, not fees, therefore I am reluctant to make a recommendation in relation to fees. However, I would leave the decision, as to whether to report back on fees in the human rights system, up to the Ministry of Attorney General, to whom I have directed a recommendation on costs.

Recommendation 33:

The Ministry of the Attorney General should investigate and publicly release a report in a timely manner on the merits of a costs regime for the Tribunal based on empirical data and policy considerations. This data could be obtained from multiple sources,

including applicants, respondents, other jurisdictions, social agencies, academic research, and the three human rights agencies.

9. Human Rights Cases in Court

With the amendments to the *Code*, s. 46.1 was enacted to provide a civil remedy for a breach of the *Code*.[98] This created a new substantive jurisdiction for Ontario courts to award monetary compensation and/or restitution for a breach of the *Code*. In order to utilize s. 46.1, a plaintiff must plead a recognized civil cause of action to properly bring the case before the court as well as a breach of the *Code*. This may occur, for example, where an employee alleges that she has been terminated from her job and her race is a factor in her termination. This would constitute a human rights element to a wrongful or constructive dismissal claim. It is important to note that s. 46.1 does not permit a person to commence an action based solely on a breach of the *Code*.[99] In considering s. 46.1, the courts have determined that it should be read prospectively only therefore bringing cases with human rights allegations pre-dating June 30, 2008 is barred.[100]

My research revealed 19 cases that addressed human rights within a civil action and 14 cases that specifically relied on s. 46.1 of the *Code*.[101] However, I was unable to identify a single

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[98] *Human Rights Code*, RSO 1990, c H.19, s. 46.1
[99] *Ibid.* s. 46.1(2)
[100] See, for example: *Dobreff v. Davenport*, 2009 ONCA 8, aff'g [2008] OJ No. 6001 (SCJ), leave to appeal to SCC dismissed, [2009] SCCA No. 96; *Leclair v. Ottawa (City) Police Services Board*, 2012 ONSC 1729; and *Mackie v. Toronto (City)*, 2010 ONSC 3801 at para. 58.
[101] *King v. Peel (Regional Municipality)*, 2012 ONSC 1730 (s. 46.1 not pleaded); *Leclair v. Ottawa (City) Police Services Board*, 2012 ONSC 1729; *Guhbawin Co-Operative Housing Incorporated v. Poulton*, 2011 ONSC 7169 (s. 46.1 not pleaded); *St. John's Evangelical Lutheran Church of Toronto v. Steers*, 2011 ONSC 6308; *Peel Condominium Corporation No. 542 v. Gorgiev*, 2011 ONSC 7211 (s. 46.1 not pleaded); *Russell v. York (Regional Municipality) Police Services Board*, 2011 ONSC 4619; *London Property Management Association v. City of London*, 2011 ONSC 4710 (s. 46.1 not pleaded); *Anderson v. Tasco Distributors*, 2011 ONC 269; *Kalen v. Brantford (City)*, 2011 ONSC 1891 (s. 46.1 not pleaded); *Jaffer v. York University*, 2010 ONCA 654, leave to

case where a human rights allegation was upheld. In a few cases, final decisions were rendered on the issue of a human rights violation, but the courts found that there was no discrimination.[102] Otherwise, the majority of cases considered s. 46.1 at the motion level or by way of application on such issues as jurisdiction, timeliness, whether the matter had been properly pleaded, certifying a class action, or seeking a declaration from the court. In some cases, especially at the appellate level, the court has engaged in a more detailed analysis of s. 46.1 in order to clarify its meaning and utility to plaintiffs. The jurisprudence has been clear that s. 46.1 provides substantive jurisdiction to Ontario courts and permits a plaintiff to advance an allegation before the courts and seek damages for a breach of Part I of the *Code* along with an otherwise properly pleaded cause of action.

My consultations with Ontario employment lawyers suggested that human rights allegations under s. 46.1 of the *Code* are often pleaded in a wrongful or constructive dismissal matters. However, pleading a violation of the *Code* is as much for tactical tax considerations as it may be for substantive human rights reasons. It appears that at mediations or settlements following a civil pre-trial, a number of these cases were resolved by converting damages that would have been characterized as "in lieu of income" and therefore taxable to non-taxable human rights damages. In many of these cases, there is a set of facts setting out an arguable case

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appeal to SCC dismissed, [2010] SCCA No. 402; *Cerqueira v. Ontario*, 2010 ONSC 3954; *Mackie v. Toronto (City)*, 2010 ONSC 3801; *Aba-Alkhail v. University of Ottawa*, 2010 ONSC 2385; *Stokes v. St. Clair College of Applied Arts and Technology*, 2010 ONSC 2133; *Parapatics v. 509433 Ontario Ltd. (c.o.b. Perth Precision Machining and Manufacturing)*, [2010] OJ No. 861 (Sm. Cl. Ct.); *Halton Condominium Corporation No. 59 v. Howard*, [2009] OJ No. 3566 (SCJ); *Dwyer v. Advanis Inc.*, [2009] OJ No. 1956 (SCJ); *Andrachuk v. Bell Globe Media Publishing Inc. (c.o.b. Globe and Mail)*, [2009] OJ No. 461 (SCJ); *Dobreff v. Davenport*, 2009 ONCA 8, aff'g [2008] OJ No. 6001 (SCJ), leave to appeal to SCC dismissed, [2009] SCCA No. 96.

[102] *King*; *Parapatics*; *Dwyer*.

for breach of the *Code*; therefore I do not mean to suggest that parties or their counsel have no basis upon which to argue s.46.1.

In my review of legal education materials presented since 2008 – in particular labour, employment and human rights materials – while there has been some discussion of the *Code* amendments and s. 46.1,[103] it did not appear that much attention has been paid to this provision. Moreover, I am unaware of any specific judicial seminars on s. 46.1 of the *Code* that have been presented. Given the dearth of s. 46.1 court decisions and the apparent lack of any successful s.46.1 case in the four years after *Code* reforms, it appears that s.46.1 has not provided the kind of alternative venue or "relief valve" to the Tribunal for human rights cases that was discussed under Bill 107.

I draw that conclusion with caution noting that judicial consideration of 46.1 would only be evident from written decisions and only very small percentage of civil cases (particularly employment cases). While I do not believe that a recommendation follows, I would encourage members of the Bench and Bar or groups like the Ontario Bar Association, County and District Law Associations or the Advocates' Society to inquire from their members about their knowledge, practices and experiences, if any, in bringing human rights cases in civil court. These groups may also wish to canvass members of the judiciary to determine if judicial education concerning the court's approach to s.46.1 of the *Code* is necessary.

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[103] See, for example: Cherolyn R. Knapp, "Update on Human Rights Remedies 2010-11" in *Annual Update on Human Rights: Keeping on Top of Key Developments* (Ontario Bar Association, Continuing Legal Education, June 10, 2011); Cherolyn R. Knapp, "Update on Human Rights Tribunal Remedies and Human Rights Activity in Ontario's Civil Courts 2011-12" in *Annual Update on Human Rights: Keeping on Top of Key Developments* (Ontario Bar Association, Continuing Legal Education, June 8, 2012); and Janice B. Payne, Beth Symes & Steven P. Williams, "Terminations & Discrimination: A Panel Discussion" in 10th Annual Employment Law Summit (The Law Society of Upper Canada, Continuing Legal Education, October 29, 2009).

10. The Budget of the Human Rights System

A review of the budgets of the human rights agencies from 2004 to 2011 indicates that the Ontario human rights system is better funded in the post-*Code* reform era than previously.

	2003/04[1]	2004/05	2005/06	2006/07	2007/08	2008/09[2]	2009/10[3]	2010/11	2011/12
OHRC	12.2	12.5	12.9	13.4	13.9	13.7	5.9	5.5	5.6
HRTO	0.87	0.99	1.0	0.93	0.94	9.9	11.1	9.1	9.1
HRLSC	N/A	N/A	N/A	N/A	N/A	4.6	5.3	5.3	5.3
TOTAL	**13.0**	**13.4**	**13.9**	**14.3**	**14.9**	**28.2**	**22.3**	**19.9**	**20.1**

Notes

Based on Printed Estimates in $M

1 - 2003/04 - The OHRC and the HRTO were transferred from the Ministry of Citizenship to MAG

2 - 2008/09 - The HRLSC budget reflects 9 months of operation (established as of June 30, 2008)

3 - 2009/10 - The HRTO budget included additional funding to address s. 53(3) and (5) transitional cases

Between fiscal years 2003-04 and 2007-08, the human rights system consisted of the Commission and the Tribunal. The total funding for both agencies rose from approximately $13 million in 2003-04 to approximately $15 million in 2007-08, with the Tribunal's budget being approximately $1 million of that amount. In 2008-09, with the Code reforms coming into force, and a third agency, the Centre, coming into existence, the provincial government injected a large infusion of one-time funding into the system. The total budget of the human

rights agencies for 2008-09 was approximately $28 million. The infusion also attempted to allow the Commission and the Tribunal to tackle the backlog of cases that had developed at the Commission. For the last two years, since 2010, the human rights budget has been approximately $20 million, consisting of $9.1 million for the Tribunal, $5.6 million for the Commission, and $5.3 million for the Centre. Since 2011, the Tribunal has become part of the SJTO cluster.

In making a budget recommendation, I kept in mind several factors.

A human rights system without adequate funding compromises fundamental rights. All the talk of "quasi-constitutional" rights would be for naught if there was inadequate funding in place for Ontario's human right system. In budgetary discussions, we should not lose sight of what is ultimately at stake: the inclusion and advancement of millions of Ontarians in workplaces, retail, social and cultural sectors. The ability of diverse Ontarians to participate in and contribute as fully as possible to the life of the province is critical to our success and economic wellbeing.

Ontario's government, which funds the human rights system, is presently operating in a challenging fiscal environment. The terms of reference for my Review indicate that, where appropriate, I am to offer advice to the government regarding best practices that should be supported and any advice for enhancing the effectiveness of Ontario's human rights system; and that any advice developed should be cognizant of the challenging fiscal context for government and should provide costs and relative benefits.

At the time of my review in 2011-12, according to the Drummond Report:

> Ontario faces more severe economic and fiscal challenges than most Ontarians realize. We can no longer assume a resumption of Ontario's traditional strong economic growth and the continued prosperity on which the province has built its public services. Nor can we count on steady, dependable revenue growth to finance government programs. Unless policy-makers act swiftly and boldly to prevent such an outcome, Ontario faces a series of deficits that would undermine the province's economic and social future.[104]

I take my terms of reference seriously and I accept that making a recommendation that is likely not to be accepted – because it is viewed as fiscally irresponsible in the present bleak economic climate – makes no sense. However, I also note that:

Each Ontarian spends $1.57 per year on the human rights system.[105] Viewed in these terms, it is fair to ask whether the paltry human rights budget should bear any of the responsibility of "reducing the budget" in harsh fiscal times? Funding for human rights agencies faces a paradox: everyone wants "more" done for less funding. In *Restraining Equality: Human Rights Commission in Canada*, professors Howe and Johnson describe the paradox of human rights policy and, in particular, the funding constraints:

> The tensions facing all those interested in human rights policy and administration are complex. The Canadian public is rights conscious, generally supports the expansion of individual human rights policies and protections, and wants governments and commission to "take rights seriously." Rights advocacy groups, moreover, emphasize that rights legislation must be expanded in order to combat the discrimination that still exists in society. They are demanding that codes be strengthened; that individuals be given stronger protections from discriminatory treatment; that rights protections be extended to address collective matters such as affirmative action, employment equity, and systemic discrimination; that commissions be given increased funding to prosecute their work; and that rights procedures be simplified to reduce case delays and improve case handling.

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[104] Commission on the Reform of Ontario's Public Services, Public Services for Ontarians: A Path to Sustainability and Excellence, Chair Don Drummond ("Drummond Report"), Executive Summary.

[105] Ontario's population in 2011 was 12,851,821 and the budget of the three human rights agencies for 2011-12 was $20,133,200.

> Yet the Canadian public also acknowledges that governments are facing problems. Canadians are generally leery of program initiatives that would increase taxes, and want governments to exercise more restraint in their undertakings. Business advocacy groups as well as some policy analysts, such as Crawford, stress the need for governments and human rights commissions to be much more restrained in how they apply rights policies. These voices call for prudence in the development of rights protections and for the careful management of rights enforcement. They emphasize that governments and commissions should refrain from promoting collective rights that do not have widespread public support and that inflict harm on business. They also contend that commissions should concentrate on their basic tasks – dealing with individual complaints of clearly unjustifiable discrimination – and pay close attention to the rules of due process. Such analysts claim that by holding to this restricted approach to rights enforcement, commissions could do much more with less.[106]

In trying to strike a balance between fiscal responsibility and recognizing the importance of adequate funding for human rights enforcement, I find that the absolute budget for the human rights system is still very small. Despite the government increasing the overall human rights system by about $6 million or over 40% – it was typically around $14 million before the Code reforms and is now $20 million - the overall amount is low in response to the serious and long-standing problem of discrimination in society. Accordingly, I am strongly opposed to any reduction in the budget of human rights agencies, even in the present economic climate. However, I also accept that if the present budget is $20 million, a recommendation should be made in relative, not absolute, terms; and tied to strategic objectives that are related to my findings and recommendations.

In reviewing the recommendations that I have set out in this Report, I attempted to gauge which recommendations are likely to require additional funding of the human rights agencies' budgets.

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[106] R. Brian Howe and David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000), pp.157-8.

Likely to impact budgets:

- The Centre should reduce telephone wait times, advise callers of wait times while on hold, and reduce initial interview wait times for non-urgent inquiries to less than 30 days (Recommendation 17)

- The Centre and Tribunal should coordinate to reinstitute a Centre Duty Counsel service (Recommendation 18)

- The Centre should expand placement of Centre staff in legal community clinics outside Toronto (Recommendation 19)

- The Commission should develop litigation strategy at the Tribunal focused on cases involving systemic deprivation of rights, and should initiate applications and intervene at Tribunal consistent with this strategy (Recommendation 20)

- The Commission should re-establish incoming public telephone line (Recommendation 22)

- The Commission should engage in more initiatives in the private employment sector (Recommendation 24)

- The Commission should offer summary advice and information to assist respondents (Recommendation 25)

- Commission and Centre should coordinate on strategy to increase engagement of Aboriginal persons (Recommendation 32)

As well, earlier in my Report I discussed my key finding that the Centre's representation of 12% of applicants before the Tribunal is inadequate; and that applicants with meritorious cases who cannot otherwise find legal representation and who would be unable to navigate the Tribunal's processes are having their needs unmet. The part of this finding that translates into a budget recommendation is that the government must significantly improve the Centre's funding to tackle this problem.

Based on the above analysis it is apparent that the Centre and the Commission will require more resources than they currently have to accomplish those tasks which go towards their primary mandates – for the Centre, it is providing more assistance and representation to Ontarians who believe they have faced discrimination; and for the Commission it is promoting human rights in the province, including through strategic litigation at the Tribunal. Although I have made a number of recommendations regarding the Tribunal, I do not believe they will necessarily require that additional funds be directed to the Tribunal's budget in the near term. It is also difficult to make a budgetary recommendation concerning the Tribunal given the creation of the SJTO cluster which will have budgetary implications for the Tribunal.

Recommendation 34:

The Ministry of the Attorney General should, in the very near term, increase funding for the Centre and the Commission. Relative to their present budgets, the Centre's funding should be increased significantly and the Commission's funding should be increased somewhat so that the two agencies can address the findings and implement the recommendations made in this Report and better fulfill their statutory mandates.

PART VII - CONCLUSION

The *Human Rights Code Amendment Act, 2006,* formerly Bill 107, brought about fundamental changes to Ontario's human rights enforcement system. Representatives of the human rights agencies suggested that that it is only now some four years later that the "new system" is getting off the ground. Having closely examined the operation of the agencies, I agree. My Review occurred at about the earliest possible opportunity to realistically assess the "implementation and effectiveness of the changes" to the new system.

Although over four years have passed since the *Code* reforms came into effect, the reality is that "the paint isn't quite dry" on the newly renovated human rights system. All three agencies appear to be still trying and testing various policies, programs and operations within their revised mandates. This was most evident in the evolution of the case-management systems for the Tribunal and the Centre; and the process changes introduced by the Tribunal in 2010, such as moving to half-day mediations; and introducing Rule 19A which allows cases to be dismissed that have "no reasonable prospect of success". The Commission too, in the last year alone, has commemorated the 50th anniversary of the Code, launched its brand new website and issued two important new reports.[107] The human rights agencies have been very active since the reform of the *Code*.

I note that in 2010, stakeholders commenting on British Columbia's direct access human rights system, which was introduced in 2003, expressed the view that despite the passage of 7

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[107] *Policy on Competing Human Rights* (April 2012) and *Minds that Matter: Report on the Consultation on Human Rights, Mental Health and Addictions* (September 2012).

years, “the [B.C.] direct access human rights system is only now just getting off the ground.”[108] Perhaps the first conclusion to be drawn is that change takes time and that it may take a long time before the impact of the agencies’ process improvements can be ascertained. Still, having heard from hundreds of Ontarians and dozens of organizations about their experiences with the new system, and having analyzed available statistics from the last four years and met with the key decision makers in the human rights system, I am keen to share my observations about how the province’s human rights system is working, and how it could work better.

Overall, I conclude that the Ontario human rights system is working better in many respects than under the previous *Code*; but I would declare the reforms a “qualified success” since there remain a number of challenges in the revised system.

A. The Tribunal

In response to the first question raised by my Terms of Reference, I find that the redesigned Tribunal is providing quicker and direct access for applicants and a fair dispute resolution process for all parties, including respondents. Under the revised *Code*, the Tribunal is able to handle a greater volume of complaints without accumulating a backlog; applications are processed faster; there is greater transparency to the Tribunal’s decision-making achieved through the public availability of procedural and substantive written decisions; there is a significantly greater volume of final decisions decided on their merits; the Tribunal’s rulings on

[108] British Columbia Law Institute, Workplace dispute Resolution Project, Report to the Ministry of Labour and the Ministry of the Attorney General, October 31, 2010.

discrimination appear impartial; and public interest remedies are routinely awarded where discrimination is found.

The appointment of adjudicators to the Tribunal appears to be merit-based and stakeholders were generally complimentary about Tribunal members' knowledge of and experience in human rights. The quality of the Tribunal's mediation and adjudication services is generally well-regarded and considered fair by both applicant and respondent-oriented stakeholders. The Divisional Court has only rarely found the Tribunal's decisions to be unreasonable. The Tribunal's inclusion in the SJTO cluster which was established in January 2011 is also, in my view, a positive development. The Tribunal's decisions and operations will be, and will be seen to be, part of a larger administrative justice framework.

On balance, the Tribunal's approach to deferral and/or early dismissal of applications also appears to be fair. The Tribunal seems to have an adequate screening mechanism in place for entirely unmeritorious cases. However, the Tribunal needs to do a better job of weeding out these cases *faster and earlier* in the application process. Many respondents are frustrated, for instance, that it is taking too long for their dismissal motions to be heard. This results in respondents having to take the next step in the main proceeding while still waiting for the Tribunal's decision on a preliminary threshold issue. While I do not make a specific recommendation in this area, I encourage the Tribunal to focus its efforts on addressing this problem.

With respect to concerns about the Tribunal potentially re-examining disputes where another Act applies, I find that the Tribunal's approach has been consistent with the law. As of October 2011, appellate courts set down binding legal rulings that greatly narrow the ability of applicants to re-litigate cases at the Tribunal which have been or could be dealt with in parallel proceedings. I anticipate that the Tribunal will continue to deal with these sorts of applications on a case by case basis consistent with the new more restrictive approach.

The Tribunal has experienced difficulties in a number of areas. The Tribunal forms, which were innovative for their time, appear to be more complicated than necessary. Not as many mediations are taking place as compared to available applications; and the Tribunal's average rate of resolving mediations, 65%, is lower than the 70% plus average established by the Commission for mediations conducted under the previous *Code*. While the Tribunal is *relatively* quicker at dealing with applications, the absolute length of time it takes to get to mediation, hearing and final decision under the current *Code* is still problematic. The Tribunal's general damages are too low in relation to the Tribunal's claims about the serious impact of discrimination; and the Tribunal's reasons for decision are deficient by failing to identify a reason for not awarding a public interest remedy even where discrimination is found.

Ultimately, although the Tribunal has adjusted its processes to take into account self-represented litigants, particularly applicants, the Tribunal's processes are still quite procedurally complex. The Tribunal's aim in the next few months and years should be to simplify and speed up its processes and offer greater guidance and clarity to its users, many of whom are likely to be self-represented.

A number of my recommendations with respect to the Tribunal are directed at simplifying its processes. The simplification of forms, elimination of early disclosure, earlier scheduling of mediations and greater use of active adjudication should all improve the earlier resolution of cases before hearing. The Tribunal's greater use of active adjudications should allow it to deal with applications in a more streamlined and efficient manner.

Other Tribunal recommendations go towards providing parties with greater clarity about the Tribunal's processes. These recommendations include those dealing with personal respondents, union participation at mediation, anonymity orders, public interest remedies and reconsideration. Finally, the recommendations concerning the appointment of a paralegal or layperson to the Tribunal's Practice Advisory Committee and the SJTO's identification of best practices enable new and diverse viewpoints to reach the Tribunal in regards to improving its operations.

B. The Centre

In response to the second question raised in my Terms of Reference, I find that the Centre is offering very good services to its clients by way of telephone summary advice, in-depth legal assistance with applications, and representation at mediation and hearings;[109] however, the effectiveness of the Centre is significantly compromised by its inability to meet all of the demand for its services.

[109] The Centre has conducted client-satisfaction surveys that confirm that the vast majority of its clients rated its services as either good or very good.

For the first 3-1/2 years of its existence, the Centre's effectiveness was severely limited by its inability to answer all incoming telephone calls (only 44% were answered and then too, only after lengthy wait times). Since November 2011, when the Centre changed its telephone system and assigned more staff to answer calls, the Centre's answer rate has improved significantly: 79% of calls are answered, and the answer rate is improving. Wait times are down to approximately 8 minutes. The Centre has implemented a number of process improvements to enhance its services delivery model resulting in it being able to provide more services to applicants than what the Centre was initially projected to achieve.

It is difficult to determine the degree to which applicants before the Tribunal have been assisted by the Centre because not all applicants contact the Centre for advice or representation; but the Centre's advice appears significant in relation to the number of active applications before the Tribunal.[110] When it comes to full representation, however, the effectiveness of the Centre must be understood in relation to the context in which the Centre operates. The context includes:

1. The Centre was never intended to provide human rights applicants with free, unlimited legal representation throughout the Tribunal process.

2. The Centre does not use a financial means test for its clients. The Centre prioritizes its services, especially full legal representation, to applicants who are particularly disadvantaged and who would have difficulty navigating the human rights system without assistance.
3. The Centre does not represent applicants with unmeritorious cases or who could otherwise afford a legal representative.

[110] In 2011—12, the Centre provided 12,562 individuals with summary legal advice and assisted 2,399 new clients with in-depth legal advice in a year when the Tribunal had 3,302 active cases.

The Centre represents only 12% of applicants before the Tribunal. I found this low rate to be unacceptable and inconsistent with the equilibrium envisaged by the *Code* reforms which require the Centre to at least partly address the power imbalance inherent in the direct access system where parties are primarily responsible for advancing their own case. I concluded that, despite process improvements made by the Centre, applicants with meritorious cases who cannot otherwise find legal representation and who are unable to navigate the Tribunal's processes are not having their needs met. I have recommended that the Ministry of the Attorney General significantly increase the Centre's funding to allow it to better fulfill its statutory mandate.

For those applicants who retain the Centre and obtain representation either at mediation or hearing, the Centre appears to be a strong advocate. The Centre is able to resolve a high number of cases at mediation: 85% compared to the Tribunal average of 65%. The Centre represented 34% of successful applicants (or about 1 in 3) in 50 merits based cases where discrimination was found; and achieved public interest remedies in about 70% of decisions where it represented a successful applicant before the Tribunal.

The recommendations in respect of the Centre are directed at making process improvements to reduce wait times for incoming phone calls and for initial interviews by a Centre Human Rights Advisor. A reinstatement of the Centre Duty Counsel service at mediations and the expanded placement of Centre staff in legal community clinics outside Toronto have a strong potential to extend the reach and expertise of the Centre which has a proven record of success at mediations and training other community legal clinic staff.

C. The Commission

The *Code* reforms ended the Commission's involvement in individual applications but preserved its overall mandate to prevent and eliminate discrimination. My Terms of Reference required me to determine whether the Commission is proactively addressing systemic human rights issues through activities such as research and monitoring, policy development, and education and training. I find that the Commission has been very active in these areas and point to the many examples cited in Part V of my Report dealing with the Commission. In its submission to the Review, the Commission stated:

> Where we feel we have made great progress, since the change in our mandate, has been in balancing our approaches to issues, by having clear criteria for priorities and using policy, partnership and litigation as needed to fit the circumstance. In many cases, that has given us the opportunity to cooperatively "build in", rather than impose, change.

I find that the Commission has made major strides in fulfilling its revised mandate and that cooperative strategies to build in human rights compliance have been important to its success. However, the consensus of stakeholders was that the Commission has withdrawn from certain parts of its mandate and has therefore not quite achieved the right balance. In order to fulfill its *complete* mandate, the Commission must: (1) engage in more strategic litigation at the Tribunal; (2) be more accessible to the public; and (3) reconnect with the private employment sector.

The Commission is seen as the appropriate agency and the one with the most expertise for taking on complex systemic discrimination cases where individual applicants would have great difficulty initiating or advancing the application. My first two recommendations directed at the

Commission encourage it to develop and implement a litigation strategy that will guide it in initiating and intervening in applications at the Tribunal in a more concerted manner than has been the case to date.

My third Commission recommendation, concerning the re-establishment of its incoming public telephone line, is meant to reconnect the Commission both literally and symbolically to the public. The Commission's concern about public telephone access - that the majority of its incoming calls will have to be redirected because the Commission does not handle individual complaints – misapprehends the point that many stakeholders want to contact the Commission about issues properly within its revised mandate. I also find, based on feedback I received during the Review, that the Commission's reputation as an accessible agency is being damaged by its lack of telephone access.

As for my recommendation to eliminate the Anti-Racism and Disability Rights Secretariats, I found that the policy basis for establishing these permanent secretariats was weak and almost entirely symbolic. The Commission continues to be active in the areas of anti-racism and disability rights without having to operationalize these secretariats. My recommendation that the Commission should engage in more initiatives in the private employment sector flows from feedback that the Commission was no longer a presence in this area. Many of the Commission's activities over the last four years have been in the public or quasi-public sector, such as in policing, housing, municipalities and education. Earlier in my Report, I suggested various initiatives both in terms of voluntary compliance and strategic litigation where the

Commission could make an important contribution to non-discriminatory hiring, retention and promotion practices in the private employment sector.

My fifth and final Commission recommendation, that it should provide summary human rights advice to respondents, is arguably going to be the most difficult to implement. But it fulfills an important gap in the effectiveness of the revised *Code*. Many respondents are unclear about their human rights obligations and would like to receive prompt advice and information. Assisting respondents not only addresses a perceived imbalance in the human rights system, since applicants are currently assisted by the Centre but respondents are not, but it also potentially prevents human rights misunderstandings from becoming formal applications. Proactive compliance with human rights laws is in everyone's best interest.

D. System-Wide Issues

The theme running through many of the system-wide concerns that I identified is a lack of coordination between the agencies and in the human rights system in general. It appears that after the *Code* reforms were passed, the agencies had a limited ability or willingness to consider how their own decisions would interact with others and impact parties involved in the human rights system. For instance, the Commission's decision at the end of 2008 to discontinue its incoming public telephone service had a strong impact on the Centre whose call volume increased. The Tribunal did not track legal representation of parties until 2010 which made it difficult to determine the reach of the Centre in representing applicants. The Commission and Centre had each been engaged in outreach to Aboriginal communities but not in any coordinated fashion. Most surprisingly, regular meetings between the three human

rights agencies had not occurred. Some of this was predicted as a consequence to the removal of the Commission from its predominant role in the human rights system, but the present lack of coordination is not inevitable and can be significantly improved upon. The recommendations I have made about system-wide concerns provide a good starting point to address this problem.

E. The Ontario Human Rights System: Past, Present and Future

In conducting the Review, I head from many Ontarians with strongly held views on how the human rights system should work. My characterization of the *Code* reforms as a "qualified success" is unlikely to change the minds of those firmly committed to the previous enforcement model where the Commission played a predominant role in complaints. Indeed, I do not believe that the values that animate the previous and present Ontario human rights system are entirely reconcilable, which suggests that my Report will contribute to, but not end the underlying debate. There will be philosophical, political and practical issues to discuss as Ontario's human rights system matures. Since I believe it is of ongoing importance to decision makers in the human rights system, I find it necessary to touch on a couple of questions in light of my Report's findings.

Whose responsibility is human rights enforcement? The *Code* reforms were premised on the notion that the parties themselves should play a greater role in resolving their human rights disputes. However, the reforms acknowledged the public importance of human rights and continued the state's important funding and operation of specialized human rights agencies. Some critics of direct access called this "privatization" but, in reality, the Ontario government

increased the province's human rights budget by over 40% and created a new agency, the Centre, to assist individuals who believed their human rights were infringed. Those who believe that human rights breaches are almost entirely about a public wrong will favour an approach closer to the criminal public prosecution model whereby the state takes on the entire responsibility for "prosecuting" the human rights breach. Those who believe that human rights disputes are closer to private civil disputes, albeit with a public dimension, will favour an approach that apportions responsibility for dispute resolution to the parties and the state. The approaches are not really reconcilable and the public policy options flow from this fundamental difference of characterization.

Are we in a post-Cornish and La Forest world? Supporters of the *Code* reforms often rely on the argument that the revised *Code* adopted the framework for human rights enforcement suggested by the Cornish Report (1992) and La Forest Report (2000). Indeed, it is true that both reports recommended a direct access model, with a commission reoriented towards promotion of human rights, and a publicly funded legal advocacy centre to assist complainants. But on a go-forward basis it is important to ask whether the legal and fiscal assumptions that both task forces made still hold true today.

In my view, we are in a considerably different era: (a) The rise of alternative dispute resolution (ADR) generally and in human rights proceedings in particular; and the use of active adjudication as permitted by the *Code* has resulted in human rights cases being resolved very differently now than was the case many years ago when the traditional adversarial model was used in tribunal hearings. Parties before the Tribunal may experience a hearing very

differently than was the case 12 or 20 years ago; (b) Technological changes and the rise of the internet allow parties and the Tribunal to exchange much more information than what was possible even 5 years ago, let alone 12 or 20. The increased accessibility and amount of online information cuts both ways. It is empowering for many technologically savvy and computer literate individuals, but also overwhelming for individuals who are reliant on assistance from third parties to mediate information; (c) The rise of operational and fiscal accountability for public agencies is also very different now than was the case in 1992 or 2000. The Cornish and La Forest reports made wide-ranging findings and recommendations in relation to how the human rights system should be reformed to respond to the evolution of human rights since the 1960s and 70s. The Reports did not concern themselves with how to fund their recommendations. Today, even leaving aside the present fiscal crisis that Ontario finds itself in, there is an expectation that government and publicly funded agencies will be held accountable for the public resources that they expend.

The fact that Ontario has changed considerably since 1992 or 2000 does not mean that the insights of the Cornish Report or the La Forest Report are incorrect. But it means that the assumptions made in those reports, particularly with respect to the Tribunal hearing process and what government is willing to fund, should be examined critically, if we are to continue to rely on those Reports to support a particular perspective.

Is the "three-pillars" focus too narrow? My Terms of Reference required me to examine the operations and effectiveness of the Tribunal, Centre and Commission, the so-called "three-pillars" of the revised Ontario human rights system. However, many human rights disputes in the province are resolved without the involvement of the three agencies that were the focus of

the *Code* amendments. In particular, for unionized employees, their workplace human rights disputes are typically resolved through labour grievance arbitration. As well, many employees in the private and public sector have access to internal workplace discrimination and harassment policies whose procedures may offer an alternative dispute resolution process for their human rights concerns.[111] Both unionized employees and employees in organizations with internal discrimination policies still have access to the Tribunal. [112] It is beyond the scope of my Review to determine how these alternate methods of human rights dispute resolution interact with the three agencies; but further debates and discussions about reform and improvement of the human rights system must take into account the opportunities and challenges presented by these alternate processes. For instance, while Ontario passed Bill 168,[113] as amendments to the *Occupational Health and Safety Act* in 2010, to make it mandatory for employers to establish policies and procedures concerning workplace harassment and violence, there has been little discussion of mandatory workplace human rights policies. To the extent that human rights disputes are resolved elsewhere, the pressure on the three agencies will be reduced; however, whether and what human rights principles are applied in these alternate venues and what kinds of remedies are available to aggrieved individuals should continue to be of concern to decision makers.

What of the present challenging fiscal environment in Ontario? I strongly urge the government and the agencies to not use the consequences of the present economic downturn

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[111] The Ontario government's Workplace Discrimination and Harassment Prevention Policy (WDHPP) is an example.
[112] The Tribunal has held that an employer's internal human rights investigation does not adjudicate the matter or provide any remedy to the employee so it cannot be considered "another proceeding" that has appropriately dealt with the subject matter of the application: *Cedeno v. Martens*, 2012 HRTO 383.
[113] *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace) 2009*, S.O. 2009 C.23.

as a justification for not adopting the recommendations I have made. My recommendations have already been mindful of this constraint. Many individuals and groups who are likely to face discrimination are the very ones who are most likely to be negatively affected by the poor economy. It would be a cruel irony if the very complaint mechanisms that they rely upon for fair employment, housing and services are not functioning as well as they can. And this goes for respondents too, who must deal with challenging human rights allegations at a time when they are already grappling with the fiscal downturn. In an economic downturn, a functioning human rights enforcement system is more important than ever, and my budgetary recommendation should be seen in that context.

F. Final Thoughts

The human rights system may appear to be for the few but, in fact, it is for the many. We don't care much about human rights until it is about *our* human rights. The public and governments have a complex relationship with the human rights enforcement system that is reflected in varying degrees of support for recommendations from reviews such as the present one. Aware of this, the recommendations that I have made are modest. They are also modest because I did not find a system in dysfunction so no radical new approach is proposed. Instead, I found a human rights system that is working better but faces some *important and urgent* challenges. That I have not declared the system in crisis should not be an excuse for complacency.

Over the last four years, much of the hard "set-up" work has been done to operationalize the system envisaged by the revised *Code*. Ontario's human rights system is now in a position to

absorb and implement the next level of change. Having conducted the review, I look forward to participating in and being a resource for the revised *and improved* Ontario human rights system. The time is opportune for the agencies and the government to focus in a coordinated manner on bringing about positive change.

PART VIII - LIST OF RECOMMENDATIONS

Human Rights Tribunal

1. The forms and the means of accessing the forms both electronically and physically should be reviewed and simplified to reduce duplication, length and increase accessibility. The Tribunal should continue working with its stakeholders, accessibility and cognitive specialists to determine how the forms and processes can be made more accessible to a broad range of users including (a) persons with disabilities; (b) persons without high-speed internet access; and (c) persons without computer or internet access.

2. The Tribunal should take steps beyond its current Practice Direction to reduce the inappropriate naming of personal respondents.

3. The Tribunal should establish a better protocol for the service of applications on large respondents. This will help to reduce delays between the receipt of the application by the Tribunal and service on the respondent.

4. The Tribunal should eliminate the requirement for applicants and respondents to identify the important documents in their or others' possession and their list of witnesses in the initial stage of the application. Instead, the Tribunal should advise parties to begin preparing this information as soon as possible as it will be required at a later stage in the application and may be more difficult or impossible to obtain as time elapses.

5. The Tribunal should dedicate more resources and determine means by which mediations can occur as early as possible after receipt of a response.

6. The Tribunal should have and publicize a consistent policy that is more transparent and enforced in a timely manner in regards to union intervention requests and participation at mediation where applicants indicate that they are members of a trade union.

7. The Tribunal should compile and publicize data and descriptive information concerning the terms and conditions of settlements achieved at mediation, albeit in a way that guarantees parties' anonymity.

8. The Tribunal should make greater efforts to promote active adjudication at its hearings. Specifically, the Tribunal should identify mechanisms at the internal Tribunal level, whether through research, training, mentorship or the identification of best practices concerning the circumstances in which a hearing, or parts of a hearing, can be expedited via the

application of active adjudication. Active adjudication should be further encouraged at the Tribunal, while maintaining adjudicator independence and flexibility.

9. The Tribunal should develop and publicize a guideline to describe the circumstances in which the Tribunal would likely issue an order providing for the anonymity of an applicant.

10. The Tribunal should reconsider its current approach to general damages awards in cases where discrimination is proven. The monetary range of these awards should be significantly increased.

11. In cases where discrimination is found but no public interest remedy is ordered, the Tribunal should provide some explanation in its reasons for decision.

12. The Tribunal should update and revise its current Guides to better identify and explain the nature of public interest remedies that may be ordered against a respondent where discrimination is found.

13. The Tribunal should provide a better explanation in its Rule(s), forms or other materials concerning how reconsideration will be granted. The explanation should include how the criteria for reconsideration are different than what may apply to applications for judicial review. The Tribunal should require a party making a reconsideration request to formally acknowledge they have reviewed this information (which would be an enhanced level of information than what currently exists) before proceeding with a request for reconsideration.

14. The Tribunal should provide applicants with information about why the same adjudicator that rendered the original decision may be assigned to rule on the reconsideration decision. This information could be attached as a Practice Direction to any final decision on the merits when the decision is served on the parties.

15. In its next round of recruitment for Practice Advisory Committee members, the Tribunal should appoint a qualified paralegal or layperson. If necessary, the Terms of Reference of the Tribunal's Practice Advisory Committee should be amended to accommodate this change.

16. The SJTO should research, identify and implement a series of policies and best practices that would allow the Tribunal to utilize the SJTO as a platform to achieve greater regional presence, use technology more effectively and improve accessibility for its services.

The Human Rights Legal Support Centre

17. The Centre should:

    a. Reduce telephone wait times to levels that are consistent with comparable public service organizations.
    b. Advise and update callers on hold on the telephone about wait times.
    c. Reduce wait times to less than 30 days for initial interviews by a Human Rights Advisor for non-urgent inquiries.

18. The Centre and Tribunal should coordinate to reinstitute a Centre Duty Counsel service to assist applicants at mediations. The Centre should not decline to conduct the program in Toronto because of difficulties associated with extending it to other regions. However, if the difficulties are primarily associated with coordination with the Tribunal, greater efforts at coordination between the two agencies should occur.

19. The Centre should expand the placement of Centre staff in legal community clinics outside Toronto.

The Human Rights Commission

20. The Commission should develop a litigation strategy at the Tribunal focused on cases where applicants would have difficulty advancing and proving a systemic deprivation of rights. The Commission should initiate applications and intervene at the Tribunal consistent with this strategy.

21. The Commission should have a process based on established criteria whereby community organizations can request the Commission to initiate a public interest application.

22. The Commission should re-establish its incoming public telephone line.

23. The Code should be amended to eliminate the Anti-Racism and Disability Rights Secretariats.

24. The Commission should engage in more initiatives in the private employment sector.

25. The Commission should establish and maintain a unit that would offer telephone and/or internet based summary advice and information to assist respondents comply with their human rights obligations.

System-Wide Issues

26. The Tribunal should submit and make publicly available a Report concerning its handling of transitional cases that would be of benefit in respect of its handling of regular s.34 applications.

27. The Ministry of the Attorney General should facilitate meetings of the leadership of the Tribunal, Centre and Commission at least twice a year to focus on better coordination in the human rights system.

28. The Tribunal should, on its website and materials, better and more prominently explain the role of the Commission, particularly in terms of the Commission's policies and its role in potentially intervening in or initiating applications that deal with alleged systemic discrimination.

29. The Commission should provide a link on its website to provide access to Tribunal decisions.

30. The Tribunal and Commission should coordinate more closely to fulfill the *Code* objective of the Commission receiving pleadings filed with the Tribunal; and the Tribunal should assist the Commission by eliminating duplication of effort in terms of capturing and analyzing the critical information contained therein.

31. The Attorney General should table the annual reports of the Human Rights Legal Support Centre and the Human Rights Tribunal of Ontario in the Legislative Assembly within 60 days of receiving the report, as provided for in the Agency Establishment and Accountability Directive.

32. The Commission and Centre should coordinate on a strategy to increase the engagement of Aboriginal persons in the human rights system.

33. The Ministry of the Attorney General should investigate and publicly release a report in a timely manner on the merits of a costs regime for the Tribunal based on empirical data and policy considerations. This data could be obtained from multiple sources, including applicants, respondents, other jurisdictions, social agencies, academic research, and the three human rights agencies.

34. The Ministry of the Attorney General should, in the near term, increase funding for the Centre and the Commission. Relative to their present budgets, the Centre's funding should be increased significantly and the Commission's funding should be increased somewhat so

that the two agencies can address the findings and recommendations in this Report and better fulfill their statutory mandates.

APPENDIX A – Commission Comparative Indicators

1995-96 to 2007-08, prior to 2008 Code Reforms

	2007-08	2006-07	2005-06	2004-05	2003-04	2002-03	2001-02	2000-01	1999-00	1998-99	1997-98	1996-97	1995-96
Public Contacts													
Written Inquiries	2,241	1,921	1,760	1,648	2,275	2,324	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Visitors	655	625	760	886	843	902	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Calls Received				60,698	67,216	69,817	64,154	65,207	60,977	n/a	n/a	n/a	n/a
Calls Responded To	51,753	40,391	43,011	46,429	42,650	46,127	48,732	52,848	52,030	40,112	32,579	n/a	n/a
Unique Visits to www.ohrc.on.ca				523,878	461,365	330,131	233,090	158,971	n/a	n/a	n/a	n/a	n/a
New Complaints Filed	3,492	2,337	2,399	2,399	2,450	1,776	2,438	1,775	1,861	1,850	1,368	1,916	2,560
Voluntary Mediation Settlement Rate		69%		73%	71%	73%	74%	73%	74%	69%	81%	n/a	n/a
Complaints Closed by Disposition													
Dismissed	202	189	256	290	265	311	284	298	462	403	169	176	248
Not deal with (s. 34)	118	151	193	196	245	185	218	351	281	180	304	343	331
Referred to Human Rights Tribunal	330	140	143	150	286	58	60	73	92	92	30	28	37
Average Age at Time of Referral to Tribunal (months)	22.4	33.4	27.6	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Settled	1,025	898	1006	998	778	909	851	727	897	867	379	314	359
Withdrawn/Resolved	801	740	662	581	464	491	519	492	573	676	578	499	399
Total Cases Closed	2477	2,118	2,260	2,215	2,038	1,954	1,932	1,941	2, 305	2,218	1,460	1,260	1,374
Average Age of Completed Cases at the Commission months)	14.6	14.6	12.9	11.2	10.8	11.5	n/a	n/a	n/a	n/a	n/a	n/a	n/a
% referred to Tribunal to Total Cases Closed	13.3	6.6	6.3	6.8	14.0	3.0	3.1	3.7	4.0	4.1	2.0	2.2	2.7
Year-End Active Caseload	4198	3,099	2,880	2,733	2,549	2,137	2,300	1,781	1,952	2,386	2,754	2,800	2,899

APPENDIX B – Timeline of Commission Referred Cases

Case #	Date Filed	Referral Date	First Hearing Date	Decision Date	Length Between Filing and Referral	Length Between Filing and Hearing	Length Between Filing and Decision	Length Between Referral and Hearing	Length Between Referral and Decision
					(DAYS)	(DAYS)	(DAYS)	(DAYS)	(DAYS)
2008 7	15-Dec-04	02-May-07	04-Dec-07	24-Jan-08	868	1084	1135	216	267
2007 28	23-Sep-03	08-Feb-06	27-Aug-07	27-Aug-07	869	1434	1434	565	565
2008 10	6-Sep-01	20-Apr-05	15-May-06	13-Feb-08	1322	1712	2351	390	1029
2007 36	27-Feb-04	13-Dec-05	27-Aug-07	19-Oct-07	655	1277	1330	622	675
2007 17	11-May-04	26-Apr-06	14-May-07	25-May-07	715	1098	1109	383	394
2007 19	31-Jul-02	26-Apr-06	written	29-Jun-07	1365	No written hearing	1794		429
2007 31	26-Mar-03	15-Feb-05	09-Jan-06	28-Aug-07	692	1020	1616	328	924
2008 2	9-Jul-04	26-Apr-06	14-Aug-07	17-Jan-08	656	1131	1287	475	631
2007 43	11-Nov-02	02-Aug-06	30-May-07	04-Dec-07	1360	1661	1849	301	489
2007 38	15-Oct-02	27-Feb-07	13-Sep-07	31-Oct-07	1596	1794	1842	198	246
2007 34	22-Mar-02	19-Aug-04	20-Jun-05	16-Oct-07	881	1186	2034	305	1153
2007 41	19-Sep-01	09-Feb-04	26-Apr-07	21-Nov-07	873	2045	2254	1172	1381
2007 14	17-Mar-03	05-Nov-04	01-Jun-06	11-May-07	599	1172	1516	573	917
2007 42	12-Jan-05	02-May-07	28-Sep-07	27-Nov-07	840	989	1049	149	209
2008 9	13-Aug-04	25-Apr-06	19-Apr-07	04-Feb-08	620	979	1270	359	650
2007 33	20-Aug-03	13-Dec-05	14-May-07	15-Oct-07	846	1363	1517	517	671
2007 37	6-Feb-04	04-Dec-06	25-Jul-07	30-Oct-07	1032	1265	1362	233	330
2008 13	18-Mar-04	04-Jul-07	07-Jan-08	25-Feb-08	1203	1390	1439	187	236
2006 15	14-Jan-03	08-Dec-04	09-Jan-06	25-May-06	694	1091	1227	397	533
2006 7	27-May-98	25-Jan-01	18-Feb-04	13-Apr-06	974	2093	2878	1119	1904
2006 13	09-Jul-00	09-Feb-04	14-Feb-05	16-May-06	1310	1681	2137	371	827
2006 32	27-Jun-00	16-Dec-02	10-Jan-05	28-Nov-06	902	1658	2345	756	1443
2006 19	01-Jan-95	11-Apr-00	19-Sep-05	24-Jul-06	1927	3914	4222	1987	2295

2007 5	06-Jun-03	11-Feb-05	24-Jan-06	31-Jan-07	616	963	1335	347	719
2007 2	15-Oct-03	15-Oct-05	written	11-Jan-07	731	No oral hearing	1184		453
2007 12	04-Sep-02	28-Nov-03	01-Jun-05	21-Mar-07	450	1001	1659	551	1209
2006 33	09-Aug-02	20-Apr-04	11-Oct-06	30-Nov-06	620	1524	1574	904	954
2007 8	23-Jul-03	16-Jun-05	08-Mar-06	02-Mar-07	694	959	1318	265	624
2007 1	10-Jun-02	15-Dec-05	08-Nov-06	08-Jan-07	1284	1612	1673	328	389
				Averages:	**938**	**1448**	**1715**	**518**	**777**

APPENDIX C – List of Review Participants

	Name of Organization	***Public Meeting***	***Stakeholder Meeting***	***Written Submission***
1.	APLUS Institute			Y
2.	Accessibility for Ontarians with Disabilities Act Alliance (AODA Alliance)		Y	Y
3.	Advocacy Centre for the Elderly (ACE)			Y
4.	Alliance for Equality of Blind Canadians (AEBC)	Y		Y
5.	African Canadian Legal Clinic (ACLC)		Y	Y
6.	ARCH Disability Law Centre	Y	Y	Y
7.	Assembly of First Nations			Y
8.	Association for Reformed Political Action, Canada	Y		Y
9.	Association for Reformed Political Action, Hamilton Area	Y		Y
10.	Baba Budha Ji Sikh Society, Stoney Creek	Y		
11.	Canadian Association of Counsel to Employers (CACE)			Y
12.	Canadian Auto Workers (CAW) Union, Canada			Y
13.	Canadian Hearing Society (CHS)	Y	Y	Y
14.	Canadian Mental Health Association Ontario (CMHA)		Y	Y
15.	Canadian Sikh Association	Y		Y
16.	Centre for Equality Rights in Accommodation (CERA)		Y	
17.	Centre for Israel & Jewish Affairs			Y
18.	Citizens with Disabilities Ontario (CWDO)			Y
19.	Clinic Human Rights Working Group	Y	Y	
20.	Colour of Poverty	Y		
21.	CUPE National		Y	Y
22.	Deerhaven Centre			Y
23.	Federation of Asian Canadian Lawyers (FACL)	Y		Y
24.	GurSikh Sangat Hamilton-Wentworth	Y		

25.	Hagi Community Services for Independence	Y		
26.	HIV & Aids Legal Clinic Ontario (HALCO)			Y
27.	Hamilton Community Legal Clinic			Y
28.	Hamilton Punjabi and Sports Culture Club	Y		
29.	Human Rights Legal Support Centre (HRLSC)	Y	Y	Y
30.	Idea Systems Inc.			Y
31.	Income Security Advocacy Centre (ISAC)	Y	Y	Y
32.	Industrial Accident Victims Group of Ontario (IAVGO)	Y		Y
33.	Justicia for Migrant Workers	Y		
34.	Kinna-Aweya Legal Clinic	Y		
35.	Lake Country Community Legal Clinic	Y		
36.	Lakehead Social Planning Council	Y		
37.	Learning Disabilities of Ontario			Y
38.	Metro Toronto Chinese and Southeast Asian Legal Clinic (MTCSALC)		Y	Y
39.	Ministry of Education			Y
40.	Native People of Thunder Bay Development Corp.	Y		
41.	Neighborhood Legal Services, London	Y		Y
42.	Nishnawbe Aski Nation	Y		
43.	Northwestern Ontario Women's Shelter	Y		
44.	Ontario Bar Association (OBA)			Y
45.	Ontario Multi Faith Council	Y		
46.	Ontario Labour Arbitrators Association (OLAA)		Y	
47.	Ontario Municipal Human Resources Association (OMHRA)			Y
48.	Ontario Human Rights Commission (OHRC)	Y	Y	Y
49.	Ontario Native Women's Association (ONWA)	Y		
50.	Ontario Shores Centre for Mental Health Sciences			Y
51.	Poverty Free Thunder Bay	Y		
52.	Queer Ontario			Y

53.	Sudbury Community Legal Clinic	Y		
54.	Thunder Bay Indian Friendship Centre	Y		
55.	Thunder Bay Catholic District School Board	Y		
56.	Thunder Bay & District Injured Workers' Support Group	Y		Y
57.	Thunder Bay Urban Aboriginal Advisory Committee	Y		Y
58.	Thunder Bay Urban Aboriginal Strategy	Y		Y
59.	Toronto District School Board (TDSB)		Y	
60.	Toronto Transit Commission (TTC)			Y
61.	United Steel Workers, District 6	Y		Y
62.	Urban Alliance on Race Relations (UARR)	Y		Y

	Name of Individual	Public Meeting	Stakeholder Meeting	Written Submission
1.	Agarwal, Ranjan		Y	
2.	Albertyn, Christopher		Y	
3.	Anand, Raj		Y	
4.	Baker, David		Y	Y
5.	Balloi, Antonia	Y		
6.	Bark, Louise	Y		Y
7.	Bernhardt, Kim		Y	
8.	Bhabha, Faisal		Y	
9.	Black, Earl	Y		
10.	Boucher, Renee	Y		
11.	Boyce, Michelle	Y		Y
12.	Chaboner, Daniel	Y		
13.	Cohen, Josh	Y		
14.	Cook, Mark	Y		
15.	Conway, Richard			Y
16.	Cornish, Mary		Y	
17.	Crowe, Cindy	Y		
18.	D'Eath, Doreen	Y		
19.	Dimitrie, David	Y		Y
20.	Dimovski, Jim		Y	
21.	Ernst, Fred		Y	
22.	Fisher, Barry		Y	
23.	Forde, Jeff	Y		Y
24.	Goodman, Jeff		Y	
25.	Grant, Yola		Y	
26.	Haichuck, Coreen	Y		
27.	Hashmani, Taufiq		Y	
28.	Hatala, Andrea	Y		

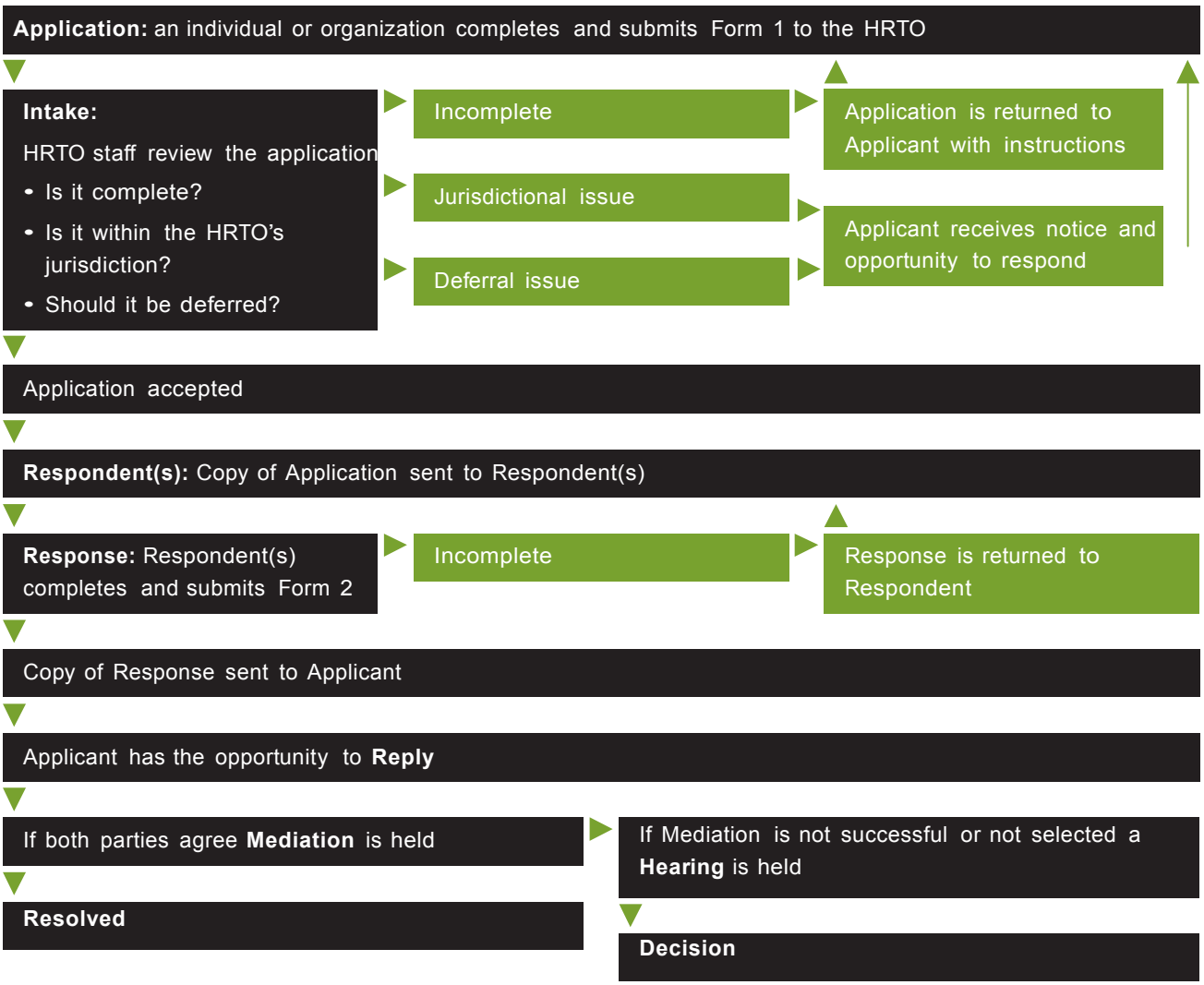
29.	Ho, Wendy			Y
30.	Hyman, O'Brien			Y
31.	Jogendra, Regis	Y		Y
32.	Johnson, Kenneth Carl	Y		Y
33.	Kaplan, Barry			Y
34.	Kelly, Mary		Y	
35.	Kirby, Ryan			Y
36.	LeClair, Penny	Y		Y
37.	Lipsey, Adrienne		Y	
38.	MacDonald, Bruce			Y
39.	MacDonald, Lorin	Y		
40.	Makuch, Natalia		Y	
41.	Makuto, Moffat	Y		
42.	McNevin, David	Y		Y
43.	Mishkiri, Said			Y
44.	Mantis, Steve	Y		
45.	Morton, Sarah		Y	
46.	Murphy, Bob			Y
47.	Murray, Patricia		Y	
48.	Olizondo, Elizabeth			Y
49.	Ordel, Lorne			Y
50.	Paquin, Lorraine	Y		Y
51.	Pidgeon, Judith	Y		
52.	Pollock, Chantal	Y		Y
53.	Persaud, Ghainsaroop	Y		Y
54.	Robertson, Chris		Y	
55.	Rusak, Paula		Y	
56.	Ryder, Bruce		Y	
57.	Traversy, Norman	Y		
58.	Tunney, Robert	Y		

59.	Sanson, Geri		Y	
60.	Saxon, Linda	Y		Y
61.	Sexsmith, Bob	Y		
62.	Silver, Ian	Y		
63.	Shamshudin, Aliya		Y	
64.	Shannon, Dave	Y		
65.	Snider, Greg	Y		
66.	Stolarsky, Dorothy	Y		
67.	Weigl, Ben	Y		Y
68.	Weiss, Jessica		Y	
69.	Whyte, Alan		Y	
70.	Wolkin, Stephanie			Y
71.	Yamagishi, Kendall		Y	
72.	Zeng, Lisa			Y

APPENDIX D – Tribunal Flow Chart

Application Process

This flowchart offers an overview of the Tribunal's new Application process. Details are available on the HRTO website in the Applicant's Guide and the Respondent's Guide.



Appendix E – Tribunal Statistics

The Human Rights Tribunal of Ontario's (HRTO's) fiscal year runs from April 1 to March 31.

New Applications

New Applications are applications filed directly with the HRTO under sections 34 or 35 of the *Code*. The following chart sets out the HRTO statistics on new applications from June 30, 2008 to March 31, 2012.[114]

	2008– 2009 (June 2008 to March 31, 2009)	2009-2010	2010-2011	2011-2012
New Applications	1,738	3,551	3,167	2,740
Cases reactivated	0	52	58	40
Closed	18	1,937	2,717	3,364
Active remaining cases[115]	1,720	3,378	3,886	3,302

Mediations conducted	350	1200	1,425	1635
Matters settled	245 (70%)	804 (67%)	(60%)[116]	1,013 (62%)

[114] The types of statistics maintained by the Tribunal sometimes vary from year to year. Where there are blank spaces in the charts, there was no information available for that year. The sources for the Tribunal statistics were: the 2008/09 and 2009/10 Annual Reports; the 2010/11 Social Justice Tribunals Ontario Report (Tribunal chapter); the Tribunal's statistics on its website; the Tribunal's response to questions submitted by the Accessibility for Ontarians with Disabilities Act Alliance (AODAA); and the Tribunal's responses to the Review. There are minor discrepancies in the Tribunal stats compiled from the sources due to statistics being compiled manually and through a case management system. Also, the statistics do not separately track reactivated cases that are bought back into the system after initially being deferred.

[115] Active remaining cases include all applications that have been received since June 30, 2008 that have not been resolved. Also includes currently open cases that have been deferred, of which there were 429 at the end of fiscal 2011-2012.

[116] Figure based on final quarter of 2010 only. The Tribunal reports that beginning in 2010-2011, "settlement" was given a stricter definition. Settlements reached in mediation-adjudication are not counted.

Final Decisions	43	75	104	95
Discrimination found		29 (39%)	41 (39%)	40 (42%)
Discrimination not found		46 (61%)	63 (61%)	55 (58%)
Dismissal on a preliminary basis[117]		301	562	786
Deferrals		147	233	229
Withdrawals[118]		212	38	-
Other procedural issues		931	570	1,026
Reconsideration decisions	7	66	103	140
Breach of settlement decision		8	7	12
Total Decisions		1,740	1,617	2,288

Geographical Breakdown (based on postal code)				
Eastern (K)		405 (11.4%)	342 (11%)	11 %
Central (L)		1,357 (38.2%)	1,145 (36%)	37%
Toronto (M)		860 (24.2%)	854 (27%)	27%
Western (N)		618 (17.4%)	519 (16%)	17%
Northern (P)		214 (6.0%)	187 (6%)	6%
Other		97 (2.7)	120 (4%)	2%

Social Area[119]				
Employment		2,664 (75.0%)	2,437 (77%)	76%
Goods, Services and Facilities		714 (20.1%)	650 (21%)	22%
Accommodation		201 (5.7%)	178 (6%)	5%
Contract		64 (1.8%)	57 (2%)	0.7%
Membership in a Vocational Association		41 (1.2%)	46 (1%)	1%
No Social Area		75 (2.1%)	39 (1%)	1%

[117] This includes cases dismissed under the Tribunal's summary hearing procedure based on a finding that the application had "no reasonable prospect of success."
[118] The Tribunal no longer prepares a decision for each withdrawal, and most withdrawals are now confirmed by letter.
[119] While most applications only refer to one social area, some are based on more than one so the total exceeds the number of applications received by a small amount.

Grounds of Discrimination[120]				
Disability		1,853 (52.2%)	1679 (53%)	54%
Reprisal		896 (25.2%)	772 (24%)	26%
Sex, Pregnancy, and Gender Identity		836 (23.5%)	752 (24%)	25%
Race		699 (19.7%)	684 (22%)	20%
Colour		494 (13.9%)	512 (16%)	13%
Age		488 (13.7%)	490 (15%)	13%
Ethnic Origin		485 (13.7%)	499 (15%)	17%
Place of Origin		438 (12.3%)	417 (13%)	13%
Family Status		345 (9.7%)	320 (10%)	8%
Ancestry		336 (9.5%)	336 (11%)	10%
Sexual Solicitation or Advances		330 (9.3%)	178 (6%)	5%
Creed		222 (6.3%)	202 (6%)	7%
Marital Status		210 (5.95)	180 (6%)	9%
Sexual Orientation		141 (4.0%)	132 (4%)	4%
Association		140 (3.9%)	152 (5%)	3%
Citizenship		128 (3.6%)	145 (5%)	4%
Record of Offences		126 (3.5%)	91 (3%)	3%
Receipt of Public Assistance		50 (1.4%)	40 (1%)	1%
No Grounds		106 (3.0%)	69 (2%)	3%

Summary of the HRTO Statistics:

Beginning on June 30, 2008 all claims of discrimination under the Code are filed directly with the HRTO under section 34 or 35 of the *Code*. There has been an increase in the number of new applications the Tribunal has received since the direct access system came into effect on June 30, 2008.

The majority of new applications were from Central Ontario, followed by Toronto, Western Ontario and Eastern Ontario. The most commonly raised grounds of discrimination were disability, reprisal, sex and race. Employment, goods, services and facilities and accommodation were the most commonly cited social areas. The majority of applicants were self-represented at the time the application was filed. The following is a more detailed summary of the HRTO statistics on new applications.

[120] As many applications claim discrimination based on more than one ground, the totals in the chart far exceed the number of applications received.

2008-2009 Fiscal Year (June 30, 2008 to March 31, 2009):

- The HRTO received 1,738 new applications and closed 19 applications.
- A total of 350 mediations were held, with 245 resulting in settlement, representing a settlement rate of 70%.
- The HRTO held 16 hearings and issued 43 final decisions and seven reconsideration decisions.

2009-2010 Fiscal Year (April 1, 2009 to March 31, 2010):

- The HRTO received 3,551 new applications and closed 1937 applications.
- Less than 30% of applicants were represented at the time the application was filed.
- The HRTO held 1,200 mediations, with 804 resulting in settlement, representing a settlement rate of 67%.
- The Tribunal issued 75 final decisions and 66 reconsideration decisions. Discrimination was found in 29 cases and not found in 46.
- The geographical breakdown of applications indicates that the majority of applications originated in Central Ontario (38%), followed by Toronto (24.2%), Western Ontario (17.4%) and Eastern Ontario (11.4%).
- The most commonly cited social area was employment, with 2,664 (75%) applications, followed by goods, services and facilities at 714 (20.1%) and accommodation at 201 (5.7%).
- Disability was raised as a ground of discrimination in 1,853 (52%) of applications, followed by reprisal at 896 (25.2%), sex, pregnancy and gender at 836 (23.5%) and race at 699 (19.7%).

2010-2011 Fiscal Year (April 1, 2010 to March 31, 2011):

- The HRTO received 3,167 new applications and closed 2,717 applications.
- 71% of applicants were self-represented.
- The HRTO issued 104 final decisions and 103 reconsideration decisions. Discrimination was found in 41 cases and not found in 63.
- The geographical breakdown of applications indicates that the majority of applications originated in Central Ontario (36%), followed by Toronto (27%), Western Ontario (16%) and Eastern Ontario (11%).
- The most commonly cited social area was employment, with 2,437 (77%) applications, followed by goods, services and facilities at 650 (21%) and accommodation at 178 (6%).
- Disability was raised as a ground of discrimination in 1,679 (53%) of applications, followed by reprisal at 772 (24%), sex, pregnancy and gender at 752 (24%) and race at 684 (22%).

2011-2012 Fiscal Year (April 1, 2011 to March 31, 2012):

- The HRTO received 2,740 new applications and closed 3,364 applications.
- The geographical breakdown of applications indicates that the majority of applications originated in Central Ontario (37%), followed by Toronto (27%), Western Ontario (16%) and Eastern Ontario (11%).

- The most commonly cited social area was employment, with 76% of applications, followed by goods, services and facilities at 22% and accommodation at 5%.
- Disability was raised as a ground of discrimination in 54% of applications, followed by reprisal at 26%, sex, pregnancy and gender at 25% and race at 20%.
- The average number of days from application acceptance to mediation was 268 days (8.7 months), with a median of 238 days (7.8 months).
- Of the 2,597 cases closed in fiscal 2011-2012 (where the application was initially accepted), the average number of days from application acceptance to closure was 387 days (12.7 months), with a median of 324 days (10.7 months). Fifty-five percent of these files were closed within one year of application acceptance. Most of the 767 cases that were closed prior to being accepted were closed well within one year.

Other Statistics

- In 2011/2012 there were 12 contravention of settlement decisions.
- In 2011/2012 there were 1,255 interim decisions.
- In 2011/2012 there were 229 deferral decisions.
- In 2011/2012 786 cases were dismissed on a preliminary basis, including those dismissed after a summary hearing.

Transitional Applications

Transitional applications are applications that were filed with the HRTO between June 30, 2008 and June 30, 2009 based on complaints originally filed with the Ontario Human Rights Commission under the old system (s.53 of the *Code*). The following chart sets out the HRTO statistics on transitional applications from June 30, 2008 to March 31, 2012.

	2008 – 2009 (10 months – June 2008 to March 2009)	**2009-2010**	**2010-2011**	**2011-2012**
Transitional Applications under s.53(3)	947			
Transitional Applications under s.53(5)	204	775		
Total Transitional Applications	1,151	775		

Closed	278	919	448	198
Active remaining cases	873	731[121]	283	85

Mediations conducted	365	690	98	
Matters settled	152 (41%)	361 (52%)	40 (41%)	
Hearings	74	388	320	
Final Decisions	36	316	256	
Reconsideration decisions	6			

Summary of the HRTO Statistics:

Transitional applications under s.53(3) of the *Code* are those that had not been finally disposed of by the Commission and the complainant chose to abandon the complaint before the OHRC and make a transitional application to the Tribunal. The application could be made at any time between June 30, 2008 and December 31, 2008.

Transitional applications under s.53(5) are those where the complainant filed a complaint with the Commission before June 30, 2008 but it had not been settled, withdrawn or finally dealt with on the merits by December 31, 2008. The complainant could make an application to the Tribunal between January 1, 2009 and June 30, 2009.

2008-2009 Fiscal Year (June 30, 2008 to March 31, 2009):
- The HRTO received 1,151 transitional applications, 946 under s.53(3) and 204 under s.53(5). The Tribunal closed 278 applications.
- The HRTO held 365 mediations, with 152 resulting in settlement, representing a settlement rate of 41%.
- The Tribunal held 74 hearings, issued 36 final decisions and 6 reconsideration decisions.

2009-2010 Fiscal Year (April 1, 2009 to March 31, 2010):
- The HRTO received 775 transitional applications, all under s.53(5). The Tribunal closed 919 applications.
- The HRTO held 690 mediations, with 361 resulting in settlement, representing a settlement rate of 52%.
- The Tribunal held 388 hearings and issued 316 final decisions, including reconsideration decisions.

2010-2011 Fiscal Year (April 1, 2010 to March 31, 2011):
- The HRTO closed 448 cases, resulting in 283 active remaining cases.
- The HRTO held 98 mediations, with 40 resulting in settlement, representing a settlement rate of 41%.

[121] This is a minor discrepancy. The HRTO has reported 731 open cases, but the number of applications filed, less applications closed gives 729 open cases. The HRTO explains this discrepancy based on different methods of data collection, see note above.

- The Tribunal held 320 hearings and issued 256 final decisions, including reconsideration decisions.

2011-2012 Fiscal Year (April 1, 2011 to December 31, 2011):
- The HRTO closed 198 cases, resulting in 85 active remaining cases.

Of the 85 cases still open at the end of fiscal 2011-2012:

- 11 were pending final decision
- 26 were deferred pending the outcome of some other process
- 43 were at the mediation or hearing stage
- 5 were combined with s.34 applications

Commission Referred Complaints

Under the old system, the Commission decided which complaints would be referred to the HRTO for a hearing. This continued until December 2008 when the Commission referred its final group of complaints. The following chart sets out the HRTO statistics on commission referred applications.

	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012
Referred by Commission	271	301			
Closed by HRTO	154	140	228		
Unresolved complaints	536	697	469	428	396
Effective number of active cases[122]			56	37	16

Mediations conducted	146	139			
Matters settled	134	70			
Hearings	50	67	34		
Cases closed by decision	19	13	13		
Discrimination found			11		
Discrimination not found			2		

Social Area					
Employment	126 (46.5%)	106 (35.21%)			

[122] Many related cases can constitute one case.

Goods, Services and Facilities	138 (50.9%)	189 (62.79%)			
Accommodation	5 (1.9%)	5 (1.66%)			
Contract	1 (0.4	0			
Other	1	1 (0.33%)			

Grounds of Discrimination[123]					
Disability	160	163			
Reprisal	30	36			
Sex	41	31			
Race	33	38			
Colour	29	29			
Age	11	10			
Ethnic Origin	10	16			
Place of Origin	18	15			
Family Status	10	8			
Ancestry	7	6			
Creed	11	77			
Marital Status	3	7			
Sexual Orientation	10	4			
Citizenship	1	1			

Summary of the HRTO Statistics:

2007-2008 Fiscal Year (April 1, 2007 to March 31, 2008):

- The HRTO received 271 commission referred complaints and closed 154 complaints.
- The HRTO conducted 146 mediations, resulting in 134 settlements.
- A total of 50 hearings were held and 19 complaints were closed by decision.
- The most commonly cited social area was services, good and facilities, with 50.9% of complaints referring to this social area, followed by employment at 46.5%.
- Disability was raised as a ground of discrimination in 160 applications, followed by sex at 41, race at 33and reprisal at 30.

2008-2009 Fiscal Year (April 1, 2008 to March 31, 2009):

- The HRTO received 301 commission referred complaints and closed 140 complaints.
- The HRTO conducted 139 mediations, resulting in 70 settlements.
- A total of 67 hearings were held and 13 complaints were closed by decision.
- The most commonly cited social area was services, good and facilities, with 68.79% of complaints referring to this social area, followed by employment at 35.21%.
- Disability was raised as a ground of discrimination in 163 applications, followed by race at 38, reprisal at 36 and sex at 31.

[123] As many applications claim discrimination based on more than one ground, the totals in the chart far exceed the number of applications received.

2009-2010 Fiscal Year (April 1, 2009 to March 31, 2010):

- There were 469 unresolved complaints at the HRTO. As many of these complaints involved related issues, the effective number of cases by the fiscal year end was 56. The HRTO closed 228 complaints.
- The HRTO held 34 hearings and issued 13 final decisions. Discrimination was found in 11 cases, with two complaints being dismissed.

2010-2011 Fiscal Year (April 1, 2010 to March 31, 2011):

- There were 428 unresolved complaints at the HRTO, representing 37 active cases.

2011-2012 Fiscal Year (April 1, 2011 to March 31, 2012):

- There were 396 unresolved complaints on March 31, 2012, representing 16 active cases.

APPENDIX F – Centre Statistics

The Human Rights Legal Support Centre's (HRLSC's) fiscal year runs from April 1 to March 31.

The Centre operates a public telephone line which allows callers to choose from a variety of options such as listening to recorded information about the *Code* and the Centre's services, or speaking to a Human Rights Advisor. Services are offered in English and French. Staff of the Centre can also offer direct service in over 10 languages and additionally offer service in 140 languages through an interpreter services.

To date, the Centre's Human Rights Advisors have not been able to keep up with the demand for their services. Accordingly, callers experience wait times before speaking to an Advisor and some calls are not answered.

The Centre has calculated the percentage of telephone inquiries answered as follows:

Volume of Calls and Percentage of Calls Answered

Fiscal Year	Calls offered	Calls answered	Calls not answered	Answer rate
2011-12	36,238	20,226	16,012	66%
2010-11	41,736	23,673	18,063	57%
2009-10	38,579	21,871	16,708	57%
2008-09	26,934	13,121	13,813	49%

In 2011-12, the Centre assigned more staff to answer telephone inquiries and installed a new telephone system in November 2011. These two factors improved the Centre's answer rate in the 4th quarter.

The answer rate for 2011/12 can be split into two parts: OLD phone system (44%) and NEW phone system (79%).

4th Quarter	Calls offered	Calls answered	Calls not answered	Answer rate
Jan 1- Mar 31, 2012	11,655	9,317	2338	79%

Telephone Inquiry Statistics for Centre

	Telephone Inquiries during fiscal year	Telephone wait times	# of inquiries related to human rights and % of all telephone inquiries	# of inquiries where summary legal advice Provided	# of inquiries answered concerning general information about Code	# of inquiries unrelated to human rights and % of all telephone inquiries
2011-2012	25,276*	8 minutes+ **	18,420 (73%)	12,562	NA	6,856 (27%)
2010-2011	25,793	12-17 minutes	18,793 (73%)	16,378	7000	7,000 (27%)
2009-2010	24,905	NA	19,905 (80%)	10,700	8,200	5,000 (20%)
2008-2009 (nine months)	15,140	NA		NA	NA	NA

*From 18,968 individuals.
** For January to March 2012, the last quarter of 2011-12, after the Centre's new telephone system was installed, the wait times were 6:19 minutes for service in English, and 9:52 minutes for service in French.

Telephone Inquiries by Social Area

	Contracts	Employment	Goods, Services & Facilities	Housing	Membership	No social area identified
2011-2012	0.2%	78.8%	14.4%	6.3%	0.3%	0%
2010-2011	0%	75%	11%	5%	0%	9%
2009-2010	0%	84%	12%	4%	0%	0%
2008-2009 (nine months)	0%	84%	12%	4%	0%	0%

Telephone Inquiries by Ground
Each ground is cited as a % of all grounds of discrimination in all inquiries.

	Disability	Sex, Sexual Harassment, Gender, Gender Identity, Pregnancy and Related Grounds	Sexual Orientation	Race and Related grounds	Family, Marital Status	Age	Receipt of Public Assistance	Creed and Religion	Record of offences	Reprisal	Association	No Ground Identified
2011-2012	46%	16%	1%	20%	5%	5%	1%	3%	1%	1%	1%	NA
2010-2011	44%	14 %	2%	15%	5%	5%	0%	3%	0%	1%	NA	10%
2009-2010	28%	21%	10% **	30%***	4%	3%	0.5%	NA	0%	2.5%	NA	NA
2008-2009 nine months)	48%	22%*	NA	16%	7%	5%	NA	1%	1%	NA	NA	NA

* 2008-2009 statistic includes discrimination based on sexual orientation in this category.
**2009-2010 statistic includes gender identity in this category.
*** 2009-2010 statistic includes race-related creed in race discrimination category.

Statistics concerning Centre representing clients before Tribunal

	# of clients provided legal assistance concerning Tribunal applications	**# of clients provided representation at mediation and/or hearing**	**Settlement rate at mediation**	**# of applications settled at all stages**
2011-2012	2,399*	497**	85%	378
2010-2011	1,830*	554	80%	350
2009-2010	995	500	N/A	258
2008-2009 (nine months)	1,500	375	N/A	150***

* Described by the Centre as the provision of “in-depth lawyer services.”
** Of the 497 cases in which the Centre provided representation, 278 were in respect of Tribunal mediations, while 219 were in respect of Tribunal hearings.
*** This figure for 2008-09 was for cases that were resolved without filing an application.

Statistics for 2011-12 Only

2011-2012 was the first full fiscal year since the implementation of the Centre's new case management system. The Centre was able to capture certain additional statistics as follows:

LEGAL AND SUPPORT SERVICES

- Legal and Support Services
  - 12,562 new individuals received *Code*-related legal assistance at one or more stages of the human rights enforcement process.

- In-depth Legal Services
  - 2,399 new individuals received in-depth legal services[124] at one or more stages of the human rights enforcement process.

RETAINED SERVICES

i. Application Stage
   - Number of Applications filed by the Centre as Counsel of Record:
     - 100

ii. Mediation Stage
   - Number of Applications where the Centre was retained to provide full representation at Tribunal Mediation:
     - 278
   - Number of Mediations Attended:
     - 230
   - Settlement rate at Mediation:
     - 85%[125]

iii. Hearing Stage
   - Number of Applications where the Centre was retained to provide full representation at Hearing:
     - 219
   - Number of hearing files that settled before, at or during hearing:
     - 101
   - Number of hearings on the merits:
     - 91[126]

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[124] In 75% of these cases, service was provided by one of the Centre's lawyers. In the remainder, service was provided through a team of Legal Services Representatives that handles urgent cases, usually where an application is facing a limitation period or other Tribunal deadline, and early settlement initiatives.

[125] The Centre's Operational Business Plan set a target settlement rate at mediation of 70% for 2011/12. The target was exceeded by 15%.

iv. Settlements by Stage

- Number of Applications Settled at all Stages:
  - 378

Pre Application	56	15%
Application	7	2%
Pre Mediation	15	4%
Mediation	196	52%
Pre Hearing	69	18%
Hearing	32	8%
Post Hearing	1	0%
Enforcement	2	1%
	378	100%

v. Retainers by Ground of Discrimination

a) Each ground as a % of all grounds in all retainers

Age	4.3%
Ancestry	4.7%
Association	1.2%
Citizenship	0.7%
Colour	6.5%
Creed (e.g. Religion)	2.5%
Disability or Perceived Disability	34.2%
Ethnic Origin	5.6%
Family Status	2.6%
Marital Status	0.9%
Place Of Origin	5.3%
Race	8.7%
Receipt of Public Assistance	0.3%
Reprisal or Threat of Reprisal	4.4%
Sexual Harassment, Pregnancy and Gender Identity	14.2%
Sexual Orientation	0.6%
Sexual Solicitation, Sexual Advances or Reprisals	3.3%
	100%

[126] Of the 91 hearings, almost one-third were converted to mediation-adjudication hearings at the start or during the hearing.

b) % of retainers that cited each ground[127]

Age	59	8.1%
Ancestry	64	8.7%
Association	16	2.2%
Citizenship	10	1.4%
Colour	90	12.3%
Creed (e.g. Religion)	35	4.8%
Disability or Perceived Disability	470	64.2%
Ethnic Origin	77	10.5%
Family Status	36	4.9%
Marital Status	13	1.8%
No Ground Identified	14	1.9%
Place Of Origin	73	10.0%
Race	120	16.4%
Receipt of Public Assistance	4	0.5%
Reprisal or Threat of Reprisal	60	8.2%
Sex - Sexual Harassment, Pregnancy and Gender Identity	195	26.6%
Sexual Orientation	8	1.1%
Sexual Solicitation, Sexual Advances or Reprisals	45	6.1%
	1,389	190%

[127] 1,389 grounds were cited in all retainers. The reason why the percentages add up to more than 100% is that some retainers cited more than one ground.