USING PUBLIC INTEREST REMEDIES TO IMPACT CULTURAL CHANGE

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Introduction

The *Human Rights Code* (the *Code*) contains provisions that help to combat the ever-present and everyday problem of discrimination in the workplace, irrespective of whether the issue relates to recruitment, training, drug testing, compensation, workplace standards, retention, promotion, discipline and discharge. These provisions go beyond financial and non-financial compensation for damages to persons that were discriminated against, to change the very structure of institutions and their procedures.

> Section 45.2(1) 3 of the *Code* provides the Human Rights Tribunal of Ontario with the jurisdiction to award remedies for future compliance with the *Code*, or what are more commonly referred to as "public interest remedies". ....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."[1]

The Human Rights Legal Support Centre reported that in 2010/2011 70% of successful decisions before the Tribunal and about 75% of settlements achieved a public interest remedy.[2] It is not clear whether or not there has been a decline of public interest remedies as most cases are

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[1] Ministry of the Attorney General (2012). Report Of The Ontario Human Rights Review 2012. < https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/#_Toc436831400> citing "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>.

[2] ARCH Disability Law Centre (2012, March 1). Ontario Human Rights Review. <http://www.archdisabilitylaw.ca/sites/all/files/ARCH%20written%20submissions%20HR%20Review%20FINAL%20%20(TSH%20LL%20KRS)%20MARCH%201%202012.doc> and HRLSC Three Year Review < http://www.hrlsc.on.ca/sites/default/files/docs/en/Tab%20E%20-%20HRLSC%20Public%20Information%20for%203%20Year%20Review%20Website%20Material.pdf >, pages 11-12

resolved at the Tribunal through the mediation process. However, in those cases that are reported it will be seen that public interest remedies are ordered in the majority of employment related human rights matters.

Davis and McKinnon – Robust remedies in cases of disability and race-based discrimination

More related to issues of employment, *Davis v. City of Toronto*[3], was one such case, in which there was a push for significant public interest remedies, where the City of Toronto Fire Service withdrew a conditional offer of employment to Mr. Davis, based on the perception that he had a disability.

Based on Section 45.2(1)(3) of the *Code*, the Ontario Human Rights Commission requested that the *Tribunal* order the City of Toronto to:

1. Establish an appeals process for applicants who are denied a firefighting position;
2. Require any person within the hiring process to attend human rights training which includes a component on the accommodation of individuals with disabilities;
3. Make hiring decisions based on an individualized assessment of a candidate's ability to do the job;
4. Prepare documentation that sets out the purpose of the medical examination and medical history data form, which states that medical information acquired during the examination or history data form will not be

[3] *Davis v. City of Toronto*, 2011 HRTO 806 (CanLII) <http://canlii.ca/t/flr69>

> used to deny the candidate a job if they pass the Occupation Specific Fitness test.[4]

The Tribunal in this case ordered the City to do the following:

> 1. Dr. Forman shall attend, at the City's expense, a training program on disability and the duty to accommodate, and provide written confirmation to the Commission that the training has been so provided;
> 2. The City shall establish a panel of orthopaedic specialists who will be consulted by the Fire Service's Chief Medical Officer before excluding any candidate based on medical reasons within this field of medicine.[5]

In *McKinnon v. Ontario (Ministry of Correctional Services)* [1998] O.H.R.B.I.D. No. 10 (Ont. Bd. Inq.) and numerous decisions that followed in Mr. McKinnon's matter,[6],[7] changed significantly the way in which the Ontario Government manages discrimination in the workplace, particularly its prisons. This particular decision led to the creation of department responsible for Organizational Effectiveness led by an Assistant Deputy Minister. Numerous public interest remedies were ordered in this case. And in the

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[4] Para. 178.
[5] Para. 183.
[6] *McKinnon v. Ontario (Ministry of Correctional Services)* (2001), 39 C.H.R.R. D/308) "this Board of Inquiry found the Toronto East Detention Centre to have been "redolent ... particularly towards black employees and inmates"
[7] *McKinnon v. Ontario (Ministry of Correctional Services)* 2007 CarswellOnt 9187 Professor Hubbard wrote:
"The Minister's response made reference to the orders of this Tribunal, as indicated in the April 7, 2006 news item in the Toronto Sun (Exhibit 196, Tab 3), which reads in part as follows:
... The request [for an inquiry] comes 15 months after another officer received the first of about 20 letters threatening hundreds of black and South Asian officers working at Toronto jails. ... Certain information in the letters led Mitchell's lawyer, Selwyn Pieters, and [Donald] McLeod [Tardiel's lawyer] to believe they come from colleagues. ... Community Safety and Correctional Services Minister Monte Kwinter said yesterday that police and the ministry are investigating the allegations. He said a public inquiry would have to be called by the attorney general once police finish their investigation. Previous complaints to the Ontario Human Rights Commission led to a tribunal that made recommendations to the ministry, with two outside consultants to ensure the recommendations were implemented, Kwinter said. "There are people who have particular biases," he said. "We have to find out who they are and get them out of there."

unusual circumstances of this case, the Tribunal had the Deputy Minister, Jay Hope, show cause why it should not state a case of contempt against him.[8]

Using Public Interest Remedies to Impact Cultural Change

The examination of these and many other cases involving public interest remedies for human rights claims, point to a number of ways that these remedies can be used to affect the way particular systems and procedures are conducted, leading to possible cultural changes. Section 45.2(1)(3) of the *Code* is explicitly broad in terms of the types of remedies the Tribunal may order, leaving room for anything that it is determined will bring a respondent in compliance with the *Code*.[9] It is therefore within the mandate of the Ontario Human Rights Commission, when it intervenes in an application under section 35(1)(a) of the *Code*, as well as counsel representing aggrieved complainants, to put forth an evidentiary record to support findings on liability and public interest remedies to foster cultural and behavioral change in workplaces that are "redolent" with Code-based discrimination. The creation of public interest remedies aimed at preventing human rights violations from occurring in the future, should perhaps consider the following issues.

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[8] McKinnon v. Ontario (Correctional Services), 2011 HRTO 263 (CanLII) the Tribunal wrote "[186] Having concluded that the Complainant has established a prima facie case of conduct falling within s.13(1) of the SPPA, for the reasons set out in the last section, I have decided to exercise my discretion in the matter by requesting the Divisional Court to inquire into whether Deputy Minister [JH] is in contempt of the board's orders.." This contempt ruling was a very rare and ground-breaking remedy to a workplace whose culture supported and rewarded bad behavior.

[9] Crêpe It Up! v. Hamilton, 2014 ONSC 6721 (CanLII), <http://canlii.ca/t/gfj1l>.

1. Understanding the problem through the use of statistics

Human rights violations particularly discrimination sometimes occur subconsciously, meaning that perpetrators of these are acts are often times not completely aware of their behavior and its effects.[10] This may lead to outright denials of the occurrence of human rights violations, regardless of whether such violations have actually occurred. The Ontario Human Rights Commission observed that racist ideology may "become deeply embedded in systems and institutions that have evolved over time"[11].

Detailed and efficient data collection, resulting in compelling statistics detailing differential treatment between different groups of people, can go a long way toward, at the very least, bringing the differential and systemic discrimination to light.[12] In 2005, the Ontario Human Rights Commission stated that "data collection is necessary for effectively monitoring discrimination, identifying and removing systemic barriers, ameliorating historical disadvantage and promoting substantive equality."[13] The Commission went further, saying that "data collection and analysis should be undertaken where an organization or institution has or ought

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[10] Rooth, D. (2007, April). Implicit discrimination in hiring: Real world evidence. The Institute for the Study of Labor. Discussion Paper No. 2764 < http://ftp.iza.org/dp2764.pdf>

[11] Ontario Human Rights Commission (2008) Human Rights at Work 2008 - Grounds of discrimination: definitions and scope of protection.
< http://www.ohrc.on.ca/en/iii-principles-and-concepts/3-grounds-discrimination-definitions-and-scope-protection >

[12] Canada (Human Rights Commission) v. Canada (Department of National Health and Welfare), 1998 CanLII 7740 (FC), <http://canlii.ca/t/4c04>

[13] Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination* (June 9, 2005), p. 42 online < http://www.ohrc.on.ca/en/resources/Policies/RacismPolicy/pdf> (date accessed: August 07, 2011)

to have reason to believe that discrimination, systemic barriers or the perpetuation of historical disadvantage may potentially exist."[14]

The compiling of statistics relating to a particular issue that led to the human rights application, offers a useful first step in some public interest remedies, as it will provide concrete evidence of any systemic bias that may exist within an institution. Demographic statistics has been on the human rights landscape in cases involving law enforcement organizations. My case against Canada Customs was one of the first cases in which a settlement resulted in the collection of statistics by a law enforcement agency to be sent on by the CHRC for a public hearing before the CHRT.[15] On January 30, 2002, on the eve of the hearing, I settled the complaint with Canada Border Services Agency. Amongst other remedies mandated the collection of demographic data on passengers referred to secondary inspection at Canada's Ports of Entry. This was one of the first human rights cases against a law enforcement agency to mandate such a process in Canada.[16] This was followed by Kingston Police Service, Windsor Police Service and Ottawa Police Service.

Selmi argues that when such statistics exists, intentional discrimination could be established, as "repeated patterns of behavior will almost certainly have a conscious component to them"[17]. In attempts to contribute to positive cultural changes, statistical information is often times necessary to

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[14] *Ibid*

[15] The referral to a Tribunal generated print, radio and television coverage. See, for example, John Saunders, "Black traveller calls search racial profiling: Rights body to hear Selwyn Pieters's case involving two Canada Customs agents over train incident, JOHN SAUNDERS reports", The Globe and Mail (June 04, 2001), p. A16.

[16] See, for example, Paul Waldie, "Customs to gather racial data to see if officers use profiling" The Globe and Mail (December 16, 2002), p. A1.

[17] Selmi, M., (2016). Statistical inequality and intentional (not implicit) discrimination. Law and Contemporary Problems, 79, p. 199-221

determine if an act of discrimination is an isolated incident, or an example of widespread bias in processes and systems.[18] Such statistical information is essential for determining how to best go about the task of redesigning systems and procedures to lessen instances of human rights violations.

2. Redesign of systems and procedures in policy and physical standards and environment

It is not enough to understand the problems that allow human rights violations to occur. Institutions should restructure their systems and procedures to prevent such violations from occurring in the future.[19] Furthermore, a significant component of any redesign may be a complete overhaul or change in the culture of the organization. While this is often done in the form of new rules and regulations, the Commission observed that "Organizations and institutions have a positive obligation to make sure they are not engaging in systemic discrimination. They should prevent barriers by designing policies and practices inclusively up front. They should also review their systems and organizational culture regularly and remove barriers where they exist."[20] Again, Section 45.2(1)(3) of the Code allows much room for the *Tribunal* to be creative in the types of public interest remedies they offer, so this is not beyond

[18] Hadibhai, A.M (2004) Surveying Racial Discrimination Cases, Ontario Human Rights Commission <http://www.ohrc.on.ca/en/book/export/html/8973 >
[19] CNR v Canada (Human Rights Commission), [1987] 1 SCR 1114 (SCC).
[20] Policy on preventing discrimination because of gender identity and gender expression < http://www.ohrc.on.ca/en/book/export/html/11169>

the scope of remedies that can be advocated for.[21] The use of remedies to affect the physical environment occurs mostly in Code based disability related grounds application. The issue of physical standard occurs mostly in gender-related hiring and discrimination.[22]

The defense used by employers that we are following established practices or standard operating procedures in most case are the application of rules and procedures that mask discrimination. So not only should change be advocated for on paper and in policy, but public interest remedies should also attempt to change the physical environment in which discrimination occurs, as this also has a profound impact on behavioral and cultural change.[23]

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[21] See, *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO 675 (CanLII), <http://canlii.ca/t/gj60b>, para. 227. See also, Scarlett v. Hamilton Health Sciences Corporation, 2010 HRTO 5, at para. 42 and *Fair v. Hamilton-Wentworth District School Board*, 2012 HRTO 350.

[22] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3 and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC), [1999] 3 S.C.R. 868 (SCC) - numerous human rights decisions in all jurisdictions have spawned from these two significant decisions.

[23] See Ontario Human Rights Commission, Human rights and policing: creating and sustaining organizational change <http://www.ohrc.on.ca/en/human-rights-and-policing-creating-and-sustaining-organizational-change> (Toronto: Ontario Human Rights Commission, 2011)

3. Sensitivity training and education

This is perhaps the most obvious aspect that often is and should be incorporated into public interest remedies. A cursory search of canlii.org indicates at least 84 decisions in which the Tribunal has ordered Respondents to take Human Rights 101.[24] In addition to understanding the scale and the manner in which these violations occur and making the corresponding changes to policy and the physical environment, attempts should be made to create changes within the agents that are at risk for committing acts that violate the human rights of others. The Commission suggests that as a best practice, employers "through training and education provided as part of the human rights strategy and on an ongoing basis."[25] This is vital for developing employees that can know about, identify and work towards avoiding types of discrimination.[26]

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[24] eLearning module "Human Rights 101" Ontario Human Rights Commission <http://www.ohrc.on.ca/en/learning/human-rights-101/human-rights-101>

[25] Ontario Human Rights Commission (2008) Human Rights at Work 2008 - Resolving human rights issues in the workplace.
< http://www.ohrc.on.ca/en/iv-human-rights-issues-all-stages-employment/12-resolving-human-rights-issues-workplace>

[26] Ibid.

4. Reinstatement

The usual treatment in employment law is to award damages in lieu of reinstatement. The recent case of *Hamilton-Wentworth District School Board v. Fair,* 2016 ONCA 421 (Ont. C.A.), changes the legal landscape in terms of the availability of reinstatement in employment. While reinstatement is an individual remedy to an affected employee, it also has a public interest component. Madam Justice Roberts wrote:

> [91] First, while rarely used in the human rights context, the remedy of reinstatement clearly falls within the Tribunal's discretion to order under s. 45.2(1) of the Code, as follows:
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> > 45.2 (1) on an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:
> >
> > ...
> >
> > 3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.
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> [92] As the Divisional Court correctly noted, "The Code provides the Tribunal with broad remedial authority to do what is necessary to ensure compliance with the Code."

I like the remedy of reinstatement because workplaces will be forced to change their culture to respect the dignity of persons who do not "fit" within the dominant culture of the workplace.

As observed in *McKinnon v. Ontario (Ministry of Correctional Services* [2002] O.H.R.B.I.D. No. 22:

> ¶ 146 Dr. Agard, who (as seen) pointed out that "denial" is one of the four phases organizations go through when confronted with institutional misbehaviour, suggested elsewhere in his testimony that the para-military structure and culture of an organization may lead to the ostracism of those who complain. They are regarded as troublemakers, and made to suffer accordingly. Indeed, a kind of pack mentality can be found even in less regimented organizations, as can be seen in Naraine v. Ford Motor Co. of Canada (No. 4), (1996), C.H.R.R. D/230, at D/245.

No longer can dismissal without notice be the norm for victims of Code based workplace violations. In such cases the discretion remains with an adjudicator to order reinstatement. This in turn must force employers to ensure that the culture is reintegrating those who are reinstated. Otherwise the employer risks significant adverse findings for reprisals or further Code based violations.

Conclusion

Acts that violate the human rights of others are reprehensible and the provision included to institute public interest remedies, provides an opportunity to positively impact cultural and behavioral change within institutions, thereby decreasing the likelihood of these violations occurring in the future.[27] Advocates for the implementation of public interest remedies should first attempt to thoroughly understand the nature of instances of discrimination, as they are

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[27] *McKinnon v. Ontario (Correctional Services)*, 2002 CanLII 46519 (ON HRT), <http://canlii.ca/t/1r5v2>

often times indicators of much larger imbedded systems of bias. Based on these understandings, attention should be paid to making relevant changes not just in policy and regulations, but also in the social and physical environments where these human rights violations occur. Employees within these environments should also be educated and trained on the issue of human rights as a matter of policy, so that they can appropriately act in accordance with systems and procedures that affirm human rights. Legal counsel for complainants should therefore be encouraged to look beyond issues of compensation and restitution to the aggrieved party when human rights violations occur, seizing these opportunities to impact on cultural change, through the use of public interest remedies.