Emerging Trends in Human Rights Remedies

Labour Arbitration Awards for Human Rights Remedies

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Introduction

In this paper, focusing primarily on Ontario, we will examine emerging trends in recent human rights remedies awards.

We will look at the differences between the monetary remedies awarded by the Human Rights Tribunal of Ontario (the "HRTO") and those remedies awarded by labour arbitrators. While labour arbitrators have, in the past, made lower awards for injury to dignity than the HRTO, arbitrators are increasingly relying on the HRTO's jurisprudence, and as a result, the awards are increasing.

In addition to an examination of the different approaches to awarding monetary damages, we will examine non-monetary awards, including reinstatement awards issued by the HRTO, and review cases where the HRTO and labour arbitrators have awarded public interest remedies.

We will also examine a developing trend, by both arbitrators and the HRTO, to award damages where it is determined that there has been a failure to properly investigate human rights complaints raised with an employer.

Damages for Injury to Dignity, Feelings and Self-Respect

In Ontario, the Human Rights *Code* (the "*Code*")[1] specifically provides that the HRTO may order the payment of "monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect."[2] Prior to amendments to the *Code* removing the cap on damages for mental anguish, the HRTO would often divide orders of monetary compensation into general damages and damages for mental anguish. This practice has changed. Currently, as stated in Arunachalam,[3] the HRTO will "make a general evaluation of the circumstances of the *Code* violation and its effects to determine the appropriate monetary compensation for injury to dignity, feelings and self-respect."

To determine an appropriate award for injury to dignity, feelings and self-respect, the HRTO considers the objective seriousness of the conduct, and the effect the conduct has had on the applicant.[4] The relevant factors considered in determining the extent of damages for injury to dignity, feelings and self-respect are set out in *Sandford v Koop*[5] and include: the humiliation experienced by the applicant; the extent of hurt feelings experienced by the applicant; the applicant's loss of self-respect; the experience of victimization; and the seriousness, frequency, and the duration of the offensive treatment.

Varying Approaches in Arbitral Jurisprudence

Labour arbitrators have not always displayed a uniform approach when awarding compensation for injury to dignity, feelings and self-respect. Compensation has sometimes been awarded with very little explanation of the factors taken into consideration. For example, in *Bonnell*,[6] the grievor, a teacher, suffered from numerous medical conditions that were accommodated for a long period of time, and for which new medical information was not provided. Upon the arrival of a new principal at the grievor's school, a new medical certificate was requested. However, the grievor did not provide the required documentation immediately. A series of incidents ensued, which included placing the grievor on attendance management, the rejection of the grievor's medical certificate, and placing the grievor on home duty on the basis of unverified complaints. Arbitrator Weatherhill found these incidents to constitute harassment on the basis of disability. In light of this finding, he determined that there was a breach of the *Code* and awarded **$20,000** as general damages for pain and suffering. Arbitrator Weatherhill concluded that the grievor experienced considerable pain and mental stress as a result of the school board's actions, and the amount was reasonable in the circumstances.

In contrast, in *Providence Care v OPSEU, Local 431*,[7] Arbitrator Stephens awarded **$5,000** as compensation for mental distress and infringement of the *Code*. In his award, Arbitrator Stephens considered whether the employer's actions were reasonable in the circumstances, and determined that they were not. He took into consideration the grievor's experience, the fact that the grievor suffered from a mental health condition that was exacerbated by the employer's conduct, and the fact that the grievor experienced unnecessary, additional mental distress. However, Arbitrator Stephens awarded only $5,000 in damages, which is possibly

explained by the fact that he also ordered reinstatement, and compensation for lost wages. Presumably Arbitrator Stephens thought these remedies would go a long way to putting the grievor in the position he would have been had the discrimination not occurred.

Increasing Reliance on the Principles set out by the HRTO

In recent arbitral jurisprudence, labour arbitrators have explicitly adopted the principles and approach set out by the HRTO in *Sandford v Koop* and *Arunachalam*. This seems to reflect some arbitrators' thinking that there should be some degree of consistency across arbitral decisions in terms of damage awards.

For example, the Ontario Grievance Settlement Board very recently awarded **$18,000** in general damages and **$12,000** for mental anguish when the employer, the Central East Correctional Centre ("CECC"), failed to accommodate an employee with a severe smoking allergy. In *Re Hyland*,[8] the Ontario Grievance Board found that the CECC failed to enforce a non-smoking policy that had been in effect for some time, and failed to engage in a thorough search for accommodated positions that were desirable. The Board cited the factors set out in *Sandford v Koop* as being relevant to determining the quantum of general damages, as well as for the assessment of damages for mental anguish. It concluded that the grievor had experienced humiliation, hurt feelings, a loss of dignity, and victimization. It also concluded that the employer's conduct had caused the grievor a significant amount of stress and anxiety. Based on these conclusions, the Ontario Grievance Board awarded damages for general damages and mental anguish, but did not provide any further explanation as to how it arrived at each amount.[9]

The *Re Hyland* case is to be contrasted to *City of Hamilton v Amalgamated Transit Union, Local 107*,[10] in which Arbitrator Waddingham adopted the HRTO's principles regarding damages for injury to dignity, feeling and self-respect, as set out in *Arunachalam*. Arbitrator Waddingham considered both the objective seriousness of the conduct as well as the grievor's own experience. The grievor was the only female transit inspector employed by the city, and was sexually harassed by her supervisor over the course of a number of years. Arbitrator Waddingham determined that the supervisor's conduct, which included touching, was very

serious. She also found that the city exacerbated the situation by failing to respond adequately, and this resulted in a poisoned work environment. The arbitrator considered the significant impact the harassment had on the grievor's mental health. On this basis, Arbitrator Waddingham concluded that the injuries to the grievor's dignity, feelings and self-respect were substantial, and awarded **$25,000** in general damages**.**

Similarly, in *Dominion Forming Inc v Universal Workers Union (LIUNA, Local 183)*,[11] the Ontario Labour Relations Board (the "OLRB") specifically referred to the HRTO's reasoning in *Arunachalam* in which the HRTO stated that "[c]ases with equivalent facts should lead to an equivalent range of compensation, recognizing, of course, that each set of circumstances is unique. Uniform principles must be applied to determine which types of cases are more or less serious. Of course there will always be an element of subjective evaluation in translating circumstances to dollars, but the HRTO has a responsibility to the community and parties appearing before it to ensure that the range of damages based on given facts is predictable and principled."[12] The OLRB specifically refused to follow cases such as the *Bonnell* case in which the rationale for the award was not clearly spelled out.

In the *Dominion Forming* case, the grievor's employment was terminated after he made a claim for, and received worker's compensation benefits. In rendering his decision on behalf of the OLRB, Vice-Chair Anderson determined that the most probable reason for the grievor's discharge was an unconfirmed suspicion that the grievor was faking his injury or at least exaggerating its extent in order to receive WSIB benefits, avoid his full-time work obligations, and earn additional income from some other source. The OLRB found that the medical evidence did not support the employer's suspicions and that in terminating the grievor's employment because he left the worksite, claiming he was in pain, the employer had discriminated against the grievor. In determining the appropriate remedy, the OLRB applied the considerations set out by the HRTO in *Arunachalam.* The OLRB determined that while it was a very serious matter to terminate the grievor's employment, this was a singular event, and there were no incidents of harassment. The OLRB further determined that there was no subjective effect on the grievor, except for the fact that he was angry because the termination of his employment interfered with his claim for benefits. In the words of the OLRB:

> However, unlike in *Szabo*, the objective circumstances of the Grievor's employment did not constitute him a particularly vulnerable worker. He was a member of a construction trade union during a period of incredibly strong demand for construction workers. Indeed, the Grievor was able to obtain alternative employment as soon as his doctors cleared him to return to work. Further, his actual employment with Dominion was of very short term and his period of active employment only three or four days.[13]

Accordingly, the OLRB awarded **$2,000** in general damages to the grievor. Of note, the OLRB stated that while general damages should not be so low as to trivialize human rights violations, they also should not constitute a winning lottery ticket for the grievor.[14]

Quantum of Awards for Injury to Dignity in the Arbitral Context

It appears that amounts awarded by arbitrators for injury to dignity are lower than those awarded by the HRTO. However, while arbitral awards for injury to dignity have tended to be lower than those awarded by the HRTO, there have been some notable recent exceptions to this pattern, perhaps suggesting a trend upwards in cases of egregious conduct, as is happening in the HRTO jurisprudence. Recently, the Ontario Grievance Settlement Board awarded **$98,000** in general damages to a grievor who was the victim of extensive harassment and discrimination on the basis of sexual orientation. In *Ontario Public Service Employees Union (Ranger) v Ontario (Community Safety and Correctional Services)*,[15] the Board recognized that the amount awarded was unprecedented in arbitral jurisprudence, but it was in keeping with compensation awarded by the HRTO. The grievor worked as a correctional officer and was subjected to ongoing bullying and harassment on the basis of his sexual orientation. Although the grievor's managers were aware of the ongoing harassment, nothing was done to address the situation. As a result, the grievor fell ill, and took a medical leave of absence that lasted for three years. Eventually, he was able to return to work on the condition that he be put in a different position. Although the employer identified possible positions, it was unwilling to modify them to accommodate the grievor. The grievor was eventually offered a customer service position within a different department, but he was unable to do the job effectively. This lead to an exacerbation of his depression and anxiety, and he took further leaves.

Vice-Chair Leighton concluded that the grievor was subjected to harassment and a poisoned work environment on the basis of his sexual orientation. Vice-Chair Leighton also found that

the employer failed to accommodate the employee when he was able to return to work, and failed to make diligent efforts to accommodate him when the customer service position was not working. With respect to the grievor's claim for damages, Vice-Chair Leighton emphasized that the compensation was aimed at making the grievor whole, but that the damages must be foreseeable and not too remote. Vice-Chair Leighton awarded **$45,000** in damages as compensation for the harassment, discrimination and poisoned work environment. In so doing, she noted that, in accordance with decisions from the HRTO, she must consider the nature of the breach and the extent of the harm to the grievor. She concluded that the grievor had suffered greatly, including well-documented issues of anxiety and depression.

Vice-Chair Leighton went on to award a further **$35,000** for the failure to accommodate the employee when he was able to return to work. She held that such a failure was an egregious breach of the collective agreement and of the *Code* and therefore, it merited significant compensatory damages. She also accepted the medical evidence showing that the grievor's condition was exacerbated as a result of the employer's treatment of him during that period, and that he had suffered greatly as a result of the employer's unwillingness to accommodate him. Finally, a further **$18,000** was awarded to compensate the grievor for the second failure to accommodate him, which was another significant breach causing the grievor to suffer harm.

In her decision, Vice-Chair Leighton recognized that these amounts were significant and expressed the view that they were not punitive, but were necessary to compensate the grievor adequately. She noted that the award was proportionate with awards ordered by other boards, and the HRTO, since the cap was removed for damages under the *Code*.

Another notable general damage award was made to a grievor who was repeatedly sexually assaulted by her supervisor at the City of Calgary.[16] In that case, the grievor's misery was exacerbated by the inept and often malicious handling of her case by City of Calgary managerial staff. As a result of the assaults and the mishandling of her case, the grievor's mental health was severely damaged and her prospects of ever working again all but ruined. In awarding **$125,000** in general damages, the Arbitration Board compared the facts of the case to two civil cases and to the *Greater Toronto Airports Authority* case decided by Arbitrator Shime.[17]

However, the quantum of damages in Arbitrator Shime's award for mental anguish that was relied upon by the Arbitration Board in determining the appropriate amount had been overturned by the court. In our view, the Alberta Grievance Board's decision on the issue of general damages in this case is weakened by its reliance on civil claims involving tort law and on an overturned portion of an arbitration award. It does not provide a principled basis for the very high award of general damages.

Nevertheless, both cases suggest that arbitrators may be bringing the quantum of general damages they are ordering in line with the awards that are being ordered by the HRTO, which are also on the increase.

Public Interest Remedies

Labour Arbitration Awards

Historically, it has been the HRTO that has issued systemic and public interest remedies. Non-monetary remedies aimed at compliance with human rights legislation are more exceptional in the labour relations context. However, in recent cases, labour arbitrators have shown themselves to be more willing to order systemic remedies. It is to be noted that the Federal Court has in fact endorsed the power of a labour arbitrator to award public interest (or systemic) remedies.

For example, in *Jeffrey Stringer v Attorney General of Canada* [18] the Federal Court endorsed the power of a labour arbitrator to award systemic remedies. In that case, the arbitrator held that although he had jurisdiction to make orders to remedy systemic discrimination, no such order was warranted on the facts of the case.[19] The Court disagreed, finding that "[e]xperts and specialists must help those managers choose the best means, methods and tools to accommodate those employees". [20] The matter was remitted to the arbitrator for redetermination of the systemic remedy issue.

On redetermination,[21] Arbitrator Paquet reiterated the comments in his original decision that if he were to accept that he did not have the power to award systemic remedies, it would mean that an arbitrator's remedial powers would be more limited for grievances involving human

rights than for other types of grievances. Arbitrator Paquet found that it was, in fact, appropriate to order that the employer, in full consultation with the union, provide a training and sensitization program to all managers and civilian employees on the duty to accommodate employees with disabilities and to ensure that managers who supervise employees with disabilities are fully informed of the existing resources they can rely on for assistance in accommodating employees. However, he declined to order that the employer be required to revise its accommodation policies, finding that the failure to accommodate came, not from any deficiencies in the policies, but from the failure of the grievor's managers to adhere to the policies.

In the *City of Hamilton* decision, discussed above, involving sexual harassment of an employee of the City of Hamilton, the parties agreed that Arbitrator Waddingham would deal with both the grievance based on the collective agreement, and the issues raised in a separate human rights application filed by the grievor.[22] Along with monetary compensation, Arbitrator Waddingham ordered a variety of public interest remedies requested by the union. The employer was ordered to retain a third party to evaluate its discrimination and harassment policy, and to provide training to inspectors, supervisors, and human resources managers. She also ordered the employer to complete the training within six months of the date of the decision, and further ordered the employer to post documents related to the *Code*, the discrimination that had occurred and the harassment policy within a specific timeframe. She ordered the employer to advise the union when it had completed these requirements. Finally, Arbitrator Waddingham retained jurisdiction to deal with any issues regarding the implementation of the award.

In *Re District School Board Ontario North East and OSSTF (Bristow)*,[23] an arbitration panel heard the grievance of a blind employee whose position was made redundant by the school board. After her position was made redundant, the grievor elected to be placed on a recall list. Arbitrator Davie concluded that the school board discriminated against the grievor, and breached her rights under the *Code* by refusing to send the grievor job postings electronically, as she had requested, so that she could read them using a computer program. The school board also failed to involve the union when the grievor was offered a position that required

accommodation. Along with monetary compensation, Arbitrator Davie ordered that, in future, the school board must involve the union "in all staffing matters involving the placement and accommodation of disabled bargaining unit employees."

In *Re Renfrew County and District Health Unit and OPSEU Local 487*[24] Arbitrator Parmar found that the grievor had been subjected to discriminatory comments based on his sexual orientation and ordered systemic remedies, in addition to a payment of general damages of **$9,000** to the grievor. She ordered the employer to consult with an external human rights expert to develop a human rights policy and a human rights training program.[25]

More recently, in *Laurentian University and LUFA (Dr. X), Re*, Arbitrator Etherington ruled that the University failed to properly accommodate the griever's medical condition when it refused to allow the grievor to return to work as a full professor.[26] While recognizing that the University had attempted to accommodate the grievor for nearly a decade, the arbitrator also noted that past accommodation attempts did not properly address the grievor's particular needs brought upon by his medical condition. The arbitrator ordered the University to adopt a return to work plan drafted and proposed by the union, which mandated the University to allow the grievor one academic term to get "back in to an academic environment to prepare to return to teaching, followed by a term with a single online course, before increasing [the grievor's] course load in later terms…"[27] Although the University argued that the union's plan was unreasonable and constituted undue hardship, the arbitrator disagreed because the union's proposed plan was a temporary and gradual process aimed at re-integrating the grievor in the workplace and to eventually allow him to reasonably perform his normal work functions. Of note, the arbitrator declined to award any monetary damages.

In *Society of Energy Professionals and Ontario Power Generation (Chetcuti), Re*,[28] Arbitrator Trachuck found that the employer was engaged in discriminatory practices when it failed to assign the grievor any work (save a weekly Saturday shift) because of his role as Unit Director and his involvement with union activities. In addition to awarding **$3,000** in damages, the arbitrator ordered the employer to find an appropriate work assignment for the grievor.[29]

While not in Ontario, it is interesting to note that Justice Ross from the Alberta Court of Queen's Bench recently upheld a controversial arbitral decision ruling that the employer was engaged in discriminatory practices on the basis of family status when it refused to allow the grievor to solely work day shifts as opposed to rotating day and night shifts.[30] The grievor pleaded that the required night shifts prevented her from adequately providing care to her two children. She asserted that she did not have the financial resources to pay night-time childcare and that the father of the children had left and was not providing any support. In considering both the grievor's personal and financial circumstances, the arbitrator ordered the employer to only schedule her straight day shifts in order to comply with the *Alberta Human Rights Act*.[31]

As these decisions demonstrate, in certain circumstances, arbitrators are willing to order non-monetary remedies that are very similar to public interest or systemic remedies ordered by the HRTO. Given that the right to be free from discrimination is enshrined in the vast majority of collective agreements, such orders are not at odds with a labour arbitrator's role of providing remedies that ensure the enforcement of rights pursuant to the collective agreement. Some might argue that arbitrators are not well placed to order non-monetary remedies, as it brings into question the finality of the arbitral decision and creates uncertainty from a labour relations standpoint. However, it may also be argued that arbitrators are well placed to retain authority to address any issues arising from a non-monetary award, and commonly do so with other types of awards. Furthermore, proceeding through arbitration is often much more timely and efficient than proceeding through the HRTO. On the whole, while such non-monetary awards are unusual, they are not outside of the labour arbitrator's expertise. Should issues arise with the implementation of a non-monetary award, it is preferable for the parties to return to an arbitrator who is familiar with the labour relations and the nature of the particular industry, than to reappear before an administrative tribunal or court.

Remedies for the Failure to Investigate

A trend that is developing, in both the HRTO and labour arbitration awards, is an award for damages designed to compensate a person where there has been a failure to properly investigate a human rights complaint which has been raised with an employer.

In the *Renfrew County* case discussed above, a labour arbitrator awarded damages for a failure to investigate. Arbitrator Parmar based her damage award in part on the "[e]mployer's inadequate investigation and response", which she found extended the impact of the discriminatory incident.[32]

An interesting development in this area is the potential of a 'free standing' award of damages for a failure to investigate human rights complaints, even where it is found that the complainant had not in fact been discriminated against. The HRTO has awarded damages for the failure to investigate allegations of discrimination, independent of the actual findings on the allegations themselves.[33]

A recent arbitral decision has held that employers also have an obligation to promptly communicate the outcome of employee complaints following an investigation. In *Ontario (Ministry of Community Safety and Correctional Services) and OPSEU (Williams), Re*, Arbitrator Albertyn (Vice-Chair) awarded the grievor **$3,500** in damages due to the employer's failure to consult with the grievor during a fifteen-month period following the employer's acceptance of an investigation report into her racial discrimination complaint, leaving her in "limbo" and causing her "some injury to her dignity and to her feelings of self-respect."[34]

Thus it appears that even in the arbitral context, damages can be awarded for a failure to investigate a human rights complaint, even where it is ultimately determined that no human rights violation in fact occurred.

Reinstatement

The HRTO and labour arbitrators alike have the power to order reinstatement as part of its extensive remedial powers. However, this remedy is more frequently awarded in the arbitral context.

Recently, in *Kinsey v Deputy Head (Correctional Service of Canada)*,[35] the Canada Public Service Labour Relations and Employment Board held that the grievor had been subject to discrimination contrary to the *Canadian Human Rights Act* when the employer's aggressive approach in disciplining the grievor was "unacceptable." The adjudicator held that the grievor's

sleep apnea, obesity and other physical disabilities biased the employer against the employee and highly contributed to the employer's decision to terminate the employee. The Board accordingly ordered the grievor to be reinstated to a position "consistent with his needs for accommodation […] without loss of seniority or other benefit."[36] In the Board's words, when an employer fails to accommodate and instead disciplines an employee due to his or her disability, the employer "trivializes the disciplinary process and creates a lack of credibility for the person imposing that discipline."[37]

In *TRW Canada Ltd and TPEA (Lockhart), Re*,[38] Arbitrator Sheehan ordered the reinstatement of the grievor after finding that the employer dismissed the employee due to his absenteeism and failure to follow the reporting process of his absences to his employer. The arbitrator found that the reasons for the grievor's termination upon which the employer relied were brought upon by severe diagnosed depression. In addition to granting the reinstatement, Arbitrator Sheehan ordered the grievor to comply with medical advice instructing him to attend 20 therapy group sessions, and imposed a "last chance" agreement allowing the employer to suspend the grievor for a first absence without leave, and to terminate the grievor for a second unreported absence. This case indicates that even when an arbitrator orders reinstatement in Ontario, he or she may impose terms and conditions which the employee must be strictly follow, failing which the employee may be dismissed.

In *Global Communications Ltd v CEP, Local 722-M*,[39] the employer denied the grievor's request for leave after the grievor informed her superior that she had requested the time off because her faith required her to complete a pilgrimage in Japan. In spite of the denial to her request, the grievor went to Japan, completed her pilgrimage and consequently failed to report for work, which led to her dismissal. The employer stated that the employee failed to stress the nature of her trip to Japan, and did not attend meetings between the union and the employer regarding her duties at work. However, Arbitrator Levinson found that the employer failed to accommodate the grievor's religious beliefs to allow her to partake in the pilgrimage, failed to meet the threshold of undue hardship, and ordered the grievor's reinstatement accordingly.

These arbitral cases demonstrate that when an employer is found to have violated a prohibited ground of discrimination in dismissing an employee, is it not uncommon for arbitrators to order the employee's reinstatement as part of the remedy.

Conclusion

Given the multiple possible forums for the adjudication of human rights complaints, it is unsurprising that diverging approaches have developed in terms of remedies. In general, the case law suggests that awards compensating employees for injury to dignity are rising, and will continue to rise. As recent jurisprudence demonstrates, arbitrators and the HRTO are showing themselves willing to order remedies that are exceptional where it is required to make the person whole, or where it is in the public's interest. These emerging trends will certainly continue to have an impact on the choice of forum in the future.

EMERGING TRENDS IN HUMAN RIGHTS REMEDIES

Civil Awards For Human Rights Remedies

Introduction

In Ontario, human rights legislation now specifically provides jurisdiction to courts to award monetary and non-monetary relief to aggrieved parties in certain circumstances.

In June of 2008, the Ontario *Human Rights Code*, R.S.O. 1990, c.H. 19 (the "*Code*") was amended to add section 46.1, which allows human rights claims based on the *Code* to be brought in a civil court. Despite the great promise of human rights damages in the civil context, the predicted floodgates have not opened; there have been few successful cases brought under section 46.1. This paper reviews each of the successful cases; considers the barriers to successful claims; and explores the likely future of section 46.1.

Before launching into a substantive analysis of the jurisprudence, it is helpful to first set out the legislative framework and a brief history of the development of human rights remedies in the civil context.

Legislative Framework

Section 46.1 created a new substantive jurisdiction for Ontario courts to award monetary compensation and other remedies for a breach of the *Code*. Section 46.1 provides:

> 46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:
>
> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
>
> 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect. 2006, c. 30, s. 8.
>
> (2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I.[40]

Section 46.1 therefore permits a plaintiff to advance an allegation before the courts and seek damages for a breach of Part I of the *Code*. Pursuant to section 46.1(2), in order to commence an action seeking compensation for discrimination, a human rights claim must be accompanied by a civil cause of action.

In considering section 46.1, the courts have determined that it should be read prospectively only. Cases with human rights allegations pre-dating June 30, 2008 are barred.[41]

Concurrent civil and Human Rights Tribunal ("Tribunal") applications are barred by section 34(11) of the *Code.* Section 34(11) states:

> 34 (11) A person who believes that one of his or her rights under Part I has been infringed may not make an application under subsection (1) with respect to that right if,
>
> (a) a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or
>
> (b) a court has finally determined the issue of whether the right has been infringed or the matter has been settled.[42]

Tracing the judicial interpretation of human rights in the civil context

Until the 2008 amendment to the *Code*, human rights claims in civil courts were effectively barred by the jurisprudence. In *Bhadauria v. Seneca College of Applied Arts & Technology*,[43] the Supreme Court of Canada rejected the recognition of an independent tort of discrimination and established that a civil cause of action could not be grounded only in an allegation of a breach of human rights legislation or the public policy expressed therein. In rejecting a tort of discrimination, the Court recognized that the enforcement scheme of the *Code* was intended to be comprehensive.

In 2008, in *Honda Canada Inc. v. Keays*, the Supreme Court of Canada concluded that a breach of the *Code* is neither an actionable tort, nor an "independently actionable wrong" for the purposes of awarding punitive damages.[44] The Court did recognize, however, that a plaintiff could advance a breach of the *Code* as a cause of action in connection with another actionable wrong under the newly enacted section 46.1.

With the enactment of section 46.1, the barrier to prosecuting human rights violations in the civil context slowly began to lift. According to a 2012 report on the changes to the Ontario human rights regime, section 46.1 was intended to provide a kind of alternative relief valve for human rights cases outside of the Tribunal context.[45] This provides an interesting contrast to the approach taken by the Court in *Bhadauria,* which cautiously avoided deconcentrating the comprehensive administrative human rights regime.

Despite the legislative indication, in the form of the 2008 amendment, that a shift was desired, courts were slow to catch on. For at least three years following the introduction of section 46.1, courts struggled with questions as to its applicability.

In *Andrachuk v. Bell Globe Media Publishing Inc*.[46], a senior level employee was notified that her position had been dissolved pursuant to a "re-organization" just eleven days after she informed her employer that she was pregnant and intended to take maternity leave. A younger male manager was hired a few months later to fill the plaintiff's former position. The employee commenced an action and the employer brought a Rule 21 motion to strike the employee's wrongful dismissal action as statute barred. The employer also moved to strike certain paragraphs of the employee's Statement of Claim, arguing that there was no independently actionable wrong of discrimination recognized in law.

The Court rejected the employer's submission that pursuant to *Bhadauria* and *Keays*, a civil cause of action cannot be grounded in a breach of human rights legislation. Instead, the Court held that in support of her claims of wrongful dismissal and reprisal and as descriptive of the defendant's conduct in dismissing her, the employee had pleaded discrimination for the purpose of claiming monetary compensation under section 46.1 for discrimination on the basis of sex. The Court refused to strike the Statement of Claim.

Despite this basic recognition of the utility of section 46.1, the Ontario Court of Appeal's decision in *Jaffer v. York University* set the stage for a narrow interpretation of human rights claims in the civil context.[47] In this motion to strike the Plaintiff's claim under Rule 21, a student with Downs Syndrome claimed that the University had breached its contract and its duty of care to him by failing to accommodate his disability. Although the Statement of Claim did not plead

discrimination under the *Code*, the University argued that the Plaintiff's claim fell solely within the jurisdiction of the Tribunal.

The Court found that the failure to accommodate provided no basis for a claim in negligence, and in the absence of a specific contractual claim, the duty to accommodate arose under the *Code* and not in breach of contract.[48] In rejecting the claims, Karakatsanis J.A. held:

> To recognize a common law duty of care that required the university to provide reasonable accommodations would, in my view, undermine the comprehensive dispute resolution mechanisms established by the Code in precisely the ways that the Supreme Court has cautioned against in cases such as *Bhadauria* and *Keays*.[49]

There was some confusion in the early days with respect to the extent to which the human rights claim needed to be related to the separate cause of action. The Superior Court in *Anderson v. Tasco Distributors* clarified that the non-human rights cause of action need not be directly related to the *Code* claim in order to properly ground a claim.[50] In that case, however, the claim of wrongful dismissal and failure to accommodate the Plaintiff's disability did share a factual matrix. The Defendant's motion to strike paragraphs of the Plaintiff's pleading was denied.

Similarly, in *Stokes v. St. Clair College of Applied Arts & Technology,* the Superior Court affirmed, in a Rule 21 motion, that a claim for human rights damages need not be relevant to a wrongful dismissal claim advanced in the same action.[51]

Successful cases under section 46.1

It seems that wrongful dismissal claims often dovetail with human rights breaches. Thus far, all of the successful claims brought under section 46.1 have been in the employment context.[52]

Although section 46.1 was raised in more than a dozen cases between 2008 and 2012, Ontario's Small Claims Court was the first to grant a remedy under section 46.1 in 2013.[53] In *Berkhout v. 2138316,*[54] the Plaintiff brought a claim against her former employer for constructive dismissal, failure to pay vacation pay, breach of her human rights and failure to investigate the breach. The Plaintiff was employed as a salesperson at the Defendant's furniture store for four months. She alleged that her supervisor sexually harassed her both verbally and physically. Although few facts about the harassment are included in the decision, the Court accepted that the Defendant

supervisor would often make phone calls to her after work hours telling her that he expected to come home with her.

The Defendant's claim of financial difficulties was not accepted by the Court as the reason for her dismissal; the Court found that Plaintiff was in fact terminated because she complained of sexual harassment. Given the human rights violation, she was not obliged to accept the Defendant's offer to reinstate the Plaintiff.

Although the Defendant argued that the court did not have jurisdiction to deal with the human rights claim, the Court applied section 46.1 to find discrimination on the basis of sex and sexual harassment. As the individual defendant was acting in the course of employment, and the employer failed to act after the Plaintiff complained of harassment, the Defendant corporation was found jointly and severally liable with the Defendant supervisor. The Plaintiff was awarded $15,000 in damages under the *Code* in addition to $2,500 pay in lieu of notice.

Of note, the plaintiff had initially sought relief by filing a complaint with the Ontario Human Rights Commission but was advised by the Commission to proceed through the Courts.

Human rights damages were first awarded by the Ontario Superior Court in 2013 in *Wilson v. Solis Mexican Foods Inc*.[55]

The Plaintiff in this case was a Certified General Accountant employed by the Defendant for sixteen months. She received a grade of satisfactory or better on a performance review approximately one year into her employment. Shortly thereafter, she suffered a back ailment which eventually led her to take a medical leave.

When she commenced her leave and submitted a doctor's note, her employer required that she provide more detailed medical evidence. She submitted a note from her doctor indicating that she would be able to make a graduated return to work over the following three weeks. This proposal was rejected by her employer; it stated that she should not return to work until she was capable of full-time hours and full duties. She was then asked to submit a further form from her doctor. Her physician indicated that with accommodation – including a combination of sitting, standing and walking – she would be able to return to work on a full-time basis. The employer again

found this accommodation plan unacceptable and reiterated the requirement of a return to full duties.

One month following the last accommodation proposal, following further communications, the Plaintiff received a letter of termination. The purported reason for the termination was restructuring which included a sale of part of the business.

The Plaintiff brought a claim for wrongful dismissal and further alleged that her termination was discriminatory. Given her relatively short employment with the Defendant, the Court awarded three months' notice. The Court went on to find that the Plaintiff's disability had been a significant factor leading to the decision to terminate her employment. The employer had been disingenuous in its claim that restructuring was the reason for dismissal. The Court found that the employer intended to make unfair demands for a full return to work until it had an excuse to terminate her under the guise of organizational changes. In determining the quantum of $20,000 for human rights damages, the Court held:

> First in this case, the plaintiff lost "the right to be free from discrimination" and experienced "victimization". Second, the defendant's breach of the statute is serious. The defendant orchestrated the dismissal and was disingenuous at various times both before and during termination.[56]

Solis opened the door for a trickle of successful Superior Court cases under section 46.1.

The Plaintiff in *Partridge v. Botony Dental Corp*.[57] worked for the employer for seven years as a dental hygienist working irregular hours, before being promoted to office manager and working a regular 9 to 5 schedule. Rather than being returned to her office manager position upon her return from maternity leave, the Plaintiff was unilaterally returned to her former position as a dental hygienist. The Plaintiff's schedule was also changed, reducing her hours and making them more uncertain. The new schedule conflicted with the Plaintiff's daycare arrangements. When the plaintiff asserted her right under the *Employment Standards Act, 2000*, S.O. 2000, c.41 (the "*ESA*") to be reinstated in her previous position and working conditions, she was subjected to reprisals, including further scheduling changes and a cold, intimidating attitude from a manager, culminating in termination. The Court rejected the employer's claim that the termination was for cause and dismissed the employer's counterclaim seeking damages in the amount of $400,000 as nothing more than an attempt to intimidate the Plaintiff.

The Court awarded the Plaintiff $42,517.44 for damages arising from wrongful dismissal, and a further $20,000 in damages for breach of statutory obligations: namely, the Plaintiff's right to be reinstated to her prior position after pregnancy and maternity leave under section 53(1) of the *ESA*; the Plaintiff's right not to suffer reprisal for attempting to exercise a right under the *ESA*; and the Plaintiff's right not to be discriminated against on the basis of family status, pursuant to section 5 of the *Code*.

The Court stated at para. 98:

> The discrimination experienced by Partridge clearly did injury to her dignity, feelings and self-respect, as her testimony made clear that she took great pride in her job and the efforts that she had made on the defendant's behalf. At the time of her testimony in this trial, she remained visibly emotionally affected by the ordeal. As in *Johnstone*, I found that the discrimination arose out of Jauhal's wilful and reckless disregard for her legal obligations as an employer. Accordingly, I found that the sum of $20,000 for breach of the *Human Rights Code* was a just and proper sum to signify the seriousness of breaches of this nature. Particularly where the discrimination has ultimately taken the form of dismissal, this particular breach affects a group of individuals who typically require childcare arrangements out of economic motivation. The discrimination not only has the effect of causing injury to dignity, feelings and self-respect, but may have an economic impact on individuals who can often least afford it. The Court's censure is warranted by way of an award that will act as a deterrent to employers who are unwilling to accommodate childcare arrangements, except where legitimate, justifiable grounds exist for being unable to do so.

The recent case of *Bray v. Canadian College of Massage and Hydrotherapy*[58] also dealt with a woman who experienced changes to her terms of employment following a maternity leave. The Plaintiff worked as a massage therapy instructor and a supervisor of clinics and outreach programs. While preparing to return to work after maternity leave, the Plaintiff learned she would be assigned to the position of teaching assistant rather than her pre-leave position as a lead instructor. The Plaintiff advised the employer that she understood the labour laws to mean that she was supposed to be reinstated to the position she held prior to going on maternity leave.

The employer responded by email, saying,

> "Let's see how this term goes and see if you find it ok with even being in 4 classes and having to be a mother at the same time. It will be a big adjustment."

The Plaintiff filed a complaint with the Ministry of Labour, but never communicated with her employer about it. The Court inferred that the Ministry notified the employer of the complaint shortly before or shortly after the Plaintiff's return to work.

Upon her return, the Plaintiff found her schedule had been reduced to 19 hours per week from 25. Coupled with her change in position, this reduced the Plaintiff's weekly pay by one third. The Court accepted the Plaintiff's evidence that the atmosphere in the workplace had become "strange" and "odd", and that co-workers and managers did not talk to the Plaintiff as much as before. When, at the end of the term, the Plaintiff asked what her schedule would be for the following term, she was notified that her services were not required for the upcoming term.

The Court held that the Plaintiff was constructively dismissed and awarded $17,700 in damages in lieu of reasonable notice. The Court also found that the Plaintiff's change in position, reduction in hours, decrease in income, and eventual termination amounted to discrimination on the basis of sex and family status, as evidenced by the employer's email, which specifically referenced the connection between the Plaintiff's status as a new mother and the new working conditions the employer decided to impose on her. The Court awarded $20,000 in compensatory damages for injury to feelings, dignity and self-respect.

The Court declined to award aggravated damages but awarded $5,000 in punitive damages because of the employer's bad faith conduct. The Plaintiff was therefore entitled to a sum of $42,700, but because she had limited her claim to the Small Claim Court's monetary jurisdiction of $25,000, the latter is the amount she received, plus interest.

In *Silvera v. Olympia Jewellery Corp.,*[59] the sexual harassment faced by the Plaintiff and its effects on her were particularly severe. The Plaintiff brought an action for damages arising out of her wrongful dismissal, a series of sexual assaults and battery, sexual harassment and racial harassment. Her daughter brought a claim for damages under the *Family Law Act* for loss of guidance, care and companionship. The Defendants did not appear at trial and their defence was struck. Consequently, the Plaintiff's evidence was uncontested.

The Plaintiff was employed as a receptionist and assistant administrator at the Defendant's jewelry store. The individual Defendant, Bazik, was the Plaintiff's superior. There was no other person in authority present to address Bazik's conduct. Bazik's harassment began with

inappropriate racial comments and racist jokes, to which the Plaintiff, as a woman of colour, took offence. Bazik would often assign the Plaintiff work at the end of the day to ensure she had to stay late alone with him. He touched her breasts and buttocks without her consent and on one occasion attempted to put his hands down her shirt while giving an unwanted massage. He insisted on driving her home and bought her unwanted gifts. Bazik engaged in this conduct despite knowing that the Plaintiff had experienced sexual abuse as a child. The Plaintiff felt trapped in the job as a single mother with no other source of income.

The Plaintiff was terminated while away from work after emergency dental surgery, for which she provided medical evidence to her employer. The termination had a severe effect on the Plaintiff; she drank alcohol to cope and could not interact with older men. She was unable to look for work due to her psychological condition arising from Bazik's conduct and her termination.

Justice Glustein found the defendants liable for battery and liable under the *Code* for sexual harassment, racial harassment and discrimination on the basis of sex and race. As the Plaintiff "suffered the full list of consequences" to be considered in determining the quantum, the Court awarded human rights damages of $30,000.[60] This was in addition to nearly $270,000 in general, aggravated, and punitive damages, lost income, damages in lieu of notice, and damages under the *Family Law Act.*[61]

Another recent successful case, with damages varied by the Ontario Court of Apeal, is *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*[62] Default judgment was granted to a Plaintiff who was terminated after over fifteen years in her position when she became deaf due to an infection. The Plaintiff was employed as a recruiter for focus groups.

The Superior Court described her employer's attitude towards her as "unconscionable"; she was "constantly belittled, humiliated and isolated". The employer repeatedly refused myriad reasonable suggestions for accommodation, with low or no-cost associated.

The Plaintiff was awarded 24 months' pay in lieu of notice for wrongful dismissal in the amount of $50,000, $18,000 in damages for mental distress, $15,000 in punitive damages and $20,000 in human rights damages. The Court declined to award aggravated damages as it viewed them as amounting to double-recovery, in light of the human rights and mental distress damages.

On appeal, the Court of Appeal increased the human rights damages to $40,000, noting that the Plaintiff experienced a highly poisoned work environment where her manager not only failed to stop the harassment and discrimination, but actively participated in it. The awards for mental distress and punitive damages were also increased. Further, aggravated damages were awarded, as the Court of Appeal found that there was bad faith conduct on the part of the employer both before and after the termination, for which the Plaintiff was not fully compensated by the other heads of damage.[63]

The Court again differentiated between different heads of damage in another recent case by awarding both human rights and moral damages in a case that involved a poorly implemented investigation of harassment. In *Doyle v. Zochem Inc.*,[64] the employee was awarded $25,000 in damages under the *Code*, as well as an additional $60,000 in moral damages stemming from the manner of her dismissal.

The employee in *Doyle* worked in a plant manufacturing zinc oxide for nine years, first as a plant supervisor and subsequently as Health and Safety Coordinator. She supervised an all-male group of employees. Doyle experienced ongoing sexual harassment by the Maintenance Supervisor at the plant, and was terminated after making complaints about the harassment and other safety issues in the workplace. The Court found that Zochem was liable for how they dealt (or failed to deal with) the problematic work environment. In particular, the Court found Zochem did not take reasonable steps to investigate the employee's harassment complaint, and that a prudent investigator would have found Doyle's complaints to be credible. The Court of Appeal upheld the trial decision.

In *Williams Estate v. Vogel of Canada Ltd.*,[65] the Plaintiff was employed by the Defendant company for 32 years as a furniture upholsterer. During the last five years of his employment, he had an agreement with this employer that he would take a leave each January until March or April, to spend time with his family in Jamaica. In 2012, the Plaintiff attempted to return to work, but was informed there was no work because the company was in the middle of a move. Later, when the Plaintiff attended the new location to see whether there was work, a new, younger employee was doing his prior work. Williams was subsequently terminated, though his employer argued that he resigned.

The Court found that Williams was wrongfully dismissed. The Court further found that the Defendant's decision to terminate the Plaintiff was based in whole or part on his age and disability, and therefore his rights under the *Code* were breached. The Court awarded Williams $5,000 in damages under the *Code*.

Another recent case also deals with disability and wrongful dismissal. The employee in *Nason v. Thunder Bay Orthopaedic Inc.* worked as a registered orthotic technician for the employer for nineteen years.[66] His work involved handling power tools to prepare custom orthotic braces. As a result of his work, he began to have problems with his hands, wrists and elbows that developed into carpal and cubital tunnel syndrome. Some modifications were made to his work tasks. At a certain point, he was performing at 50% capacity and other employees were required to make up the difference.

After several months of this, the employer advised the employee that he could "no longer be accommodated" and advised him that he should initiate WSIB benefits, for which he had already been approved. He did so and was off work for two and a half years, receiving WSIB and later long term disability benefits.

The employee made claims under the Code for lost wages in the amount of $112,387.20 and damages in the amount of $35,000 for the period when the employer failed to accommodate his disability as well as a claim for damages for breach of his human rights related to his termination in the amount of $35,000. The Court ultimately found that the employer had fulfilled its duty to accommodate to the point of undue hardship both at the time they put him on unpaid leave and during the leave. The denial of this claim was due in part to the employee's failure to facilitate accommodation by providing the necessary information to his employer about his abilities and limitations. However, the Court went on to award $10,000 in human rights damages because the employee's physical disability was a factor in the employer's decision to terminate him at the end up his unpaid leave. The amount was reduced from $35,000 because the employer attempted to ameliorate the situation by offering the employee alternate employment following termination. The employee was also awarded fifteen months' pay in lieu of notice.

In each of the cases discussed above, there was ample evidence of a breach of the *Code*. Moreover, the facts track neatly onto typical wrongful dismissal or constructive dismissal case

law. The decision to award human rights damages in each of these cases does not appear to have been a difficult one.

Assessment of human rights damages

Given the small sample size, it is not yet possible to determine trends in the quantum of damages being awarded by the Courts. It seems that recently, the Courts may be awarding somewhat higher human rights damages than the Tribunal where the merits of the case support a higher quantum, but not necessarily as a rule.[67]

It does appear that damages under section 46.1 have been assessed by judges in accordance with the principles set out in the Divisional Court's judicial review of the Ontario Human Rights Tribunal's decision in *ADGA Group Consultants Inc. v Lane.*[68] Ferrier J. outlined the factors to be considered in determining the quantum of awards under the *Code* as follows:

> This court has recognized that there is no ceiling on awards of general damages under the *Code*. Furthermore, Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the *Code* by effectively creating a 'license fee' to discriminate.
>
> Among the factors that Tribunals should consider when awarding general damages are humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment.[69]

Thus, the quantum of awards in the civil context appears to be based on a combination of previous Tribunal decisions and the few existing human rights decisions in the civil context.[70] It remains to be seen, however, as a body of jurisprudence develops in the civil context, whether courts will begin to rely more heavily on civil tort case law for guidance.

Unsuccessful cases under section 46.1

Given the relatively large number of unsuccessful claims for human rights damages in the civil context, it is helpful to explore the themes that emerge from these cases. As with any other category of civil cases, some human rights civil claims are found to be unmeritorious. Unlike other civil claims, however, statutory restrictions within the *Code* also work to limit the success of human rights claims in the civil context.

Lack of merit in human rights claims

In several claims for human rights remedies in the civil context, courts have found human rights claims to be without merit.[71] *Parapatics v. 509433 Ontario Ltd*.[72] was a decision of the Ontario Small Claims Court dealing with a wrongful dismissal claim and a claim of discrimination based on age and disability. The Plaintiff was a low-skill machine operator at the defendant business, which was facing financial difficulties.

After approximately four years of employment, the Plaintiff was off work on short-term disability leave as a result of knee replacement surgery and recuperation from that surgery. He was laid off during his disability leave.

The Court found that the Plaintiff was laid off for legitimate financial concerns, and not for any discriminatory reason. He was accordingly granted damages in lieu of notice. With respect to the discrimination claims, the Small Claims Court found that it did not have jurisdiction to make a declaration under the *Code.* However, being equivocal about whether a declaration was required, the Court went on to consider the merits of the discrimination claims.[73] The Court determined that the Plaintiff's termination was unrelated to his knee surgery as his work was light and did not require physical labour. It also went on to find that as he was hired at the age of 57 and the average age of the business' employees was quite high, age was not a factor in the Plaintiff's termination. The discrimination claim was dismissed.

In *Cavic v. Costco Wholesale Canada Ltd.,*[74] the Plaintiff was not successful in the wrongful dismissal claim that accompanied her claim of discrimination on the basis of disability. The Plaintiff had been employed with Costco in various positions for 19 years, most recently in a first-level management position. Prior to her termination, the Plaintiff had falsified a dependent on her health benefits and had filed false claims with the benefits insurer. She sustained a workplace injury to her neck and shoulders and testified that upon her return to work, she felt belittled and harassed by her supervisor, who did not take her injury seriously.

The Court held that the Plaintiff's actions in falsifying claims, and lying when asked about it on several occasions, was sufficient to constitute cause for termination. With respect to the discrimination claim, the evidence did not support a finding that she had in fact experienced harassment, let alone harassment in relation to her disability.

Similarly, in *Phanlouvong v. Northfield Metal Products (1994) Ltd.*,[75] the Superior Court found that the conduct of the individual Defendant, who was the Plaintiff's co-worker, did not constitute harassment within the meaning of the *Code.* The Plaintiff was terminated after assaulting this co-worker, with whom he did not get along. The co-worker had previously allegedly uttered a racial slur against the Plaintiff, although the evidence on this point was minimal.

The Court found that although the Plaintiff had been wrongfully dismissed for the single altercation with his co-worker, his human rights claim could not succeed. There was no evidence that the workplace was poisoned by racial discrimination. Moreover, the Court found that the single alleged racial slur did not constitute harassment as defined in section 10(1) of the *Code.*[76] There was testimony that it was not vexatious; that is, the Plaintiff was not upset by the comment at the time it was made. In addition, it was a single comment and did not constitute a "course of comment or conduct". Finally, the plaintiff had failed to discharge his burden of proof that the Defendant co-worker had actually made the comment at issue.

It is difficult to say at this early stage in the history of section 46.1 whether the courts' lack of experience adjudicating human rights claims is to blame for the rash of unsuccessful cases. Concerns about the courts' lack of expertise in the human rights arena, in comparison with the Tribunal, have not dissolved with the advent of section 46.1.

Limits on section 46.1

There are two main statutory restrictions on the application of section 46.1. As previously discussed herein, section 46.1(2) prevents a person from bringing a civil claim based solely on the *Code*. Under section 34(11), a human rights application to the Tribunal is barred where a civil proceeding has already been commenced.

Pursuant to section 46.1(2), the jurisprudence to this point suggests that where a civil cause of action is struck down prior to trial, the accompanying human rights claim cannot survive on its own. In *Mackie v. Toronto (City),*[77] Toronto Community Housing Corporation (TCHC) tenants brought an action alleging that the TCHC had failed to carry out repairs in their units as a result of discrimination on the basis of mental disability. In a motion to strike, the Superior Court found that the repair claims were within the exclusive jurisdiction of the Landlord and Tenant

Board and could not proceed. The Court explained that "if all that remains of the Plaintiffs' claims in the Superior Court is the Plaintiffs' discrimination claim, then the exclusive jurisdiction to address that claim rests with the Ontario Human Rights Commission and not the Superior Court."[78]

However, when the claims are dealt with concurrently at trial, the failure of the accompanying civil claim does not automatically defeat the human rights claim. In *Cavic*,[79] the Court rejected the Defendant's argument that the discrimination claim need not be determined if the wrongful dismissal claim failed, and dealt with the *Code* claim on its own.

It is clear that a *Code* claim cannot proceed if it is the only cause of action in a claim from the start. *John v. Peel Regional Police*[80] considered allegations of police racial profiling in a traffic stop incident. Although the Small Claims Court recognized the applicability of s. 46.1 where there was a separate actionable wrong, it determined that discrimination was at "the heart of the pleading" and there was no accompanying civil claim. On appeal, the Divisional Court declined to award human rights damages as the Plaintiff did not appeal the above-noted finding.[81]

In *T(E) v. Hamilton-Wentworth School District*, the Superior Court dealt directly with the issue of whether the presence of a *Charter* claim qualified as an accompanying civil claim. A father brought a claim against the school district for an alleged violation of his religious freedom under both the *Charter* and the *Code* by its refusal to accommodate his religious belief that he had an obligation to protect his children from "false teachings" with respect to sexuality and marriage. He requested a declaration that his parental rights included determining what his children learned, and alleged a breach of the *Charter*'s protection of freedom of religion. In declining to deal with the *Code* claim, the Court explained:

> To allow an alleged *Code* violation to be adjudicated in court whenever a corresponding *Charter* violation is alleged would amount to a drafting sleight of hand that would negate the legislative restriction in subsection 46.1(2).
>
> In this case, the same facts underlie both the alleged *Charter* and *Code* violations. The requested declaration as to parental authority is designed as a starting point to support the breach as claimed. The declaration and alleged *Charter* breach do not constitute separate causes of action contemplated by s. 46.1 of the *Code*, sufficient to open the door to a human rights claim under the *Code* at common law.[82]

Under section 34(11) of the *Code*, a human rights application may not proceed at the Tribunal if another claim is being pursued concurrently in the court with respect to the same subject matter. Section 34(11) applies even if the civil statement of claim does not plead section 46.1 explicitly.[83]

When the restrictions of sections 46.1(2) and 34(11) are combined, negative consequences may result for a plaintiff. Pursuant to section 34(11), a complainant may not make an application to the Tribunal if a concurrent civil claim has been commenced. The limitation period for bringing an application under the *Code* is only one year. Thus, if the accompanying cause of action in the civil claim (e.g. the wrongful dismissal claim) is dismissed prior to trial and the human rights civil claim cannot proceed alone, the plaintiff may wish to pursue a Tribunal application. However, by this time the one-year limitation period may have expired. As a result, a plaintiff/applicant may be left with no remedy for an alleged human rights violation.

In *Aba-Alkhail v. University of Ottawa*, the applicant had brought a civil claim under the *Charter of Rights and Freedoms'* section 15 equality provision that was nearly identical to his Tribunal application. The Tribunal recognized this problem and addressed it as follows:

> With respect to the applicant's argument that he would be left with no human rights redress if both the civil suit and the Application are dismissed, I note that the Divisional Court recently emphasized that even in those circumstances section 34(11) is not discretionary and bars an application from proceeding: *Grogan v. Toronto District School Board*, 2012 ONSC 319. The Tribunal does not have jurisdiction and, to paraphrase the Divisional Court, it does not matter that the civil action could be withdrawn or dismissed. "In short, s. 34(11) requires an applicant to choose between the Tribunal and a (concurrent) civil action": see para. 48. The Divisional Court also confirmed that the fact that the civil suit was commenced before or after the Application is immaterial to the application of section 34(11).[84]

In *Grogan v Ontario (Human Rights Tribunal),*[85] the applicant sought a judicial review of a Tribunal decision dismissing her human rights complaint because she had subsequently filed a civil claim alleging, *inter alia*, the same acts of discrimination. The Divisional Court explained the legislature's intention in enacting s. 34(11):

> [A] review of the *Code* reveals not only that the legislator contemplated that a multiplicity of forums may be called upon to address *Code* allegations, but also, that it has provided a means to address and prevent duplicative proceedings that

> may arise precisely because there are a number of potential forums. It does so in a number of ways, of which s. 34(11) is one.[86]

Accordingly, section 34(11) requires an applicant to choose between the Tribunal and a concurrent civil action. However, given the interaction between section 34(11) and section 46.1(2), this may be a false choice for some.

Further, the courts have not yet pronounced upon whether it has jurisdiction, under section 46.1(1).2, to order non-monetary restitution to the party whose right was infringed. Specifically it remains to be seen whether the courts will ever use section 46.1(1).2 to order reinstatement as a remedy.

Outside of these statutory limitations, courts have also found that s. 46.1 does not apply to certain civil claims. In *Eidoo v. Infineon Technologies AG*, a small group of class members in a class action alleged that a distribution protocol resulting from the settlement of a class action breached the *Code* by discriminating against them on the basis of family status or marital status.[87] They sought damages under s. 46.1. The Plaintiffs had brought a class action against technology companies alleging that the Defendants conspired to fix prices for dynamic random access memory devices. The terms of the settlement enabled any person who had purchased such a device to claim $20 from the fund. However, only one claim could be submitted per household with the result that multiple members of a household could claim $20 in total and not $20 each.

Justice Perell found that the *Code* did not apply to distribution schemes of judgments or settlements under the *Class Proceedings Act* because such distributions are not services, goods, facilities or contracts within the ambit of the *Code* and the *Code* does not apply to court orders. Even if it did apply, the Court found no breach of any section of the *Code*. The pooling of household claims did not result in a disadvantage because the $20 compensation was already a windfall compared to the actual value of an individual claim and furthermore, it did not perpetuate prejudice or stereotyping on the basis of family status.

Failure to investigate human rights breaches

While failure to investigate human rights breaches is a fairly common (and sometimes successful) claim in the Tribunal and arbitration contexts, it is less common before the Courts. However, a few cases demonstrate that the failure to investigate human rights breaches, or

inadequate investigation, have at least been noteworthy factors for the courts' consideration. Both complainants and alleged harassers have sought damages for failure to properly investigate.

In *Berkhout v. 2138316*, the Plaintiff included a claim for "failure to investigate breach of her human rights". The Court made an award to the Plaintiff under the *Code*, as well as for wrongful dismissal. The claim with respect to the employer's failure to investigate was not specifically discussed by the Court, other than a brief mention of the fact that the employer "did nothing" about the complaints of sexual harassment.[88]

Another case is *Disotell v. Kraft Canada*,[89] although it does not explicitly rely on the *Code.* The employee alleged harassment and discrimination at the hands of his co-workers, who repeatedly made derogatory sexual comments to him.

The employee's supervisor refused to support a written complaint and warned the employee of the potential adverse consequences of complaining. The employer, in the person of the supervisor, knew the harassment was occurring, failed to report it to senior management, and misrepresented the seriousness and frequency of the complaints. The court noted that the employer conducted only a minimal investigation into the complaints.

The Court awarded damages for constructive dismissal equivalent to twelve months' notice ($36,000) to the sixteen year employee. However, no human rights damages were requested or awarded.

While damages for failure to investigate or negligent investigation were not specifically awarded in these cases as a "free standing award", such awards in the human rights context may see more traction in future civil cases, where the employer has not satisfied its duty to protect employees' rights under the *Code.* This may be bolstered by the amendments to the *Occupational Health and Safety Act* pursuant to Bill 132 which require employers to conduct investigations into workplace harassment, including sexual harassment, and provides for penalties if proper investigations are not conducted.[90] Although these investigations are outside the human rights context, it would not be surprising to see a spillover effect as attention to the quality of investigations increases.

Such attention was apparent in *Doyle v. Zochem*,[91] where the court awarded $60,000 for moral damages for the employer's failure to take reasonable steps to investigate the employee's harassment complaint.

However, in *General Motors Limited v. Johnson*, the Ontario Court of Appeal found that the trial judge had erred in finding that the employer had repudiated the contract by failing to conduct a comprehensive investigation into the allegations of discrimination.[92] The employer conducted three investigations and found there had been no racial discrimination.

Similarly, in *Hayden v. Niagara Regional Police Service*,[93] the Plaintiff brought an action against his employer, alleging failure to investigate his complaint of harassment. The Court found it had no jurisdiction to hear the claim as it was in the domain of a conciliator under the Plaintiff's collective agreement.

The alleged harasser may also seek damages for unfair investigation. It is noteworthy that the courts have long used the lack of a proper, or any, investigation of harassment or discrimination allegations to refuse to uphold terminations for just cause and to extend the reasonable notice period. Further, following *Honda Canada Inc. v. Keays*, courts have used the failure to investigate to award damages for breach of the obligation of good faith and fair dealing in the manner of dismissal.

For example, in the case of *Elgert v. Home Hardware Stores Limited*,[94] the Alberta Court of Appeal upheld a civil jury award of two years' pay in lieu of notice for wrongful termination as well as punitive damages (albeit in a reduced amount) by virtue of an investigation for sexual harassment which the Court of Appeal agreed was "inept and unfair" and conducted in a malicious, vindictive and outrageous manner. Further, while the aggravated damage award was set aside, it was only because the plaintiff had not provided any evidence of mental distress at trial.

In the case of *Tse v. Trow Consulting Engineers Ltd.*[95] the Court rejected an assertion that an improper investigation could result in independent damages. In that case, an employee was summarily dismissed for sexual harassment. The Court found that the employer did not have just cause and commented on the employer's inadequate investigations. In doing so, the Court specifically stated that:

> In any event, even though there may be procedural unfairness by the employer in the case at hand, this does not mean there is an actionable wrong on that account.[96]

Thus, while it seems clear that courts are open to compensating terminated employees for an employer's failure to investigate or for an inept or unfair investigation where the employees have been improperly accused of harassment or discrimination on grounds protected by the *Code*, it is less certain whether courts will consistently provide compensation in the form of moral damages to the victims of such *Code* violations who allege a lack of, or negligent, investigation.

Human rights claims in the civil context outside Ontario

Although other provinces have yet to implement provisions similar to section 46.1, the idea of expanding human rights claims to the civil context has gained traction elsewhere in Canada.

In *Picard v Air Canada*,[97] the Quebec Superior Court took section 46.1 as recognition that "it is sometimes inefficient and contrary to the effective administration of justice to force different aspects of a claim to be adjudicated in different forums". *Picard* was a motion to certify a class action brought by persons with disabilities against Air Canada and WestJet claiming that requiring them to pay for an additional seat constituted discrimination. The Court rejected the airlines' argument that the matter was in the exclusive jurisdiction of the Canadian Human Rights Commission and proceeded to certify the class action.

In Saskatchewan, a merged administrative and civil system operates to deal with human rights complaints. In that province, the Human Rights Tribunal has been eliminated and discrimination complaints that pass initial screening by the Human Rights Commission, if not successfully mediated, proceed to the Court of Queen's Bench.[98] The remedies available are still those set out in the human rights legislation.

Conclusion: The role of section 46.1 going forward

Given the apparent challenges to a successful civil human rights claim, why would potential plaintiffs chose that route? To begin, the civil context offers the opportunity to seek a variety of different types of damages and to address several related claims in one forum. For example, in *Doyle*, [99] the Ontario Court of Appeal confirmed that a plaintiff can seek general damages under the *Code* as well as moral damages. Though the same conduct formed the basis for both awards,

the Plaintiff was not receiving double recovery because the heads of damages were not identical. *Doyle* and *Strudwick*[100] both demonstrate that in the civil context, it may be possible for a plaintiff to recoup several types of damages for the same types of defendant behaviour.

Conversely, the Tribunal is limited to awarding damages for breach of the *Code*.[101] However, as the monetary cap of $10,000 on damages at the Tribunal has been eliminated, that is no longer a reason to instead pursue damages in the courts.[102]

The longer limitation period, the availability of a comprehensive discovery process, and the possibility of costs to the successful party may make a civil claim more attractive than a Tribunal application to some.[103] However, the Tribunal uniquely maintains the broad remedial power to make orders under s. 45.2(1) of the Code to direct "any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act".[104] The courts may interpret their jurisdiction under s. 46.1(1)(2) to award of monetary amounts only. Moreover, the availability of costs may be considered an added risk rather than a benefit to potential civil litigants.

Practical considerations for the plaintiff may come into play in deciding whether to include a human rights claim within a civil action. In his 2012 report on changes to the Ontario human rights regime, Andrew Pinto points out that a number of practitioners have caught on to the tax advantages of categorizing damages as a remedy under section 46.1 rather than as damages in lieu of income.[105] It appears that in settlements, cases are often resolved by converting taxable damages into non-taxable human rights damages where there is a legitimate human rights claim. However, anecdotal reports indicate that the Canada Revenue Agency sometimes takes issue with such a classification of damages because the human rights damages have not technically been awarded by a court or tribunal. Practitioners should be aware that apportioning an award to human rights damages is not a failsafe method to avoid tax consequences.

A further consideration may be that the pre-existing analytic framework provided by the *Code* and Tribunal decisions provides a well-trodden path through which to pursue claims of discrimination in the civil context. In the absence of an explicit pleading relying on section 46.1 specifically, allegations of discrimination may prove unwieldy for the courts.

The difficulties of proving discrimination in a claim for constructive dismissal where section 46.1 is not specifically pleaded are exemplified in the Ontario Court of Appeal's decision in *General Motors Limited v. Johnson.*[106] The Plaintiff employee claimed constructive dismissal on the basis of racism leading to a poisoned work environment. The Court did not refer to any human rights jurisprudence in determining that the trial judge had erred in finding that an alleged racist comment had poisoned the work environment. Contrast this with *Phanlouvong v. Northfield*, which relied on the test set out by the Court of Appeal's judgment in *Pieters v. Peel Law Association* to consider whether the Plaintiff had established *prima facie* racial discrimination.[107] It is worth considering whether the outcome in *General Motors Limited v. Johnson* might have been different had the Plaintiff pleaded section 46.1 of the *Code* in addition to his constructive dismissal claim.

For practitioners, it is clear that to make the most optimal use of section 46.1 of the *Code*, such relief, as well as the specific sections of the *Code* which have been breached, should be specifically pleaded.

As well, the factors enunciated in *ADGA Group Consultants Inc. v. Lane*[108] should be set out to justify an award of damages in an amount at least as generous as in the Tribunal jurisprudence until a sufficient body of civil cases has established a clear guideline.

Finally, while the non-monetary restitution jurisdiction under section 46.1(1)2 of the *Code* has yet to be utilized by the courts, such relief, including reinstatement, should be sought in appropriate circumstances.

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[1] RSO 1990, c H.19 [“*Code*”].
[2] *Code*, see note 1, s 45.2(1).
[3] *Arunachalam v Best Buy Canada*, 2010 HRTO 1880, at para 45 (CanLII) [“*Arunachalam*”].
[4] *Arunachalam*, see note 3, at paras 52-54.
[5] 2005 HRTO 53, at para 35 (CanLII).
[6] *Ottawa-Carleton District School Board and ETFO (Bonnell) (Re)* (2012), 216 LAC (4th) 333 (Weatherhill) [“*Bonnell*”].
[7] (2012), 221 LAC (4th) 83 (Stephens).
[8] *Re Ontario (Ministry of Community Safety and Correctional Services) and OPSEU (Hyland)* (2014), 241 LAC (4th) 82 (Ont GSB) (Petryshen) [“*Re Hyland*”].

[9] Counsel for the grievor sought $50,000 in general damages and $25,000 in damages, citing on the particular nature of the discrimination in the case and the long history of discriminatory treatment, as well as its impact on the grievor.
[10] 2013 CanLII 62266 (Waddingham) ["*City of Hamilton*"].
[11] (2013), 233 LAC (4th) 315 (OLRB) ["*Dominion Forming*"].
[12] *Dominion Forming*, see note 11, at para 51.
[13] *Dominion Forming*, see note 11, at para 127.
[14] *Dominion Forming*, see note 11, at para 123.
[15] 2013 CanLII 50479 (ON GSB) (Leighton).
[16] *The City of Calgary v Canadian Union of Public Employees, Local 38*, 2013 CanLII 88297 (AB GAA).
[17] *Re Greater Toronto Airport Authority and Public Service Alliance Canada, Local 0004 (CB Grievance)* (2010), 191 LAC (4th) 371 (Shime); [2011] OJ No 358 (Ont Div Ct).
[18] 2013 FC 735 (CanLII) ["*Stringer (FC)*"].
[19] *Jeffrey Stringer v Treasury Board (Department of National Defence)*, 2011 PSLRB 33 (CanLII).
[20] *Stringer (FC)*, at para 82.
[21] *Jeffrey Stringer v Treasury Board (Department of National Defence)*, 2014 PSLRB 5 (CanLII).
[22] *City of Hamilton*, see note 10.
[23] (2012), 225 LAC (4th) 216 (Davie).
[24] 2014 CanLII 12448 (ON LA) ["*Renfrew County*"].
[25] *Renfrew County*, see note 24, at para 114.
[26] (2015), 255 LAC (4th) 20 ["*Laurentian University*"].
[27] *Laurentian University*, see note 26, at p 70.
[28] (2015), 254 LAC (4th) 68 ["*Ontario Power*"].
[29] *Ontario Power*, see note 28, at p 22.
[30] *SMS Equipment Inc v CEP, Local 707*, 2015 ABQB 162; affirming *SMS Equipment Inc and CEP, Local 707 (Cahill-Saunders), Re* (2013), 238 LAC (4th) 371.
[31] RSA 2000, c A-25.5.
[32] *Renfrew County*, see note 24, at para 110.
[33] *Ibrahim v Hilton Toronto*, 2013 HRTO 673 (CanLII).
[34] (2015), 121 CLAS 268, at paras 27, 29 & 30.
[35] 2015 PSLREB 30, at para 87 ["*Kinsey*"].
[36] *Kinsey*, see note 35, at para 121.
[37] *Kinsey*, see note 35, at para 107.
[38] (2013), 229 LAC (4th) 382.
[39] (2010), 195 LAC (4th) 217.
[40] *Human Rights Code*, RSO 1990, c H.19 ("*Code")*, s. 46.1.
[41] This was a bar to human rights claims in: *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.
[42] *Code*, see note 1, *s. 34(11).*
[43] *Bhadauria v. Seneca College of Applied Arts & Technology*, [1981] 2 S.C.R. 181 (S.C.C.).
[44] *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362 (S.C.C.), at para. 63.
[45] Andrew Pinto, "Report of the Ontario Human Rights Review 2012" (November 2012) [Pinto Report], at p. 175.
[46] *Andrachuk v Bell Globe Media Publishing Inc.*, 2009 CarswellOnt 582.
[47] *Jaffer v York University*, 2010 ONCA 654, 2010 CarswellOnt 7531, leave to appeal to SCC dismissed, [2010] SCCA No. 402.
[48] *Ibid* at paras 34-36.
[49] *Ibid* at para 39.
[50] *Anderson v Tasco Distributors*, 2011 CarswellOnt 109, 2011 ONSC 269 at para 6.
[51] *Stokes v St. Clair College of Applied Arts & Technology*, 2010 ONSC 2133 at para 15.
[52] Of note is the Ontario Superior Court's consent order in a class action certification in *St. John's Evangelical Lutheran Church of Toronto v. Steers*, 2011 ONSC 6308 (CanLII). It included a common issue with respect to whether the plaintiffs suffered human rights damages compensable under s. 46.1. The plaintiffs also pleaded claims of breach of fiduciary duty, negligent misrepresentation, conversion, conspiracy.
[53] Pinto Report, see note 6 at p. 174.

[54] *Berkhout v 2138316*, [2013] O.J. No. 1125.
[55] *Wilson v Solis Mexican Foods Inc*, 2013 ONSC 5799 [*Solis*].
[56] *Ibid* at para 90.
[57] *Partridge v Botony Dental Corp*, 2015 ONSC 343.
[58] *Bray v Canadian College of Massage and Hydrotherapy*, 2015 CarswellOnt 1232.
[59] *Silvera v Olympia Jewellery Corp*., 2015 ONSC 3760, [2015] O.J. 3225 [*Silvera*].
[60] *Ibid* at para 151.
[61] The plaintiff received $90,000 in general and aggravated damages and $10,000 in punitive damages, $33,924.75 in lost earning capacity, three months' notice for wrongful dismissal equal to $7,475.50, $57,869.13 in lost past income, and $15,000 under the *Family Law Act*.
[62] *Strudwick v Applied Cosumer & Clinical Evaluations Inc.*, 2015 ONSC 3408, varied 2016 ONCA 520 [*Strudwick*].
[63] *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520
[64] *Doyle v. Zochem Inc.*, 2016 ONSC 3188; aff'd 2017 ONCA 130.
[65] *Williams Estate v. Vogel of Canada Ltd*., 2016 ONSC 342.
[66] *Nason v Thunder Bay Orthopaedic Inc.*, 2015 ONSC 8097, 2015 CarswellOnt 19874.
[67] Sheila Osborne-Brown, "The "Right To Sue" as Access to Justice: Discrimination in Employment before the Courts in Canada and California" (2014) 18 C.L.E.L.J. 291 – 330 at para 65 [Osborne-Brown].
[68] *Lane v. ADGA Group Consultants Inc. [2008 CarswellOnt 4677 (Ont. Div. Ct.)], 2008 CanLII 39605*, cited in e.g. *Silvera v Olympia Jewellery Corp., 2015 ONSC 3760 at para 150.*
[69] *Lane, ibid* at paras 153-54.
[70] See e.g. *Silvera*, see note 20 at para 152, *Strudwick*, see note 23 at para 28, *Solis*, see note 16 at para 84.
[71] This includes cases where s. 46.1 was not specifically plead. See e.g. *King v. The Regional Municipality of Peel*, 2012 ONSC 1730; *Guhbawin Co-Operative Housing Incorporated v. Poulton*, 2011 ONSC 7169.
[72] *Parapatics v 509433 Ontario Ltd*., 2010 CarswellOnt 1200. See also *Dwyer v. Advanis Inc*., 2009 CarswellOnt 2610, [2009] O.J. No. 1956, 177 A.C.W.S. (3d) 714, 2009 C.L.L.C. 210-029 where the financial considerations, rather than the plaintiff's heart attack was found to be the reason for dismissal.
[73] Given the plain meaning of s.46.1, it does not seem that a declaration is required.
[74] *Cavic v Costco Wholesale Canada Ltd.*, 2012 ONSC 5307, 2012 CarswellOnt 13359 [*Cavic*].
[75] *Phanlouvong v Northfield Metal Products (1994) Ltd.*, 2014 ONSC 6585, 2014 CarswellOnt 16082 [*Phanlouvong*].
[76] *Code*, see note 1, s. 10(1).
[77] *Mackie v. Toronto (City)*, 2010 ONSC 3801, 2010 CarswellOnt 4757.
[78] *Ibid* at para 59.
[79] *Cavic*, see note 35 at para 47.
[80] John v. Peel Regional Police, 2015 CarswellOnt 17836 (ONSC); rev'd on other grounds, 2017 ONSC 42 (Div. Ct.)
[81] *Ibid*, at paras 29-81.
[82] *T. (E.) v. Hamilton-Wentworth District School Board*, 2016 ONSC 7313, 2016 CarswellOnt 18389 at paras 116-117.
[83] *Beaver v. Dr. Hans Epp Dentistry Professional Corporation*, 2008 HRTO 282 (CanLII) at paras 10-11.
[84] *Aba-Alkhail v. University of Ottawa*, 2012 HRTO 656 at para 29.
[85] *Grogan v. Toronto District School Board*, 2012 ONSC 319
[86] *Ibid* at para 45.
[87] *Eidoo v Infineon Technologies AG*, 2015 ONSC 5493, 2015 CarswellOnt 13325.
[88] *Berkhout*, see note 15.
[89] *Disotell v. Kraft Canada Inc.*, 2010 ONSC 3793, 2010 CarswellOnt 5781.
[90] *Occupational Health and Safety Act*, RSO 1990, c O.1; See also *Code of Practice to Address Workplace Harassment under Ontario's Occupational Health and Safety Act* (12 August 2016).
[91] See Note 64.
[92] *General Motors of Canada Limited v. Johnson*, 2013 ONCA 502 at para 94.
[93] *Hayden v. Niagara Regional Police Service*, 2008 CarswellOnt 6396, 171 A.C.W.S. (3d) 130.
[94] *Elgert v. Home Hardware Stores Limited*, 2011 ABCA 112 (CanLII)
[95] *Tse v. Trow Consulting Engineers Ltd.*, 1995] O.J. No. 2529 (Gen.Div.)
[96] *Ibid* at para 73
[97] *Picard c. Air Canada*, 2011 QCCS 5186, cited in Osborne-Brown, see note 63 at para 62.

[98] *Ibid* at para 6.
[99] *Doyle,* see note 25.
[100] *Strudwick*, see note 64.
[101] See Osborne-Brown, see note 28.
[102] The cap was eliminated by statutory reforms in 2008.
[103] Mary Cornish, Fay Faraday & Jo-Anne Pickel, *Enforcing Human Rights in Ontario* (Aurora: Canada Law Book, 2009) at p. 151-152.
[104] *Code*, s. 45.2(1), para 3.
[105] Pinto Report, see note 6 at p. 174-75.
[106] *General Motors of Canada Limited v. Johnson*, 2013 ONCA 502.
[107] *Phanlouvong*, see note 36 at para 109, citing *Pieters v Peel Law Association*, 2013 ONCA 396 at para 56.\\kmfp\litigation\Lawyers\Huggins\Seminars\Law Society's 4th Annual Human Rights Summit - Nov 30 15\Combined Papers Nov 12 15.docx
[108] ADGA, see note 69.