

“Risky Business: Addressing the Challenges Created by Bill 107”

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In the spring of 2006, the Ontario Government introduced Bill 107, *An Act to Amend the Human Rights Code*. This Bill sought to address numerous shortcomings of the current human rights enforcement system, including eliminating the excessive backlog of complaints. While Bill 107 strives to create a more efficient and effective forum in which to deal with equality complaints, it will also create new challenges for respondents, including the following:

- a) Increased damage awards, including punitive damages;
- b) More complaints, both under the human rights regime as well as the civil courts;
- c) Increased limitation periods; and
- d) Increased deference to Tribunal decisions.

The Current System: Where Are We Now?

Under the current human rights regime, the Ontario Human Rights Commission (the “Commission”) has sole responsibility for advancing human rights in Ontario. Not only is the Commission given the power to receive, investigate and dispose of human rights complaints—even before such complaints reach the Tribunal stage—but it also has vital public education functions.

In essence, under the current system the Commission acts as the “gatekeeper” in the Ontario human rights system: when an individual makes a complaint, it is received by the Commission. The Commission will then investigate the complaint, and ultimately dispose of it, by either a) reaching a settlement, b) dismissing the complaint outright, or c) referring the case to the Ontario Human Rights Tribunal for a decision (the “Tribunal”).

According to the *Ontario Human Rights Commission Annual Report*—covering the year from April 1, 2005 to March 31, 2006—57.1% of all complaints were settled either by the Commission or mutually between the parties.¹ In such cases, the average time to reach a settlement was 12.4 months—a relatively expedient process. The time required to resolve a complaint, however, was highly dependent on the type of process that was used. For example, if the Commission was required to assume an “investigatory” role, the average time at reaching settlement was 26.2 months. By contrast, where the matter was settled without investigation, the average time period was only 7.4 months. Thus, it is clear that while the “investigatory” role of the Commission promotes settlement—10.1% of complaints were settled at the investigatory stage—it is also clear that the need for investigation adds significant time to the settlement process.

Under the current system, only exceptional cases proceeded to the Tribunal. In fact, the data indicates that the Commission was successful in resolving most complaints. Of all the cases that were completed at the Commission:

- 16.7% were withdrawn;

¹ Of the 57.1% of complaints that were settled, 34.4% were settled through early mediation without investigation (on average at 7.4 months); 10.1% were settled at the investigation stage (on average at 26.2 months); and 12.6% were resolved between the parties (on average at 15.0 months).

- 57.1% were settled;
- 8.6% were dismissed based on preliminary objections²; and
- 17.6% received a Commission decision.

Moreover, of the 2399 complaints that were received by the Commission, only 143 cases were ultimately referred to the Tribunal (6.0%).

Bill 107: The New Regime

Under the new system, the role of the Commission—which previously was the undisputed king of the Human Rights regime—has been radically transformed. No longer does it receive every new complaint³ and no longer does it have broad investigatory powers. **This raises the question of how does Bill 107 change the Human Rights system, and what do these changes mean?**

The primary change in Bill 107 is the creation of what has been described as a “three pillar” model. Whereas before the Commission would, for all intents and purposes, assume the role of human rights arbiter, under the new system, there are three pillars that have separate, but equally important, roles.

- First, we have the Human Rights Commission. Although the Commission remains a vital part of the human rights regime, both its powers and functions have been significantly altered.
- Second, we have the Human Rights Tribunal, which will now deal with all complaints at first instance (a role previously held by the Commission).
- Third, we have a new publically-funded Human Rights Legal Support Centre.

These pillars, and their corresponding benefits and drawbacks, will be discussed in further detail below.

The Commission

Under Bill 107, claimants will now file “applications”—rather than “complaints”—directly with the Human Rights Tribunal. Under this system, the Commission no longer has the responsibility of a) investigating, b) mediating or c) settling complaints. In addition, its gatekeeper function (i.e. screening complaints to determine whether said complaint shall be heard by the Tribunal) has been eliminated. Individuals seeking a remedy for violations of their rights will now be required to apply directly to the Tribunal.

The Commission's new mandate is to focus on proactive efforts to a) promote and ensure human rights compliance throughout the province, and b) to eliminate systemic discrimination. Bill 107 will replace Part III of the *Ontario Human Rights Code*—which created the Commission—and provide the Commission with an entirely new structure and list of functions. **Whereas its previous role was concerned with resolving**

² Under section 34 of the *Human Rights Code*, the Commission could decide not to proceed with a complaint for the following reasons:

- (a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;
- (b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;
- (c) the complaint is not within the jurisdiction of the Commission; or
- (d) the facts upon which the complaint is based occurred **more than six months** before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

³ In fact, under Bill 107 “complaints” have been renamed “applications”.

complaints, its new role is primarily one of public education. This stark change is illustrated in section 29 of Bill 107, which sets out the functions of the new Commission. Such functions include the following:

- a) To promote and protect human rights in Ontario;
- b) To identify and promote the elimination of discriminatory practices;
- c) To develop and conduct programs of public information and education to promote awareness and understanding of the Human Rights Code;
- d) To conduct research into discriminatory practices and to make recommendations designed to prevent and eliminate such practices; and
- e) To review statutes, regulations and associated programs and make recommendations to ensure compliance with the Human Rights Code.

What will this new “educational role” mean?

At first look, this increased educational role seems highly desirable. Indeed, there are few who would not support a human rights system that tries to educate the citizenry as to the need and desirability of respecting human rights. Unfortunately, to date, the Ontario Government has provided few details into how they will accomplish this new “educational component”.

For example, in Ontario, employers are best viewed *providing* equality rights, whereas individual employees are best seen as *receiving* equality rights. An ideal system would provide both employers (human rights providers) and employees (human rights recipients) with equal education on what rights individuals are entitled to, and how to provide those rights.

It is unclear whether the Commission’s new educational function will be limited to educating employees. If employers are not given corresponding educational services about how to deliver human rights, Bill 107 may unintentionally create a system where employers will receive more complaints without being given the necessary supports to assist them in meeting their equality rights obligations. If the Commission does not provide educational services to employers, employers will need to take the initiative to ensure that their actions comply with the Human Rights Code.

The Tribunal

Under the new model, the Tribunal will be responsible for dealing with all complaints in the province. What is unclear is how the Tribunal will accomplish this objective. Under Bill 107, the Tribunal has the power to develop its own practices and procedures—what these practices and procedures will be, however, remains to be seen.⁴ One notable change in the legislation is that the Tribunal’s remedial powers will be amended to eliminate the cap on monetary compensation for discrimination—a change that will have broad implications.

⁴ Section 43(1) provides that the Tribunal may make rules governing its practice and procedure. Currently, we do not know what these practices and procedures will be, but it is likely that the Tribunal will take an expansive approach to such a liberal provision. Although the Tribunal can make rules governing its own practice and procedure, section 43(2) places some limitations on this practice. For instance, section 43(2) specifies that an application that is within the jurisdiction of the tribunal shall not be finally disposed of without giving the parties an opportunity to make oral submissions. Section 43(2) also specifies that a complaint cannot be disposed of without written reasons.

Whereas under the old system, the Commission could dismiss a complaint without a hearing (particularly where it found that the complaint was frivolous, vexatious, or made in bad faith), Bill 107 does not give the Tribunal the same power. Rather, according to section 43(2)1, an application cannot be disposed of without giving the parties an opportunity to make oral submissions, as well as written reasons for the decision. Such a system is likely to lead not only to more hearings, but also to longer and costlier hearings.

Human Rights Legal Support Centre

Perhaps the most elusive pillar of the new human rights regime concerns what the government has described as the Human Rights Legal Support Centre. While the creation of a legal support centre certainly appears to be a welcome development, the lack of specifics regarding what this Centre will encompass is startling.

Implications of the New Regime: Causes of Concern for Risk Managers

Direct Access and the Human Rights Legal Support Centre—Increased Litigation in the Making

As previously stated, one of the primary goals of Bill 107 was to reduce the backlog of cases in the human rights system. Under Bill 107, however, every human rights complaint will now go directly to the Tribunal. This situation is further complicated as we are likely to see a proliferation of new cases due to a) the absence of a screening function, and b) the presence of a Human Rights Legal Support Centre.

Section 45.13(1) provides that the Centre shall provide the following support services:

1. Advice and assistance, legal and otherwise, respecting the infringement of rights under Part I.
2. Legal services in relation to,
 - i. the making of applications to the Tribunal under Part IV,
 - ii. proceedings before the Tribunal under Part IV,
 - iii. applications for judicial review arising from Tribunal proceedings,
 - iv. stated case proceedings,
 - v. the enforcement of Tribunal orders.
3. Such other services as may be prescribed by regulation.

Thus, section 45.13(1) effectively creates a free legal support system to those who make complaints. It is unclear, however, whether those who are the alleged rights violators will be given any corresponding services from the Centre. For example, what this means for employers is obvious:

- a) Employees will have free access to legal services with respect to workplace equality rights, and thus are encouraged and financially able to file human rights applications.
- b) In turn, employers will see an increased number of human rights complaints. This increased number of complaints, combined with the new direct access system, will increase the likelihood of litigation.
- c) Employers will now be exposed to greater financial costs in terms of legal expenses associated with representing themselves in Tribunal proceedings. In the previous system, the vast majority of complaints were dealt with by the Commission, before an adversarial hearing became necessary. This is much less likely to be the case under the new system.

There is also a serious issue in that complainants will no longer be represented by the Commission at hearings. Rather, under the new system, complainants will be required to provide their own representation. The economic reality will be that in many cases, the complainant will be representing him or herself. This may lead to a situation where represented parties will be able to use their financial resources to outmatch the other party. Indeed, under Bill 107, complainants are not ensured that they will have the assistance of a lawyer when prosecuting their case at the Tribunal level. The obvious implication is that, while there may be increased litigation under the new system, parties with representation will likely have an upper-hand (versus unrepresented litigants) at the Tribunal stage. This contrasts the previous system where the Commission was required to investigate all complaints.

Increased Access to Courts

A common criticism of the new system is that the Government has effectively transferred some of the responsibility for ensuring human rights compliance to the civil courts. Under section 46.1 of Bill 107, the Court can order monetary compensation to a party whose equality rights have been infringed for injuries to dignity, feelings and self-respect. Specifically, section 46.1(1) provides as follows:

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.

46.1(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I.

46.2(1) Every person who contravenes section 9 or subsection 31(14), 31.1(8) or 44(13) of an order of the Tribunal is guilty of an offence and on conviction is liable to a fine of not more than \$25,000.

Section 9 specifies that “no person shall infringe or do, directly or indirectly, anything that infringes a right under this Part”.⁵

Similarly, Bill 107 now bars human rights applications to the Tribunal in select circumstances. Specifically, section 34(11) provides that 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

⁵ This would include discrimination or harassment in the context of employment (see subsections 5(1) and 5(2)).

- (b) a court has finally determined the issue of whether the right has been infringed or the matter has been settled.

Employees who believe that their equality rights have been infringed now have the option of seeking a remedy through the court, rather than be isolated to the Tribunal. Thus, we can expect to see more civil litigation, through the traditional court system, with respect to human rights violations. This is in stark contrast to the current system, whereby human rights complaints are primarily litigated through the human rights system.

It must be remembered, however, that a party's right under the Code can only be raised in the civil courts together with a separate cause of action. For example, while a plaintiff could raise a human rights complaint in a wrongful dismissal action, he could not use the human rights complaint as his only cause of action. In cases where the plaintiff's complaint is solely under the Code, the Tribunal retains exclusive jurisdiction.

Limitation Period Issue

Under the current system, complainants have six months to file their complaint, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay. Under Bill 107, however, a complainant has one year in which to pursue their cause of action:

34(1) If a person believes that his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,

- (a) within one year after the incident to which the application relates; or
- (b) if there was a series of incidents, within one year after the last incident

(2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

The obvious implication for risk managers is that complainants now have double the time to bring their complaints.

Penalties: Increased Monetary Damages

Bill 107 changes how the Human Rights Code deals with remediation. One of the central tenets of human rights legislation is that it is restorative in nature.

Under the old system, section 41(1)(b) provided that the Tribunal could order a party that infringes section 9 to make restitution, including in the form of monetary compensation, for any loss arising out of an infringement. Moreover, where the respondent willfully or recklessly infringed a complainant's rights, the Tribunal could order monetary compensation for mental anguish, up to an amount not exceeding \$10,000.

Summary

Bill 107 implements the following changes:

- a) Provides for unspecified compensation for losses arising out of the infringement of a protected right;
- b) Removes the \$10,000 limit on damages for mental anguish;
- c) Provides for orders of restitution (other than through monetary compensation);
- d) Permits the Tribunal to order a respondent to do anything that the Tribunal believes the respondent ought to do to “promote compliance” with the Act; and
- e) Permits the Civil Courts to order monetary compensation.⁶

In addition, for the first time the human rights regime has implemented a punitive fine, up to \$25,000, to deal with those parties who violate the Act.⁷ Such a punitive measure may have wide-ranging repercussions, as even those persons who have only indirectly and unintentionally violated the Code may now be subject to a punitive fine.

In short, Bill 107 does not contain any limitations as to the amount of monetary compensation and/or restitution for intangible injuries such as injury to one’s dignity, feelings and self-respect. This increased chance for large damage awards is likely to lead to a proliferation of litigation.

Standard of Review

In the past, decisions of the Human Rights Tribunal were routinely reviewed by the Courts using a standard of correctness. Under Bill 107, however, the legislature has specified that a decision cannot be reviewed unless it is patently unreasonable.⁸

Risk managers should not underestimate this change. In the past, the Courts would provide little deference to the decisions of the Tribunal. Now they can only interfere where the Tribunal’s decision was patently wrong.

What this means is that parties must put their best foot forward at the Tribunal stage, as the right to appeal to the courts has been severely curtailed. This is especially true given the increased monetary damages available to the Tribunal.

Conclusion

In short, when Bill 107 is enacted it will create new challenges for risk managers, including increased damage awards, increased complaints (under both the human rights regime and the civil courts), increased limitation periods, and increased deference to the Tribunal decisions.

⁶ See sections 45.2 and 46.1.

⁷ See section 46.2(1) which states “Every person who contravenes section 9 or subsection 31(14), 31.(8) or 44(13) or an order of the Tribunal is guilty of an offence and on conviction is liable to a fine of not more than \$25,000”.

⁸ See section 45.8 which states “[s]ubject to sections 45.6 of this Act, section 21.1 of the *Statutory Powers Procedure Act* and the Tribunal rules, a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable”.