

Remedies in the Human Rights Context

Heather M. MACNAUGHTON AND Jessica CONNELL*

I.	REMEDIAL PHILOSOPHIES	476
A.	HUMAN RIGHTS TRIBUNALS	476
B.	THE COURTS	481
II.	MONETARY REMEDIES - INJURY TO DIGNITY, FEELINGS AND SELF-RESPECT	483
A.	LEGISLATIVE HISTORY	483
B.	COMPENSATORY NATURE.....	485
C.	QUANTUM.....	486
D.	INCREASING QUANTUM	487
E.	THE COURTS	492
F.	DIFFERENCES AND SIMILARITIES	497
III.	MONETARY REMEDIES - WAGE LOSS	501
IV.	A NOTE ON LEGISLATIVE AMENDMENTS TO THE ONTARIO HUMAN RIGHTS CODE	505
V.	MONETARY REMEDIES – COSTS AND LEGAL EXPENSES	507
VI.	SYSTEMIC REMEDIES	510
VII.	REMEDIAL JURISDICTION OVER LEGISLATION.....	515
VIII.	ALTERNATIVE DISPUTE RESOLUTION	517
	CONCLUSION.....	519

* Heather M. MacNaughton, Chair, B.C. Human Rights Tribunal, Vancouver, British Columbia and Jessica Connell, Counsel, B.C. Human Rights Tribunal, Vancouver, British Columbia.

The fundamental common law legal maxim *ubi jus ibi remedium*, that is, where there is a right there is a remedy, applies equally to administrative tribunals that are tasked with protecting fundamental human rights. Thus, in moving second reading of the *BC Human Rights Code Amendment Act, 2002*,¹ then-Attorney General Geoff Plant said:

Our *Human Rights Code* makes strong statements about the rights of British Columbians to live in a society in which there are no impediments to full and free participation in our economic, social, political and cultural life. The code also expresses our collective obligation to promote a climate of understanding and mutual respect where all are equal in dignity and rights.

But the law alone will not make us free. There must also be a place and a way to enforce it. That is what this bill is about. The common-law lawyer has an old expression: where someone has a right, the law should give a remedy. The bill before us is concerned not with the substance of human rights, but its processes—that is, with the place and the way in which victims of discrimination can have a remedy.²

Human rights tribunals across the country have myriad remedial powers. This paper begins by comparing the philosophical underpinnings of human rights tribunals' remedial awards with those of the courts. It then discusses a number of specific types of monetary and non-monetary remedial awards, namely, damages for injury to dignity, feelings and self-respect; wage loss awards; costs and legal expenses; and systemic remedies, and compares those remedies with the courts' awards of similar types of remedies in similar circumstances. It then discusses tribunals' ability to determine that legislation is contrary to human rights legislation,

¹ S.B.C. 2002, c. 62.

² British Columbia, Legislative Assembly, *Hansard* Vol. 9, No. 5 (23 October, 2002) at 3985 (Hon. Geoff Plant).

and concludes with a brief discussion of the remedies achieved through mediation as opposed to through a formal hearing of a complaint.

Throughout, the paper focuses on the remedial provisions of the *BC Human Rights Code*³ and BC court cases but, where appropriate, also draws on other jurisdictions.

I. REMEDIAL PHILOSOPHIES

A. HUMAN RIGHTS TRIBUNALS

Human rights legislation, in all Canadian jurisdictions, reflects broad, public policy objectives. Early human rights legislation approached discrimination as a crime to be dealt with by the police and the courts. As a consequence, victims were often reluctant to initiate proceedings and cases were difficult to prove. As Professor Bill Black explained in his 1994 *Report on Human Rights in British Columbia*:

The earliest human rights statutes relied on criminal penalties for enforcement. The safeguards that rightly apply to criminal proceedings, such as proof beyond a reasonable doubt and the right to remain silent, proved to be almost insurmountable barriers to proof that conduct had a discriminatory purpose. The Criminal Code prohibits certain conduct that constitutes discrimination in extreme forms. For example, sexual assault is a crime, as is advocacy of genocide and wilful promotion of hatred. But as applied to less blatant forms of discrimination, the criminal approach has not succeeded.⁴

To overcome these problems, legislatures gradually moved toward fair accommodation and fair employment legislation which enforced rights by means of monetary damages rather than penal sanctions. These statutes assigned responsibility to public officials to assist a human rights complainant by assessing, investigating and mediating complaints. If mediation failed, a board of inquiry or tribunal could be appointed to hear the complaint and order a remedy.

³ *Human Rights Code*, R.S.B.C. 1996, c. 210 [BC Code].

⁴ Bill Black, *B.C. Human Rights Review – Report on Human Rights in British Columbia* (British Columbia: Special Advisor to the Minister of Environment, Lands and Parks and Minister Responsible for Multiculturalism and Human Rights, 1994) at 141-142 [citations omitted].

In 1962, Ontario consolidated its various anti-discrimination provisions into a comprehensive human rights code which established the first Canadian human rights commission with responsibility for administering a complaint procedure, developing a program of human rights education, advising the government on the future development of the code and generally forwarding the cause of equality rights in the province.⁵ British Columbia followed suit in 1969.⁶

The British Columbia *Human Rights Act* (now called the *Human Rights Code*) was comprehensively amended in 1973, 1984, 1992, 1997 and 2003. As will be discussed below, in certain areas the BC Human Rights Tribunal's remedial jurisdiction has expanded, then contracted, then expanded again over time. In any event, despite its various historical incarnations, human rights legislation in British Columbia, and in all Canadian jurisdictions, remains broadly concerned with recognizing and rectifying discrimination in society.

Section 3 of the BC *Code* is illustrative of human rights legislation's broad public policy objectives:

The purposes of this *Code* are as follows:

- (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
- (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- (c) to prevent discrimination prohibited by this *Code*;
- (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this *Code*;
- (e) to provide a means of redress for those persons who are discriminated against contrary to this *Code*.

To this end, human rights legislation has long been recognized by the courts as remedial rather than punitive in nature. In *Ontario (Human Rights Commission) v. Simpsons Sears*, the Supreme Court of Canada said:

⁵ *Ontario Human Rights Code*, S.O. 1961-62, c. 93 [Ontario Code].

⁶ *Human Rights Act*, S.B.C. 1969, c. 10.

The *Code* aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.⁷

Moreover, because human rights legislation is concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, the motives or intentions of those who discriminate are not central to its concerns, and discriminatory intent is not required in order to found a breach of the *Code*.⁸ As the Supreme Court of Canada explained in *O'Malley*:

To take the narrower view and hold that intent is a required element of discrimination under the *Code* would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formulation of rules which, though imposing equal standards, could create ... injustice and discrimination by the equal treatment of those who are unequal.... The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination.⁹

Justice Dickson's comments for the majority of the Supreme Court of Canada in *Canada (Human Rights Commission) v. Taylor* are also illustrative:

The preoccupation with effects, and not with intent, is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination. To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would thus defeat one of the primary goals of anti-discrimination statutes.¹⁰

⁷ [1985] 2 S.C.R. 536 at para. 12 [*O'Malley*].

⁸ Section 2 of the BC *Code* states, "Discrimination in contravention of this *Code* does not require an intention to contravene this *Code*."

⁹ *Supra* note 7 at para. 14.

¹⁰ [1990] 3 S.C.R. 892 at para. 67.

The Supreme Court of Canada summarized these remedial principles in *Robichaud v. Canada (Treasury Board)*.¹¹ In specific reference to its remedial provisions, the Court said the *Code* “is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour.” It creates “essentially civil remedies.” Its “central purpose ... [is] remedial—to eradicate anti-social conditions without regard to the motives or intention of those who cause them.”¹² In order to further those essentially remedial purposes, and its aim of identifying and eliminating discrimination, “the remedies must be effective, consistent with the ‘almost constitutional’ nature of the rights protected.”¹³

All human rights tribunals derive their remedial powers solely from their constituent legislation; unlike the courts, they do not possess inherent jurisdiction. In BC, the remedies available under the BC *Human Code* are set out in s. 37:

- (2) If the member or panel determines that the complaint is justified, the member or panel
 - (a) must order the person that contravened this *Code* to cease the contravention and to refrain from committing the same or a similar contravention,
 - (b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this *Code*,
 - (c) may order the person that contravened this *Code* to do one or both of the following:
 - (i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;
 - (ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this *Code*, and

¹¹ [1987] 2 S.C.R. 84.

¹² *Ibid.* at paras. 10–11.

¹³ *Ibid.* at para. 13.

- (d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this *Code* to do one or more of the following:
- (i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this *Code*;
 - (ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;
 - (iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

[...]

- (4) The member or panel may award costs
- (a) against a party to a complaint who has engaged in improper conduct during the course of the complaint, and
 - (b) without limiting paragraph (a), against a party who contravenes a rule under section 27.3 (2) or an order under section 27.3 (3).

Thus, the remedial thrust of human rights remedies is both compensatory, in that remedies are designed to put the individual in the position he or she would have been had the discrimination not occurred and, where appropriate, systemic, to achieve the *Code*'s broader purposes. The exception is the Tribunal's jurisdiction to punish a party for engaging in improper conduct and/or breaching the Tribunal's rules pursuant to its cost power in s. 37(4). Unlike other forms of human rights damages, the primary purpose of a costs award is punitive, not compensatory.¹⁴

¹⁴ *Fougere v. Rallis and Kalamata Greek Taverna (No. 2)*, 2003 BCHRT 43 at para. 14.

B. THE COURTS

In the Tribunal's 2008–2009 fiscal year, complainants cited discrimination in employment most frequently (64%). Of the 14 grounds of prohibited discrimination, the most common ground cited in employment complaints was physical disability (89%), followed by sex (including harassment and pregnancy) (59%), mental disability (49%) and race (32%).¹⁵

Because so many of the complaints filed with the Tribunal arise in the employment context, complainants may seek redress in multiple forums, including the Tribunal, the civil courts in the form of wrongful or constructive dismissal suits, or grievance procedures pursuant to a collective agreement. As such, the courts and grievance arbitrators may be faced with claims that have human rights dimensions.

In the civil courts, wrongful and constructive dismissal suits arise from private contractual relations. If liability is established, the basic remedial premise is that the plaintiff is to be treated and compensated as if he or she was an employee throughout the reasonable notice period. As the Supreme Court of Canada explained in *Honda Canada Inc. v. Keays*:

An action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause. Thus, if an employer fails to provide reasonable notice of termination, the employee can bring an action for breach of the implied term (*Wallace*, at para. 115). The general rule, which stems from the British case of *Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.), is that damages allocated in such actions are confined to the loss suffered as a result of the employer's failure to give proper notice and that no damages are available to the employee for the actual loss of his or her job and/or pain and distress that may have been suffered as a consequence of being terminated. This Court affirmed this rule in *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673, at p. 684:

[T]he damages cannot be increased by reason of the circumstances of dismissal whether in respect of the [employee's] wounded feelings or the prejudicial effect

¹⁵ Many complaints include more than one ground.

upon his reputation and chances of finding other employment.¹⁶

What role, if any, does an employer's discriminatory conduct play in a civil suit?

In 1981, the Supreme Court of Canada held in *Seneca College of Applied Arts and Technology v. Bhadauria* that human rights legislation precludes a civil cause of action based on a breach of human rights legislation.¹⁷ In *Bhadauria*, the plaintiff alleged that Seneca College had refused to hire her for a teaching position because of her race. She brought a civil action alleging that the College had breached a common law duty not to discriminate against her. While the trial judge dismissed her claim on jurisdictional grounds, the Ontario Court of Appeal found that the right to be free from discrimination gave rise to a common law cause of action. The Supreme Court of Canada disagreed:

The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the *Code*.

For the foregoing reasons, I would hold that not only does the *Code* foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the *Code*. The *Code* itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use.

Because of *Bhadauria*, employees who allege human rights violations in the context of the employment relationship do not have a freestanding cause of action for discrimination. While *Bhadauria* has remained good law for some 28 years, recently the courts have become increasingly willing to consider employees' discrimination complaints in the context of wrongful or constructive dismissal suits, and to award damages to compensate employees, or to punish employers, for

¹⁶ *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362 [*Honda*] at para. 50.

¹⁷ [1981] 2 S.C.R. 181 [*Bhadauria*].

discriminatory behaviour. This has been accomplished in several fashions, discussed below, although there may be a retrenchment in the wake of the Supreme Court of Canada's decision in *Honda*, also discussed below.

With that background, this paper now turns to an examination of certain monetary and non-monetary remedies available pursuant to human rights legislation, as compared to the courts.

II. MONETARY REMEDIES - INJURY TO DIGNITY, FEELINGS AND SELF-RESPECT

A. LEGISLATIVE HISTORY

The BC Tribunal's authority to award compensation for injury to dignity, feeling and self-respect (collectively, "injury to dignity") originated in the 1973 legislation, which provided:

17(2) Where the board is of the opinion that (i) the person who contravened this Act did so knowingly or with a wanton disregard; and (ii) the person discriminated against suffered aggravated damages in respect of his feelings or self-respect, the board may order the person who contravened this Act to pay to the person discriminated against such compensation, not exceeding five thousand dollars, as the board may determine.¹⁸

The 1984 legislation rolled back the upper limit on damages for injury to dignity:

7(2) Where a board of inquiry considers that a complaint is justified, it

[...]

(b) may order the person who contravened this Act to ... pay to the person discriminated against an amount not exceeding \$2,000 [in addition to or instead of any other order made under this paragraph].¹⁹

¹⁸ *Human Rights Code of British Columbia Act*, SBC 1973, c. 119 [1973 Code].

¹⁹ *Human Rights Act*, S.B.C. 1984, c. 22 [1984 Legislation].

On July 13, 1992, the *Human Rights Amendment Act, 1992* was proclaimed.²⁰ It removed the \$2,000 cap and substituted the following provision in respect of compensation for injury to dignity:

17(2) Where a board of inquiry considers that a complaint is justified, it

(d) if the person discriminated against is a party to the proceedings, may order the person who contravened this Act to do one or more of the following:

(iii) pay to the person discriminated against an amount that the board of inquiry considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

The Tribunal's current statutory authority to award damages for injury to dignity, feelings and self-respect is found in s. 37(2)(d)(iii) of the *BC Code*, which provides:

37(2) If the member or panel determines that the complaint is justified, the member or panel

[...]

(d) if the person discriminated against is a party to the complaint, or is an identifiable member or a group or class on behalf of which a complaint is filed, may order the person that contravened this Code to do one or more of the following:

[...]

(iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

As a result, there is no limit on the amount of compensation the Tribunal may order to compensate a successful complainant for injury to their dignity, feelings, and self respect arising from the discrimination.

²⁰ S.B.C. 1992, c. 43.

B. COMPENSATORY NATURE

The general principle that human rights legislation is remedial rather than punitive applies equally to injury to dignity damages, and has been historically applied to the “aggravated damages” provision of the 1973 *Code*,²¹ to the revised “general damages” provision with its \$2,000 ceiling in the 1984 Legislation,²² and to the provision in its form since 1992.²³ Because deterrence is not a relevant factor in the determination of an appropriate award, prior to the \$2,000 ceiling being lifted, the BC Human Rights Council (a precursor to the current Tribunal) rejected a complainant’s argument that it ought to make an award against each respondent for deterrence purposes.²⁴ Once the ceiling was lifted, the Council again refused to make a substantial award for the purpose of sending a “strong message” to employers.²⁵

Rather, the Tribunal has said that the purpose of injury to dignity damages is as follows:

So far as a monetary award can, compensation for injury to dignity, feelings and self-respect should be designed in accordance with the *restitutio in integrum* principle of making the complainant whole.²⁶

²¹ *Holloway v. MacDonald* (1983) 4 C.H.R.R. 0/1454 (B.C. Bd. of Inq.). But see: *Strenja v. Rennets and Comox Taxi Ltd.* (1981) 2 C.H.R.R. D/585 (B.C. Bd. of Inq.) at D/589.

²² *Roy v. B.C. Rail Ltd.* (1987), 8 C.H.R.R. D/4193 (B.C.C.H.R.) at D/4194 (B.C.C.H.R.); *Westbury v. Trump Investments Ltd.* (1992), 17 C.H.R.R. D/516 (B.C.C.H.R.) at D/519 [*Westbury*]; *Henderson v. B. C. Transit* (1992), 18 C.H.R.R. D/124 (B.C.C.H.R.) at D/133.

²³ *Dupuis v. British Columbia (Ministry of Forests)* (1993), 20 C.H.R.R. D/87 (B.C.C.H.R.) at 0/97; *Nixon v. Vancouver Rape Relief Society* 2002 BCHRT 1 [*Nixon*] at para. 226. *Nixon* was overturned on judicial review (2003 BCSC 1936; 2005 BCCA 601), but the court did not adjudicate the issue of whether the Tribunal erred in awarding injury to dignity damages.

²⁴ *Westbury*, *supra* note 22 at D/519.

²⁵ *Courchaine v. aaah...Balloon Delights Inc.* (1994), 24 C.H.R.R. 0/76 (B.C.C.H.R.) at 0/84; see also *Clarke v. Command Record Services Ltd.* (1996), 27 C.H.R.R. 0/73 (B.C.C.H.R.) at 0/85.

²⁶ *Senyk v. WFG Agency Network (No. 2)*, 2008 BCHRT 376 [*Senyk*] at para. 448.

C. QUANTUM

The determination of quantum under s. 37(2)(d)(iii) involves an assessment of the impact of the discriminatory conduct on the complainant. The Tribunal assesses, on the evidence, injury to dignity, feelings and self-respect and attaches a monetary value to compensate for that loss.

While each case is decided on its own facts, the Tribunal is guided by the range of awards made in similar cases. In the sexual harassment context, the Tribunal has set out and adopted seven considerations to be taken into account when determining compensation for injury to dignity.²⁷ The Tribunal has indicated that this list is not meant to be exhaustive, that is, other factors could become important over time. These factors are:

1. the nature of the harassment, that is, was it simply verbal or was it physical as well;
2. the degree of aggressiveness and physical contact in the harassment;
3. the ongoing nature, that is, the time period of the harassment;
4. its frequency;
5. the age of the victim;
6. the vulnerability of the victim; and
7. the psychological impact of the harassment upon the victim.

In cases involving other forms of discrimination, similar lists have not been developed. The nature of the discrimination, the time period and frequency of the discrimination, the vulnerability of the complainant, and the impact on the complainant will always be relevant to the award. In any case, the assessment process is identical: a comparison of the relevant factors in decided cases to find a range of awards that will be of some guidance. Any factor may be properly considered so long as it is relevant to the impact of the discrimination on the complainant's dignity, feelings and self respect.

²⁷ See, for example, *Fougere v. Rallis and Kalamata Greek Taverna*, 2003 BCHRT 23 at para. 133, *Harrison v. Nixon Safety Consulting Inc.*, 2009 BCHRT 462 [*Harrison*] at para. 345 and *Ratzlaff v. Marpaal Construction and another*, 2010 BCHRT 13 [*Ratzlaff*] at para. 35.

D. INCREASING QUANTUM

As noted, on July 13, 1992, the \$2,000 ceiling was lifted. Injury to dignity damage awards remained modest; from that time until 2001, no award exceeded \$6,500, and most awards were well below that amount. However, since 2001, damages for injury to dignity in BC have been increasing, first gradually and, more recently, by larger margins.

In early 2002, the Tribunal ordered \$7,500 in *Nixon*.²⁸ After discussing the impact of the discrimination on Ms. Nixon, the Tribunal noted the highest award to date was \$6,500, and that in *Tannis et al. v. Calvary Publishing Corp. and Robbins*,²⁹ the Tribunal had commented that damages in BC had fallen behind those in Ontario. The Tribunal said that “while precedent is of some value in determining damage awards, the Tribunal should not be so bound by past damage awards that it cannot adequately compensate a complainant for the actual injury to his or her dignity.”³⁰

The following year, in *Gill v. Grammy’s Place Restaurant and Bakery Ltd.*, a sexual harassment case, the Tribunal ordered \$10,000.³¹ Again, after canvassing the impact on the complainant, the Tribunal noted the highest award to date, and the comment of the Tribunal in *Tannis*. The Tribunal said that adequately compensating the complainant for the injury sustained was of paramount importance, and that in this case, “the impact on Ms. Gill’s feelings, dignity and self respect could not have been more severe, short of a successful suicide attempt” and that “an award of \$10,000 is appropriate to compensate Ms. Gill for the extensive and prolonged injury to her dignity, feelings and self respect.”³²

The next increase was not until 2005. In *MacRae v. Interfor (No. 2)*, the Tribunal ordered \$12,500.³³ The circumstances were similar to *Fenton v. Rona Revy Inc.*,³⁴ in which the Tribunal had ordered \$10,000, with additional aggravating factors, including the complainant’s vulnerability because of his disability, his long association with the

²⁸ *Supra* note 23.

²⁹ 2000 BCHRT 47 at paras. 132–133.

³⁰ *Ibid.* at para. 245.

³¹ 2003 BCHRT 88.

³² *Ibid.* at para. 154–155.

³³ 2005 BCHRT 462 [*MacRae*].

³⁴ 2004 BCHRT 143 [*Fenton*].

employer, the impersonal manner in which his employment was terminated, and the heightened impact of the termination as a result of living in a small mill town with which he had such strong personal and familial relations.³⁵

In *Radek v. Henderson Development (Canada) and Securiguard Services Ltd. (No. 3)*, the Tribunal ordered \$15,000 in light of the severe emotional impact of the repeated acts of discrimination at a shopping centre in the complainant's community.³⁶ The Tribunal said that this figure was based on the impact of the conduct on Ms. Radek, which was more serious than *Fenton*, and "the size of the awards made by this Tribunal for injury to dignity, feelings and self-respect, and the need to increase those awards in appropriate cases in order to more adequately compensate complainants for their suffering, consistent with awards in other jurisdictions, especially Ontario."³⁷

Injury to dignity damages again increased in 2006 when the Tribunal ordered \$20,000 in *Toivanen v. Electronic Arts (Canada) (No. 2)*.³⁸ The employer admitted discrimination on the ground of disability when it terminated the complainant's employment. The termination had a devastating impact on Ms. Toivanen. The Tribunal said the dismissal undoubtedly exacerbated her illness. Her career was her life and when she was dismissed it "blew her world apart." She was going through one of the worst emotional and physical challenges she had ever experienced and, at 47, it was a challenge to have to return to live with her parents.

Since *Toivanen*, the highest injury to dignity awards have, with two exceptions,³⁹ been awarded in complaints involving disability discrimination in employment.

In 2007, the Tribunal ordered \$25,000 in *Datt v. McDonald's Restaurants (No. 3)*.⁴⁰ After discussing the impact on Ms. Datt and the Tribunal's decision in *Toivanen*, the Tribunal concluded that \$25,000 was appropriate. Ms. Datt loved her job; her 23-year career at McDonald's

³⁵ *MacRae*, *supra* note 33 at para. 163.

³⁶ 2005 BCHRT 302 [*Radek*].

³⁷ *Ibid.* at para. 646.

³⁸ 2006 BCHRT 396 [*Toivanen*].

³⁹ *Kalyn v. Vancouver Island Health Authority (No. 3)*, 2008 BCHRT 377 [*Kalyn*] and *J and J obo R v. B.C. (Ministry of Children and Family Development) and Havens (No. 2)*, 2009 BCHRT 61 [*J and J obo R*].

⁴⁰ 2007 BCHRT 324 [*Datt*].

was her life. She was terminated by someone she barely knew, had never worked with, and who did not investigate any other job opportunities. She was very depressed due to her job loss; it created stress, financially and emotionally, and difficulties in her marriage. She had difficulty recovering and there was evidence that she was no longer the same, and seemed lost without her job.

In 2008, the Tribunal awarded \$20,000 in *Lowe v. William L. Rutherford (B.C.) and another (No. 3)*, where the complainant was denied regular employment status and then dismissed due to his Crohn's disease.⁴¹ He suffered financial difficulties, which made him feel degraded. After the dismissal, he was in shock, felt sick to his stomach, panicked about how he was going to pay his bills, and felt anger and dread. The Tribunal found the dismissal exacerbated his condition.

In *Cassidy v. Emergency Health and Services Commission and others (No. 2)* (\$22,500), the complainant's employment was not terminated, but he was unnecessarily held out of service when he could have been accommodated.⁴² A significant factor was that the discrimination occurred over a lengthy period of time (over one year), during which Mr. Cassidy suffered unnecessary uncertainty and the deprivation of his livelihood. The Tribunal also considered that Mr. Cassidy has multiple sclerosis, a serious medical condition, so was inherently vulnerable; he lived in small community so his employment opportunities were limited; and the conduct left him anxious and frustrated.

In *Kalyn*, the Tribunal awarded the complainant \$20,000.⁴³ The complainant was abruptly and unfairly terminated because her employer viewed her as a "trouble-maker" because she raised concerns about sex discrimination in a male-dominated workplace. She was completely devastated by her termination, and was initially so overwhelmed by the loss of her job that she was bed-ridden with depression for about a week. Thereafter, she was under psychiatric care, and was required to take medication for her depression. She felt not only a total loss of self-worth respecting work but was so ill that she also felt a failure as a mother and a wife. Her family depended on her salary and its loss has resulted in financial hardship and stress.

⁴¹ 2007 BCHRT 336 [*Lowe*].

⁴² 2008 BCHRT 125.

⁴³ *Supra* note 39.

In *Senyk*, released the day after *Kalyn*, the Tribunal again increased its highest injury to dignity award, to \$35,000.⁴⁴ This remains the highest injury to dignity award to date in British Columbia. The complainant was callously terminated by email after two years of disability leave. She was especially vulnerable at the time of termination. Her work was her life and she nourished a hope to one day return. She had not foreseen her termination, and was devastated by the news. She was distraught, and felt her health went to “ground zero.” In the longer term, the termination and manner in which it was effected, significantly worsened the complainant’s depression, anxiety, and likely her drinking problem.

In *J and J obo R*, a services case, the Tribunal awarded the complainant \$20,000.⁴⁵ The complaint was filed by a mother on behalf of her son, who had a chronic neuro-developmental disability and was denied support services as a result of a discriminatory under inclusive interpretation of the relevant legislation. The son did not testify due to his disability, and no direct evidence was led about the impact of the denial of the support services on him. However, the Tribunal inferred from the evidence that the support services would have benefited him significantly with crucial life skills and social development, and that it would be difficult, if not impossible, for him to obtain now the full advantage he would have obtained had he received the services at an earlier, and crucial, stage in his development. Of note, the Tribunal found that there was no reason in law that the highest awards should be reserved for the employment area.

In *Ratzlaff*, the Tribunal awarded the complainant \$25,000, its highest injury to dignity award to date in the sexual harassment context.⁴⁶ The harassment was both physical and verbal, and culminated in respondent forcing his way into the complainant’s hotel room and assaulting her. While the employment relationship was not a long one, the harassment permeated virtually all of the complainant’s and the respondent’s interactions, and the complainant was particularly vulnerable. This award was a significant increase from the previously highest award of \$15,000 in *Harrison*.⁴⁷

⁴⁴ *Supra* note 26.

⁴⁵ *Supra* note 39.

⁴⁶ *Supra* note 27.

⁴⁷ *Supra* note 27.

In *Kerr v. Boehringer Ingelheim (Canada) (No. 4)*, the Tribunal found that the employer had discriminated against the complainant, who had a visual impairment, when it refused to allow her to return to work after a disability leave, and awarded her \$30,000 for injury to dignity.⁴⁸ The complainant, who was 58 years old at the time of the hearing, sought to return to work over a period of almost four years, but her attempts failed and many of her communications were ignored. Her work issues spilled over into the rest of her life. She was disappointed, humiliated and discouraged by what she felt was her failure to find a solution. She was upset that she was unable to contribute financially to her family. Although she was not terminated, the employer's failure, over a long period of time, to take steps to return her to work adversely affected her, similar to the situation in *Cassidy*.

Thus, the Tribunal has indicated a clear willingness to give higher awards, and does so particularly in cases in the area of employment and on the ground of disability. Factors considered in one or more of these cases include:

- the complainant's career was his or her life;
- the complainant was a long-term, committed employee;
- the discrimination exacerbated the complainant's disability;
- the complainant was particularly vulnerable;
- the employer acted with disregard for the complainant's dignity;
- the discrimination occurred over a lengthy period of time;
- there was a severe emotional, and in some cases psychological, impact on the complainant in all aspects of their life; and
- the complainant's disabling condition was exacerbated by the employer's discrimination.

⁴⁸ 2009 BCHRT 196 [*Kerr*]. A judicial review to the BC Supreme Court was unsuccessful (2010 BCSC 427), and an appeal to the BC Court of Appeal has been filed.

E. THE COURTS

As noted above, at least until the Supreme Court of Canada's decision in *Honda*, the courts have been increasingly willing to consider employees' discrimination complaints in the context of wrongful or constructive dismissal suits, and to award damages to compensate employees or to punish employers for discriminatory behaviour. This has been accomplished in several fashions.

First, the courts have considered employees' health, both in calculating the basic reasonable notice period and by augmenting that notice period by adding *Wallace* damages to compensate employees for bad faith in the manner of dismissal.⁴⁹ For example, in *Moody v. Telus Communications Inc.*, the employee had returned to work but was in recovery from cancer treatments at the time of his termination. Justice Cullen found the employee's health to be "an ongoing uncertainty not unlikely to affect his future employment prospects," and awarded 24 months' notice.⁵⁰ Poor treatment of disabled employees has also been found to warrant *Wallace* damages in a number of cases.⁵¹

Second, the courts have held that they may compensate an employee for discrimination provided that the impugned conduct amounts to an independent cause of action separate and apart from the dismissal, such as in tort. For example, in *Prinzo*, the Ontario Court of Appeal upheld the trial judge's finding that the conduct of an employer who, among other things, had persistently harassed an injured employee to return to work and falsely suggested that she was malingering, amounted

⁴⁹ *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 [*Wallace*].

⁵⁰ *Moody v. Telus Communications Inc.*, 2003 BCSC 471 [*Moody*] at paras. 36–39. See also *Singh v. British Columbia Hydro and Power Authority*, 2001 BCCA 695, leave to appeal ref'd [2002] S.C.C.A. No. 45, where the employee was terminated while attempting to return to work on a graduated basis following an absence for depression, and was awarded 27 months' notice. It is unclear from the decision whether these circumstances were a factor in assessing the length of the notice period, in adding *Wallace* damages or both. See also *Pereira v. Business Depot Ltd. (c.o.b. Staples Business Depot)*, 2009 BCSC 1178, where the court added two months to the notice period because the plaintiff was in a vulnerable state of health at the time of his termination and was making an effort to return to work when he was terminated.

⁵¹ See for example *Prinzo v. Baycrest Centre for Geriatric Care*, (2002) 60 O.R. (3d) 474 (C.A.) [*Prinzo*] at para. 68–70; *Zorn-Smith v. Bank of Montreal*, [2003] O.J. No. 5044 [*Zorn-Smith*] at paras. 134–139; *Rinaldo v. Royal Ontario Museum*, [2004] O.J. No. 5068 (S.C.J.) [*Rinaldo*] at paras. 132–144. The court also considered the affect of the employee's health on his ability to return to the workplace in assessing damages for reasonable notice before the *Wallace* augmentation: para. 125.

to an independent cause of action, the tort of intentional infliction of mental distress, and awarded her \$10,000.⁵² In *Zorn-Smith*, an employee who was worked to the point of burnout was awarded \$15,000 in mental distress damages.⁵³

In *Sulz v. Minister of Public Safety and Solicitor General*, the British Columbia Court of Appeal upheld the trial judge's finding that a supervisor (who had harassed and verbally abused an employee to the point that she became clinically depressed and accepted a medical discharge) committed the tort of negligent infliction of mental suffering.⁵⁴ The court awarded substantial damages: \$125,000 in general damages, \$600,000 for future wage loss, and \$225,000 for past wage loss.

In the insurance context, the courts have also awarded damages for mental distress flowing from a breach of contract, even absent an independent actionable wrong. In *Fidler v. Sun Life Assurance Co. of Canada*, the court upheld the trial judge's award of \$20,000 in mental distress damages flowing from the breach of a disability insurance contract.⁵⁵ In that case, the insurer terminated the disability benefits of a woman suffering from chronic fatigue syndrome and fibromyalgia, despite medical evidence that suggested she was incapable of working. *Fidler* plays a significant role in *Honda*, as discussed below.

Finally, in a line of cases originating with the Supreme Court of Canada's decision in *McKinley v. B.C. Tel.*,⁵⁶ and ending in its decision in *Honda*, the courts considered that breaches of human rights legislation, while not constituting an independent cause of action like mental distress in tort, could nonetheless constitute an independent actionable wrong that may found punitive damages.⁵⁷ Thus, prior to *Honda* and despite *Bhadauria*, there was authority, albeit some in the context of preliminary applications to strike, that discrimination could constitute a non-tortious "independent actionable wrong" upon which punitive damages could be awarded.

⁵² *Ibid.*

⁵³ *Supra* note 51.

⁵⁴ 2006 BCSC 99; 2006 BCCA 582.

⁵⁵ [2006] 2 S.C.R. 3 [*Fidler*].

⁵⁶ [2001] 2 S.C.R. 161.

⁵⁷ See for example *Gigliotti et al. v. Masev*, 2004 BCSC 85; *Chikoski v. Shaw Cable Systems G.P.*, [2002] O.J. No. 3420; *Greenwood v. Ballard Power Systems*, 2004 BCSC 266 and *Rinaldo*, *supra* note 51.

This issue came to a head in *Honda*. For the first time since *Bhadauria*, the Supreme Court of Canada was directly asked to address the interplay between human rights legislation and civil actions.

The facts of the case are well known, and will not be repeated here. At trial, Justice McIsaac held that Honda had wrongfully dismissed, discriminated against, and harassed Mr. Keays. He awarded Mr. Keays 15 months' notice, 9 months' *Wallace* damages, and \$500,000 in punitive damages. Mr. Keays asked that *Bhadauria* be overruled, and Justice McIsaac held "with significant reluctance" that he was "forced" to find that the court was without jurisdiction to award damages for discrimination and harassment. He went on to note, however, based on *McKinley*, that "these complaints could constitute 'independent actionable wrongs' such as to trigger an award of punitive damages." Justice McIsaac found that Honda had "committed a litany of acts of discrimination and harassment," and that, overall, Honda had terminated Mr. Keays in order to avoid its obligation to accommodate his disability. Based on a number of factual findings and the considerations set out in *Whiten v. Pilot Insurance*,⁵⁸ he was satisfied that punitive damages in the amount of \$500,000 were warranted.

The Ontario Court of Appeal upheld the notice period, *Wallace* damages and punitive damages, although the majority reduced the quantum from \$500,000 to \$100,000 on the basis that Justice McIsaac had based the award on a number of factual errors and had not considered the other awards of damages. It rejected Honda's argument that the Ontario *Human Rights Code* precluded punitive damages in a civil suit. On the issue of whether it should recognize a separate civil cause of action for discrimination and harassment, the Court's reasons were brief:

[t]he respondent's attempt to have this court revisit *Bhadauria*, *supra*, in order to establish an independent cause of action of discrimination must fail. *Bhadauria* has been followed in this court as recently as [*Taylor v. Bank of Nova Scotia*, [2005] O.J. No. 838] ... and I must do so as well.⁵⁹

On appeal to the Supreme Court of Canada, Justice Bastarache, writing for the majority, maintained the notice period, but set aside both the *Wallace* and punitive damages awards. Justice Bastarache also took the opportunity "to clarify and redefine some aspects of the law of

⁵⁸ [2002] 1 S.C.R. 595.

⁵⁹ (2006) O.R. (3d) 161 at para. 86.

damages in the context of employment,” including what factors should be considered when allocating compensatory damages in lieu of notice from wrongful dismissal, the basis for and calculation of damages for conduct in dismissal (*i.e.*, *Wallace* damages), and the issue of punitive damages.⁶⁰

With respect to *Wallace* damages, the majority found that “a proper reading of the record” showed that Honda’s conduct in dismissing Mr. Keays was not, in any way, an egregious display of bad faith justifying an award of damages for conduct in dismissal.⁶¹ Much of the majority’s ruling with respect to whether *Wallace* damages were warranted flows from its finding that the trial judge erred in making certain findings of fact. However, the majority also said that the case “sheds light on the legal problems associated with the allocation of these damages” and that it was therefore appropriate “to reconsider the *Wallace* approach and make some adjustments.”⁶²

Justice Bastarache traced the law’s development, from *Vorvis v. Insurance Corporation of British Columbia*,⁶³ which left open the possibility of awarding aggravated damages in wrongful dismissal cases where the acts complained of were also independently actionable, to *Wallace*, which rejected both an implied contractual duty of good faith and a tort of bad faith discharge, and culminating in *Fidler*, where the majority concluded that it was no longer necessary that there be an independent actionable wrong before damages for mental distress could be awarded, provided that the parties contemplated at the time of the contract that a breach in certain circumstances would cause the plaintiff mental distress. Justice Bastarache reconciled the cases as follows:

Fidler provides that “as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable” (para. 48). In *Wallace*, the Court held employers “to an obligation of good faith and fair dealing in the manner of dismissal” (para. 95) and created the expectation that, in the course of dismissal, employers would be “candid, reasonable, honest and forthright with their employees” (para. 98). At least since that time, then, there has been expectation by both

⁶⁰ *Supra* note 16 at paras. 22–24.

⁶¹ *Ibid.* at para. 34.

⁶² *Ibid.* at para. 35.

⁶³ [1989] 1 S.C.R. 1085.

parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages.⁶⁴

The majority concluded that, where an employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, damages are not to be assessed through an arbitrary extension of the notice period, but rather the employee is to be compensated for his or her actual proven damages.⁶⁵ In addition, the majority confirmed that those damages are intended to be compensatory, not punitive.⁶⁶

With respect to the issue of whether discrimination could ground punitive damages, the majority was sensitive to the remedial philosophy of human rights remedies:

In [*Bhadauria*], this Court clearly articulated that a plaintiff is precluded from pursuing a common law remedy when human rights legislation contains a comprehensive enforcement scheme for violations of its substantive terms. The reasoning behind this conclusion is that the purpose of the Ontario *Human Rights Code* is to remedy the effects of discrimination; if breaches to the Code were actionable in common law courts, it would encourage litigants to use the Code for a purpose the legislature did not intend—namely, to punish employers who discriminate against their employees. Thus, a person who alleges a breach of the provisions of the Code must seek a remedy within the statutory scheme set out in the Code itself. Moreover, the recent amendments to the Code (which would allow a plaintiff to advance a breach of the Code as a cause of action in connection with another wrong) restrict monetary compensation to loss arising out of the infringement, including any injuries to dignity, feelings and self-respect. In this respect, they confirm the Code's remedial thrust.⁶⁷

Justice Bastarache concluded:

⁶⁴ *Supra* note 16 at para. 58.

⁶⁵ *Ibid.* at para. 59.

⁶⁶ *Ibid.* at para. 60.

⁶⁷ *Ibid.* at para. 63.

The Court of Appeal, relying on *McKinley*, concluded that *Bhadauria* only precludes a civil action based directly on a breach of the Code—but does not preclude finding an independent actionable wrong for the purpose of allocating punitive damages. It is my view that the Code provides a comprehensive scheme for the treatment of claims of discrimination and *Bhadauria* established that a breach of the Code cannot constitute an actionable wrong; the legal requirement is not met.⁶⁸

With respect to the issue of whether *Bhadauria* should be set aside and a separate tort of discrimination recognized, the majority noted concerns that such a tort would not contain an effective limiting device and may undermine the statutory human rights regime, which for many is a more accessible and effective means to seek redress than the courts, and that in jurisdictions other than Ontario, tribunals have exclusive jurisdiction in human rights matters.⁶⁹ At the end of the day, however, the majority concluded that there was no need to reconsider *Bhadauria* because, on the facts, there was no evidence of discrimination in any event, and Honda's conduct was not sufficiently egregious or outrageous to warrant punitive damages.⁷⁰

F. DIFFERENCES AND SIMILARITIES

As can be seen from this above review, the fundamental differences between tribunals' and the courts' remedial philosophy dictate the types of awards that both make. In particular, because wrongful dismissal actions are based on the obligation to give reasonable notice, courts will not, without something more, compensate employees for the pain and distress of termination. While tribunals are expressly enabled by statute to compensate employees for such damages, by contrast, in the civil context, as the majority explained in *Honda*:

⁶⁸ *Ibid* at para. 64.

⁶⁹ *Ibid.* at para. 65–66.

⁷⁰ *Ibid.* at paras. 67–78. Justice LeBel, in writing for himself and Justice Fish, agreed with the majority that it was not necessary to reconsider *Bhadauria*. However, he also said that the development of tort law ought not to be frozen forever on the basis of *Bhadauria*; the legal landscape has changed, and the “strong prohibitions of human rights codes and of the *Charter* have informed many aspects of the development of common law”: see paras. 118–119.

The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.⁷¹

As set out above, pre-*Honda* the courts demonstrated a willingness to depart from this principle, to some extent, and to compensate dignity interests by other means. How, then, have the courts been treating wrongful or constructive dismissal claims that may have a human rights dimension and/or involve injury to a plaintiff's feelings, including to the point of causing disability, in the post-*Honda* world?

While the Supreme Court of Canada has definitively brought to an end the line of authority suggesting that breaches of human rights legislation could found punitive damages, a brief, and non-comprehensive, review of a number of BC and Ontario post-*Honda* cases indicates that courts continue to be willing to address and compensate dignity interests in the context of wrongful and constructive dismissals.

For example, in *Bru v. AGM Enterprises Inc.*, a decision of the BC Supreme Court, the plaintiff did not allege discrimination (although she did allege personal harassment that was ultimately unfounded), nor do there appear to be any facts alleged that might give rise to a human rights complaint.⁷² However, she did allege that her wrongful termination caused her to suffer from severe reactive depression, anxiety, high blood pressure and other ill effects. She sought damages for wrongful dismissal, *Wallace* damages, intentional infliction of mental suffering and punitive damages. The decision is interesting for a number of reasons.

Justice Brown found that the plaintiff was vulnerable at the time of termination, and that the employer, who was not responsible for her vulnerability, nonetheless failed to take it into account in the context of accepting her purported resignation.⁷³

⁷¹ *Ibid.* at para. 56.

⁷² 2008 BCSC 1680 [*Bru*].

⁷³ *Ibid.* at para. 138.

In *Wallace*, cited in part in *Bru*,⁷⁴ the court said:

The vulnerability of employees is underscored by the level of importance which our society attaches to employment. As Dickson C. J. noted in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368, 38 D.L.R. (4th) 161:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well being.

Thus, for most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status is bound to have far-reaching repercussions. In "Aggravated Damages and the Employment Contract," [(1991) 55 Sask. L. Rev. 345] Schai noted at p. 346 that, "[w]hen this change is involuntary, the extent of our personal dislocation is even greater.

The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In [*Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986] it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself.⁷⁵

The Tribunal has cited this passage in five of its highest injury to dignity award cases to date: *Toivanen*, *Datt*, *Lowe*, *Senyk* and *Kerr* (all of which are discussed above). Thus, there is some cross-pollination in that both the tribunals and courts recognize the fundamental value and significance of work to individual's human dignity, and the vulnerability of employees at the end of their employment.

Also, from a comparative remedial philosophy standpoint, it is interesting to note that in awarding *Wallace* damages, Justice Brown emphasized that the defendant did not act "with any degree of malicious

⁷⁴ *Supra* note 72 at para. 105.

⁷⁵ *Supra* note 49 at paras. 93–94.

intent or callous disregard”⁷⁶ towards the complainant. This is consistent with human rights jurisprudence that emphasizes that discriminatory intent is not a prerequisite for liability or damages. It is also a less onerous test than that for intentional infliction of mental distress, which requires proof of conduct calculated to cause harm.⁷⁷

The plaintiff’s vulnerability was also a consideration in *Piresferreira v. Ayotte*, a decision of the Ontario Superior Court of Justice.⁷⁸ In that case, the plaintiff suffered verbal abuse, intimidation and an assault in the workplace by her supervisor, which caused her to develop post-traumatic stress disorder and depression. Justice Aitkin awarded damages against the supervisor for assault and battery and intentional infliction of emotional distress (both of which the employer was vicariously liable for), as well as damages directly against the employer for negligent infliction of emotional distress.

In *Piresferreira*, general damages in the amount of \$50,000 (less a 10% contingency) were awarded with respect to all torts collectively. Justice Aitkin also awarded significant tortious damages (\$450,832) for past and future wage loss. From a comparative perspective, the factors Justice Aitkin considered in assessing the quantum for general damages parallel those the Tribunal uses in assessing injury to dignity damages:

Since May 2005, Piresferreira has suffered from disabling symptoms of depression and anxiety that have not noticeably ameliorated over time. It is uncertain if and when she will ever be in a position to return to gainful employment. This has been devastating for a person who defined herself very much through her work and took great pride in her successes in the workplace. Piresferreira’s depression and anxiety have also reduced the pleasure she can experience in all other aspects of her life. I assess general damages at \$50,000, subject to my comments below on contingencies.⁷⁹

Justice Aitkin also found that the employee had been constructively dismissed because the employer had failed to appropriately deal with her complaints of workplace harassment and intimidation, and that she was entitled to *Wallace* damages. However, she did not award

⁷⁶ *Ibid.* at para. 139.

⁷⁷ *Prinzo*, *supra* note 51 at para. 43

⁷⁸ [2008] O.J. No. 5187. An appeal has been filed.

⁷⁹ *Ibid.* at para. 195.

any additional quantum to compensate for constructive dismissal or *Wallace* damages, because of the tort award.⁸⁰ While this case appears to have been pleaded as a personal harassment case, in other cases the courts have said that discriminatory harassment may be considered in determining whether the employee has been wrongfully or constructively dismissed.⁸¹

Before leaving injury to dignity damages and turning to a discussion of wage loss, it is noteworthy for future cases that *Honda* expressly left open the possibility that an employee who is terminated while disabled might be entitled to *Wallace* damages. In setting out circumstances where damages might be awarded, the majority referred the following passage from *Wallace*:

In [*Corbin v. Standard Life Assurance Co.* (1995), 15 C.C.E.L. (2d) 71] the New Brunswick Court of Appeal expressed its displeasure over the conduct of an employer who made the decision to fire the employee when he was on disability leave, suffering from a major depression. The employee advised the manager as to when he would be returning to duty and informed him that he was taking a two-week vacation. He was fired immediately upon his return to work.⁸²

However, in *Mulvihill v. Ottawa City*, the Ontario Court of Appeal said that “the mere fact that [the employee] was on sick leave at the time of termination does not necessarily mean the dismissal was conducted in an unfair or bad faith manner.”⁸³

How this plays out in future cases remains to be seen.

III. MONETARY REMEDIES - WAGE LOSS

Section 37(2)(d)(ii) of the BC *Code* permits the Tribunal to order a respondent to compensate a complainant “for all, or part the member or

⁸⁰ *Ibid.* at paras. 214–261.

⁸¹ See, for example, *Andrachuk v. Bell Globe Media Publishing Inc. (c.o.b. Globe and Mail)*, [2009] O.J. No. 461 (Ont. Sup. Ct. J.) [*Andrachuk*] and the cases cited therein at para. 23.

⁸² *Supra* note 49 at para. 100

⁸³ (2008), 90 O.R. (3d) 285 at para. 66. But see the cases cited *supra* note 50 and note 51.

panel determines, of any wages ... incurred, by the contravention.” The principles governing compensation for lost wages were set out in *Mahmoodi v. UBC and Dutton*:

Section 37(2)(d)(ii) of the *Code* provides for compensation for all or part of the wages or salary lost or expenses incurred as a result of a contravention. The principles governing compensation in human rights cases are remedial in nature. That is to say, the complainant should be returned to the position that he or she would have been in had the wrong not occurred.⁸⁴

Thus, wage loss damages in the human rights context are also compensatory in that they are intended to put the complaint in the position she or he would have been had the discrimination not occurred. By contrast, wage loss is compensated in wrongful dismissal cases pursuant to contractual principles, namely, an award of damages in lieu of reasonable notice calculated by wages and other compensation payable for a particular number of months of service.

In *Honda*, the majority reaffirmed that the number of months of service is calculated using the factors (among others) first set out in *Bardal v. Globe & Mail Ltd.*⁸⁵ These factors include the character of the employment, the length of service, age and the availability of similar employment, having regard to the experience, training and qualifications of the employee.

Such damages are available in a wrongful dismissal action, despite the fact that a plaintiff may be unable to work during the notice period. By contrast, because of the compensatory remedial underpinning of human rights wage loss damages, a complainant’s inability to work during the period following termination is directly relevant to whether wage loss will be awarded.

In *Senyk*, the Tribunal rejected the complainant’s argument that it should apply common law wrongful dismissal principles as a basis for ordering damages in lieu of reasonable notice.⁸⁶ The Tribunal cited *Vanton v. British Columbia (Council of Human Rights)*:

Does the concept of “reasonable notice” apply in human rights compensation? ... The Ontario Court of Appeal in *Piazza v.*

⁸⁴ (1999) 36 C.H.R.R.D/8.

⁸⁵ (1960), 24 D.L.R. (2d) 140 (H.C.J.).

⁸⁶ *Supra* note 26.

Airport Taxicab (Malton) Assn. (1989), 60 D.L.R. 1981 ... stated that the purpose of compensation in the human rights context is to restore a complainant to the position he or she would have been in had the discriminatory act not occurred. This is unlike the usual measure of economic loss in contract law for wrongful dismissal where the wrong suffered by the employee is the breach by the employer of an implied contractual term to give the employee reasonable notice before terminating the contract of employment is *not* the correct measure to compensate an aggrieved complainant under the *Human Rights Code*. I agree with that conclusion.⁸⁷

The Tribunal concluded that, applying the principle that the purpose of compensation in a human rights context is to restore the complainant to the position he or she would have been in had the discriminatory act not occurred, it follows that, where the complainant was unable to work by virtue of disability, and thus was unable to earn a salary, no order for lost salary is available.

The Tribunal noted, however, that an exception to this general principle might arise where a complainant is rendered incapable of working by virtue of the respondent's discrimination.⁸⁸ In the Tribunal context, this exception can be seen to be at work in the many cases where the Tribunal has held that it was reasonable for a person to take some time following a discriminatory termination of employment before being able to look for work, and has ordered lost salary during that period, without any deduction for a lack of mitigation.⁸⁹

Inability to work due to disability following termination can also be seen at work in the wrongful dismissal context. For example, although it found that there was no evidence that the disability was caused by the manner of termination, in upholding the length of the reasonable notice period, the majority in *Honda* relied on Mr. Keays' disability as one of the factors justifying an assessment of 15 months' notice. The Court said that Mr. Keays' disability, "an illness which greatly incapacitated him" was

⁸⁷ (1994), 21 C.H.R.R. D/492 (B.C.S.C.) at para. 72.

⁸⁸ *Supra* note 26 at paras. 437–438.

⁸⁹ *Ibid.* at para. 438. See, for example, *Morris v. BCRail*, 2003 BCHRT 14 [*Morris*] at para. 251.

one of several factors which “will substantially reduce his chances of re-employment.”⁹⁰

In *Bru*, Justice Brown’s treatment of the plaintiff’s inability to work following her termination is also interesting. After considering the medical evidence, he concluded that the plaintiff suffered from reactive depression following her termination, and was restricted from finding employment for six months.⁹¹ However, rather than factoring this into the length of the reasonable notice period,⁹² Justice Brown awarded damages based on six months (with a 50% deduction to avoid double compensation for the reasonable notice period, which he assessed at 3 months), using loss of earning capacity principles, but under the damage head of pecuniary losses pursuant to *Wallace*.⁹³ He also awarded \$12,000 for “non-pecuniary” *Wallace* damages.⁹⁴

In *Dawson v. F.A.G. Bearings Ltd*, a decision of the Ontario Superior Court of Justice, Justice Taylor found that the employer had acted unfairly in the manner of termination.⁹⁵ In that case, there was medical evidence that the employee suffered a major depression from the time she was terminated until approximately seven months later. The Court said:

I am of the opinion that it must have been within the contemplation of FAG at the time of entering into the employment contract with Dawson that the failure to treat her fairly, sensitively and in accordance with its own policies, after almost 14 years of employment, would have a devastating effect. This effect is demonstrated by the report of Dr. Thompson which indicates that Dawson was not in a position to begin searching for alternate employment until March 2006, seven months after her employment was terminated.

⁹⁰ *Supra* note 16 at paras. 32 and 48. Also see *Moody*, *supra* note 50.

⁹¹ *Supra* note 72 at paras. 159–170.

⁹² *Ibid.* at para. 126.

⁹³ *Ibid.* at para. 172.

⁹⁴ *Ibid.* at paras. 173–173.

⁹⁵ [2008] O.J. No. 4305.

In all of the circumstances, I am of the view that Dawson was entitled to 10 months notice of the intention to terminate her employment.⁹⁶

How the issue of the plaintiff's inability to work following termination will continue to unfold in the civil cases remains to be seen.

IV. A NOTE ON LEGISLATIVE AMENDMENTS TO THE ONTARIO HUMAN RIGHTS CODE

In June 2008, amendments to the Ontario *Human Rights Code* came into force, including a provision that the courts may entertain claims for a breach of the *Code* when those claims are connected to another claim that must be advanced through the courts:

Civil Remedy

46.1 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.

Same

(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I. 2006, C. 30, s. 8.

⁹⁶ *Ibid.* at paras. 50–51. See also *Pereira*, *supra* note 50.

As of the date of writing, there appear to be only three reported cases that have considered s. 46.1 of the Ontario *Code*.⁹⁷

In *Andrachuk*, the plaintiff was terminated without cause, on the basis of reorganization of her department, 11 days after she advised her employer that she was pregnant and intended to take maternity leave.⁹⁸ A few months after she was terminated, the employer hired a younger male employee to perform many of the same functions she had formerly performed, and that employee was later promoted to a job with the same responsibilities that the plaintiff performed in her former position. In her wrongful dismissal statement of claim, the employee pleaded gender, age and pregnancy discrimination. The employer applied to strike that portion of the statement of claim on the basis of *Bhadauria* and *Honda*. Justice O'Marra refused to strike the discrimination allegations from the statement of claim on the basis that they were relevant to the wrongful dismissal claim and because of s. 46.1 of the Ontario *Code*.

In *Dwyer v. Advanis Inc.*, the employee had a heart attack and, upon his return to work four weeks later, was told that the company was suffering financially, and he was terminated.⁹⁹ The employee sued on the basis of wrongful dismissal and pursuant to s. 46.1 of the Ontario *Code*. Ultimately, the case does not shed much light on the interplay between civil and human rights damages. This is because Justice Aston concluded that the employer had genuine financial concerns and did not terminate the employee because of his heart attack, so a breach of the *Code* was not established (he was awarded reasonable notice damages, however).

In its very short decision in *Dobreff v. Davenport*, the Ontario Court of Appeal said that s. 46.1 creates a new substantive jurisdiction

⁹⁷ Since this paper was presented, several other decisions have been released: *Parapatics v. 509433 Ontario Ltd. (c.o.b. Perth Precision Machining and Manufacturing)*, [2010] O.J. No. 861 (S.C.J.) (human rights complaint in the context of a wrongful dismissal); *Halton Condominium Corporation No. 59 v. Howard*, [2009] O.J. No. 3566 (S.C.J.) (motion to appoint arbitrator allowed and cross-motion to stay proceedings dismissed); *Stokes v. St. Clair College of Applied Arts and Technology*, 2010 ONSC 2133 (motion for determination of a question of law before trial or in the alternative to have portions of the pleadings struck, dismissed); *Aba-Alkhail v. University of Ottawa*, 2010 ONSC 2385 (successful motion to strike the plaintiff's claims, including pursuant to s. 46.1).

⁹⁸ *Supra* note 81 at paras. 19–24.

⁹⁹ [2009] O.J. No. 1956 (Ont. Sup. Ct. J.).

and that it should be read prospectively only.¹⁰⁰ The decision appealed from does not appear to be reported.

Human rights and employment law practitioners and adjudicators in other jurisdictions will be watching Ontario's concurrent jurisdiction experiment closely and with interest.

V. MONETARY REMEDIES – COSTS AND LEGAL EXPENSES

As noted above, the Tribunal's costs awards are the exception to the general rule that its remedies are compensatory rather than punitive.

When the Tribunal was established on January 1, 1997, it was given the following power to order costs in s. 37(4) of the *Code*:

The member or panel may award costs against a party to a complaint that, in the opinion of the panel or member, has engaged in improper conduct during the course of the investigation or the hearing of the complaint.

On March 31, 2003, when the direct access model was implemented, s. 37(4) was amended as follows:

The member or panel may award costs

- (a) against a party to a complaint who has engaged in improper conduct during the course of the complaint, and
- (b) without limiting paragraph (a), against a party who contravenes a rule under section 27.3(2) [Tribunal Rules] or an order under section 27.3(3) [Tribunal Orders].

There are also costs provisions in the Tribunal's *Rules of Practice and Procedure*.¹⁰¹

Since 2003, there has been a cautious and gradual expansion of the circumstances in which the Tribunal has been prepared to find a party to have engaged in improper conduct, and thereby exposed to the possibility of an award of costs.

¹⁰⁰ 2009 ONCA 8, leave to appeal ref'd [2009] S.C.C.A. No. 96.

¹⁰¹ See Rules 4, 13(15)(c)(i), 31 and 33(6). The Tribunals' *Rules of Practice and Procedure* are available on its website at www.bchrt.bc.ca/rules_practice_procedure.

In *McLean v. B.C. (Ministry of Public Safety and Solicitor General - Liquor Distribution Branch)*, the Tribunal explained:

[T]he Tribunal's increased willingness to consider conduct to be improper, and thereby open a party to an award of costs, is largely related to characteristics of the direct access system. Many parties before the Tribunal now engage in a significant amount of pre-hearing litigation. The manner in which that litigation is conducted can have a significant effect on the processing and eventual hearing of complaints, and can exact significant costs, financial and otherwise, on both other parties and the Tribunal. Under the *Code*, the Tribunal has very limited tools at its disposal in order to control parties' conduct; findings of improper conduct, and the resulting possibility of costs, are the main tool available.¹⁰²

No specific intention is necessary for a breach of a rule or order to be improper, nor is improper conduct necessarily limited to intentional wrongdoing. Any conduct which has a significant impact on the integrity of the Tribunal's processes, including conduct which has a significant prejudicial impact on another party, may constitute improper conduct within the meaning of s. 37(4).¹⁰³

Because the primary purpose of an award of costs is punitive, and such an award is meant to act as a deterrent to prevent future participants from committing similar acts, quantum "should be sufficient to signal the Tribunal's condemnation of the complainant's conduct and to serve the punitive purpose of such an award." Flowing from this, the primary factor taken into account by the Tribunal in determining the quantum of a cost award has been the nature and severity of the behaviour which is being sanctioned, and the impact of that behaviour on the other participants and the integrity of the Tribunal's processes.¹⁰⁴

Thus, "costs" pursuant to the BC *Code* do not have the same meaning as "costs" in the courts. While unsuccessful civil litigants face the prospect of a costs award, traditionally parties to human rights

¹⁰² 2006 BCHRT 103 at para. 7.

¹⁰³ *Ibid.* at para. 8.

¹⁰⁴ *Kelly v. Insurance Corporation of British Columbia*, 2007 BCHRT 382 at paras. 90–91. While the Tribunal will sometimes take into account a party's actual costs incurred as a result of the improper conduct, in the majority of cases an order for costs for improper conduct, and its quantum, are determined without reference to a party's actual costs.

complaints in BC have been required to bear their own legal expenses, at least for the period after a complaint has been filed.¹⁰⁵

However, since this paper was first presented to the CIAJ, the law in this area has been in flux. The Tribunal found in *Senyk* that it has jurisdiction, under s. 37(2)(d)(ii) of the *Code*, to order a respondent to pay to a successful complainant compensation for all or a part of the legal expenses incurred by the complainant in filing and pursuing their complaint to hearing.¹⁰⁶ The Tribunal found that where a complainant requires legal assistance to establish the discrimination he or she experienced, part of the “means of redress” is compensation for that necessary legal assistance. Whether an order to compensate for legal and other related expenses may be appropriate, and the amount to be awarded, will depend on the facts of each case, and will be within the discretion of the member hearing the complaint.

In *Senyk*, the Tribunal relied on the Federal Court Trial Division’s decision in *Canada v. Mowat*, where the court upheld the federal Human Rights Tribunal’s award of \$47,000 in legal costs as expenses as arising from discrimination under subsection 53(2)(c) of the *Canadian Human Rights Act*.¹⁰⁷ That section provides:

- (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
 - (c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;¹⁰⁸

¹⁰⁵ In *Waters v. BC Medical Services Plan*, 2003 BCHRT 13, paras. 211–214, *Morris*, *supra* note 89 and *Toivanen* *supra* note 38, the Tribunal awarded partial compensation for legal and other related expenses incurred up to and including the filing of the complaint, pursuant to s. 37(2)(d)(ii) of the *Code*.

¹⁰⁶ *Supra* note 26.

¹⁰⁷ 2008 FC 118.

¹⁰⁸ R.S. 1985, c. H-6.

The Tribunal said that the two provisions cannot be meaningfully distinguished, and relied on *Mowat* as persuasive in terms of the interpretation to be given to s. 37(2)(d)(ii) of the BC *Code*.¹⁰⁹

However, after the release of *Senyk*, the Federal Court of Appeal overturned the Federal Court and found that legal expenses were not compensable.¹¹⁰ Subsequently, in *Kerr v. Boehringer Ingelheim (Canada) (No. 5)*, the Tribunal, relying in part on the Federal Court of Appeal's reasoning in *Mowat*, determined that, contrary to the Tribunal's decision in *Senyk*, it did not have jurisdiction under s. 37(2)(d)(ii) of the BC *Code* to order a respondent to pay for legal costs incurred by a complainant in the processing of her human rights complaint.¹¹¹

After the *Kerr* costs decision was released, the Supreme Court of Canada granted leave to appeal in *Mowat*. The hearing will likely take place in late 2010 and may involve several intervenors. There are several other applications for legal expenses currently before the Tribunal, the outcome of which are uncertain. Section 53(2)(c) of the federal *Act* is very similar to s. 37(2)(d)(ii) of the *Code*. The issue of the compensability of legal expenses, and the outcome of the *Mowat* appeal, is obviously of great interest to human rights practitioners and adjudicators.

VI. SYSTEMIC REMEDIES

A major difference between tribunals and the courts is the former's ability to award remedies to deal with persistent patterns of inequality.

The BC Tribunal's jurisdiction to award systemic remedies first came into effect with the 1992 legislative amendments.¹¹² Until that time, there was no provision allowing the Tribunal to make an order requiring an employment equity program or other special program.

The Tribunal's jurisdiction to award systemic remedies is currently found in s. 37(2)(c) of the *Code*, which permits the Tribunal to order the person who contravened the *Code* to:

¹⁰⁹ *Supra* note 26 at para. 492.

¹¹⁰ *Canada v. Mowat*, 2009 FCA 309 [*Mowat*].

¹¹¹ 2010 BCHRT 62 [*Kerr* costs decision].

¹¹² *Supra* note 20.

(a) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;

(b) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicated the person has engaged in a pattern or practice that contravenes the Code.

The section's broad wording allows the Tribunal considerable breadth to fashion systemic remedies appropriate to the particular facts of the case. Some examples of the Tribunal's systemic remedies follow.

In *Radek*, the Tribunal found that an Aboriginal complainant was stereotyped and mistreated by security guards in a shopping mall.¹¹³ The Tribunal found discrimination on the basis of race, colour, ancestry and disability against the individual complainant, as well as a pattern of systemic discrimination against Aboriginals and some disabled people by the owners and security staff. The Tribunal explained the purpose of systemic remedies as follows:

[I]t is appropriate in most cases where systemic discrimination is proven to adopt and implement a specially tailored program to ameliorate the conditions of the disadvantaged individuals or groups affected by the discrimination in question. In my view, the real question to be considered in relation to crafting systemic remedies is to determine what remedies would be responsive to the discrimination proven and likely to be effective in preventing the same or similar discrimination from continuing to occur in the future. The purpose of the *Code* "is not to punish wrongdoing but to prevent discrimination": *Action Travail des Femmes [C.N.R. v. Canada (Human Rights Commission)]* [1987] 1 S.C.R. 1114] at para. 25. This basic principle is nowhere more important than in considering what, if any, systemic remedies are appropriate. As stated in *Action Travail*:

[I]n attempting to combat systemic discrimination, it is essential to look to the past patterns of discrimination and to destroy those patterns in order to prevent the same type of discrimination in the future....

¹¹³ *Supra* note 36.

[M]acGuigan J. stressed in his dissent [in the court below] that “the prevention of systemic discrimination will reasonably be thought to require systemic remedies.” Systemic remedies must be built upon the experience of the past so as to prevent discrimination in the future.... (paras. 44–45).¹¹⁴

The Tribunal awarded a number of systemic remedies, including that directions for security providers, with respect to access and appropriate behaviour within the shopping centre, be non-discriminatory and provided to the public upon request; that security personnel receive appropriate anti-discrimination training; and that an appropriate procedure be put in place for receiving and responding to complaints.

In *Moore v. B.C. (Ministry of Education) and School District No. 44*, the parents of a dyslexic student brought a representative complaint against a school board and the Ministry of Education alleging individual and systemic discrimination on the basis of mental disability.¹¹⁵ The respondents were found jointly and severally liable for failing to identify the student’s disability soon enough and to provide him with supports needed to allow access to available educational services. They had also systematically discriminated against children with severe learning disabilities in relation to the level of services provided, the inadequacy of available methods of remediation, the Ministry’s role in monitoring the delivery of special education services and the provision of funding levels for such students throughout British Columbia. The respondents were ordered to implement a number of systemic remedies within one year to resolve the noted inequities.

The Tribunal’s decision on liability was set aside on judicial review, but the court did not address the Tribunal’s remedial award.¹¹⁶ Remedy was at issue when the matter was argued at the Court of Appeal this spring, and the decision is currently under reserve.

The Tribunal has also ordered systemic remedies in the employment context. For example, in *National Automobile, Aerospace, Transportation and General Workers of Canada (CAW - Canada) Local 111 v. Coast Mountain Bus Company (No. 9)*, to remedy systemic discrimination resulting from the employer’s application of its attendance

¹¹⁴ *Ibid.* at para. 656.

¹¹⁵ 2005 BCHRT 580 [*Moore*].

¹¹⁶ 2008 BCSC 264.

management program (AMP) to operators with chronic or recurring disabilities, the Tribunal made a cease and desist order, retained jurisdiction over remedy, and ordered the parties to engage in tribunal-assisted mediation to discuss revisions to the AMP, or its application.¹¹⁷ Parts of the Tribunal's decision were set aside on judicial review, an appeal to the BC Court of Appeal was argued in the spring of 2009 and the decision is currently under reserve.¹¹⁸

Tribunals in other jurisdictions also regularly make systemic orders. The following are some exhaustive examples of those awards:

- In *McKinnon v. Ontario (Ministry of Correctional Services)*, the Ontario Human Rights Tribunal ("OHRT") found in 1998 that the complainant had been harassed and discriminated against because he is of Aboriginal descent, and made an extensive remedial order that included both personal and systemic remedies.¹¹⁹ The Board retained jurisdiction to deal with any disputes arising in the implementation of its orders. In 2002 the Tribunal determined that its orders had not been complied with and issued additional, including systemic, orders. In 2007 the OHRT issued thirty-four new orders, including expansive systemic orders, to the Ministry after finding that it had failed to comply with the Tribunal's earlier orders. The Tribunal remained seized of the matter, and recently determined, at the complainant's request, that it should reconvene the hearing to address compliance with its previous orders.
- The OHRT ordered the Toronto Transit Commission to take a number of steps to accommodate passengers with visual impairments, including consistent oral announcements of stops, educational seminars for employees, reporting requirements, and a public forum on issues of accessibility and accommodation of persons with disabilities on transit services: *Leopofsky v. Toronto Transit Commission*.¹²⁰

¹¹⁷ 2008 BCHRT 52.

¹¹⁸ 2009 BCSC 396.

¹¹⁹ 2007 HRTO 4.

¹²⁰ 2005 HRTO 20; 2007 HRTO 23; 2007 HRTO 41.

- In *Nassiah v. Peel (Regional Municipality) Police Services Board (No. 2)*, in addition to a general damage award of \$20,000, the Tribunal ordered the Peel Police Services Board to: develop a specific directive prohibiting racial profiling; prepare training materials on racial profiling for new recruits, current officers, and supervisors; hire an external consultant to draft the directive and prepare the training materials; within six months, provide the name and credentials of the consultant and copies of the training materials and directive to the Ontario Human Rights Commission; ensure that within one year all officers have been trained; and publish a one-page summary of this decision in Peel's police bulletin.¹²¹
- In *Tahmourpour v. Canada*, the Canadian Human Rights Tribunal ("CHRT") found that a Muslim Canadian who had been born in Iran was discriminated against when his RCMP training was terminated.¹²² The Tribunal ordered the depot to put into place policies and procedures for dealing with harassment and discrimination complaints; a mandatory diversity/cultural sensitivity for all cadets and personnel; and the creation of an Advisory Committee on Multi-Culturalism. At the time this paper was written, a judicial review was pending, and the decision was subsequently set aside.¹²³
- The CHRT ordered Bell Canada to create and distribute a policy relating to requests by its employees for accommodation with regard to breastfeeding: *Cole v. Bell Canada*.¹²⁴
- In *Milazzo v. Autocar Connaisseur*, the CHRT ordered the employer to formulate a revised drug testing policy that ensured that individuals who suffer from substance-related disabilities who test positive in employer-sponsored drug tests are accommodated to the point of undue hardship.¹²⁵

¹²¹ 2007 HRTO 14.

¹²² 2008 CHRT 10 at paras. 245–253.

¹²³ *Canada (Attorney General) v. Tahmourpour*, [2009] F.C.J. 1220.

¹²⁴ 2007 BCHRT 7.

¹²⁵ 2003 CHRT 37; 2005 CHRT 5.

- In the pay equity case of *Walden v. Canada*, the CHRT ordered the creation of a new comparable job class, but declined to award the complainants compensation for wage loss.¹²⁶

VII. REMEDIAL JURISDICTION OVER LEGISLATION

The BC Tribunal has jurisdiction, as a result of the quasi-constitutional status of the *Code* and pursuant to s. 4 of the *Code*, which provides that the *Code* prevails over all other legislation, to determine that a statute is contrary to the *Code*.

In *Moore*, the Tribunal explained:

The Tribunal administers the *Code*, a quasi-constitutional enactment, with broad remedial purposes set out in s. 3 ... the Supreme Court of Canada has repeatedly described the pre-eminence of human rights statutes. That pre-eminence is reflected in s. 4, which provides for the paramountcy of the *Code* over other legislative enactments. The *School Act* [S.B.C. 1989, c. 61] does not contain a provision exempting it from the operation of the *Code* and, therefore, the activities of the Ministry and the District under the *School Act* are not immune from its provisions. In addition, the Tribunal adjudicates the fundamental equality rights of the Province's most vulnerable citizens. As a result, I am satisfied that the Tribunal has jurisdiction to review both the actions of the Ministry and the District in the provision of educational services, and to provide appropriate remedies within the scope of the broad remedial authority in s. 37 of the *Code*.

However, having the power to make an order, and deciding to exercise discretion to do so in a given circumstance, engages different considerations.

[...]

The general principle which can be derived from these cases is that courts and tribunals are to identify violations of *Charter* or *Code* rights, but should generally leave the precise method of

¹²⁶ 2009 CHRT 16. A judicial review has been filed.

remedying the breach to the legislature or other body charged with responsibility for implementation of the order.¹²⁷

Other human rights tribunals have similar powers.

In *McAllister-Windsor v. Canada (Human Resources Development)*, the CHRT held that a provision of the *Unemployment Insurance Act* that placed a 30 week limit on the number of weeks for which an individual may receive maternity, sickness and parental benefits discriminated on the basis of sex and disability.¹²⁸ The CHRT ordered Human Resources Development Canada (“HRDC”) to cease applying the discriminatory provision, but suspended the order for 12 months in order to allow HRDC to consult with the Canadian Human Rights Commission with respect to appropriate measures to prevent the same or similar problems in the future, and to allow Parliament to remedy the problem in the manner it deemed appropriate.

The courts are also cautious to be overly prescriptive when remedying *Charter* breaches. For example, in *Eldridge v. British Columbia (Attorney General)*, the Supreme Court of Canada found that the government’s failure to provide sign language interpreters, where they were necessary for effective communication of the delivery of medical services, was contrary to s. 15 of the *Charter*.¹²⁹ The Court held that the appropriate remedy was to grant a declaration that this failure was unconstitutional and to direct the government to administer the relevant legislation in a manner consistent with the requirements of s. 15, as described in its decision. The Court said:

A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court’s role to dictate how this is to be accomplished. Although it is to be assumed that the government will move swiftly to correct the

¹²⁷ *Supra* note 119 at paras. 1006–1011. See also *The Minister of Health Planning et al. v. The British Columbia Human Rights Tribunal et al.*, 2003 BCSC 1112 at para. 27, where the BC Supreme Court concluded that the Tribunal had erred by ordering that the Director of Vital Statistics make certain specific changes to its birth registration form. The court said, “It should be left to the Director, acting within his or her authority, to choose between the myriad remedial steps available to correct the discriminatory aspects identified.”

¹²⁸ 2001 CanLII 20691 (CHRT).

¹²⁹ [1997] 3 S.C.R. 624.

unconstitutionality of the present scheme and comply with this Court's directive, it is appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response. In fashioning its response, the government should ensure that, after the expiration of six months or any other period of suspension granted by this Court, sign language interpreters will be provided where necessary for effective communication in the delivery of medical services.¹³⁰

At the same time, however, the courts have sometimes been willing to award broader remedies. For example, in *Vriend v. Alberta*, the Court found that the exclusion of sexual orientation as a prohibited ground of discrimination in Alberta's human rights legislation violated s. 15 of the *Charter*.¹³¹ After a comprehensive review of the principles and the jurisprudence, the Court concluded that reading sexual orientation into the legislation as a prohibited ground was the most appropriate remedy.¹³²

VIII. ALTERNATIVE DISPUTE RESOLUTION

The final area discussed in this paper is the Tribunal's use of alternative dispute resolution. Unlike the courts, at least in BC, the Tribunal offers its own settlement meeting services at every stage of a complaint, including up to and after a final hearing has been held and the Tribunal's decision is under reserve.

Settlement meeting services are heavily used. The Tribunal encourages participation and provides the option of a tribunal-assisted settlement meeting before the respondent files a response to the complaint, and at any later stage in the process. Each member schedules an average of six settlement meetings a month, and the Tribunal continues to use contract mediators as needed. Many complaints settle as a result of these efforts. During the 2008–2009 fiscal year, the parties were able to resolve their disputes in over 70% of all cases in which the Tribunal provided assistance.

¹³⁰ *Ibid.* at para. 96.

¹³¹ [1998] 1 S.C.R. 493.

¹³² *Ibid.* at paras. 129–179.

Importantly, creative solutions are often achieved which could not be ordered after a hearing. In many cases, the settlement meeting resolves other aspects of the parties' relationship and has transformative effects without the adversarial process of a hearing. Some cases resolve on the basis of an acknowledgement that there has been a breach of the *Code* and an apology. In others, the mediated solution results in systemic change and awards for injury to dignity and wage losses greater than those that might be obtained after a hearing. They may also resolve Employment Standards, civil claims, residential tenancy, academic appeals, or labour-management disputes.

Some examples of systemic solutions achieved in settlements during the 2007–2008 fiscal year include:

- in a government service-provider setting, and in a rural location, the creation of a unique structure to ensure that a disabled adult continued to receive assistance from a parent funded by a Ministry;
- also in a government service-provider setting, agreement to a number of process steps to ensure that members of a marginalized community received information about available government programs and agreement to train a community-based crisis counselor to provide a point of contact within the marginalized community;
- in an educational setting, restrictions to entitlement of employee benefits clearly explained and consistently applied;
- in a public transit service-provider setting, agreement to the involvement of the complainant in a review of policies and employee training to provide service free of discrimination;
- agreement to an experimental work share arrangement which allowed flexibility to a primary care giver of an elderly parent, allowing her to both meet family needs and remain employed;
- revisions to online employment application forms to ensure that questions seeking personal information from applicants were appropriately explained and that the privacy of the information obtained in response was appropriately protected;
- agreement to ongoing support for the integration of mentally disabled employees in the workplace, including updates for all

staff from disability counselors and an opportunity for the employees to explain their abilities;

- improved and facilitated communication for a disabled part-time employee and agreement that an expert would be retained to review the worksite for modifications that might assist the employee with tasks with a view to increasing the number of hours the employee could work; and
- in a tenancy setting, agreement of a landlord to participate in a joint meeting with all tenants to explain role of an assistance animal.¹³³

CONCLUSION

As the foregoing discussion indicates, tribunals have many tools at their disposal to remedy discrimination.

In British Columbia, the Tribunal is statutorily empowered to directly address dignity, feelings and self-respect interests, and the quantum of compensation for those interests is increasing. More broadly, the Tribunal has, and will continue, in appropriate cases, to order comprehensive and creative systemic remedies.

While the courts may have some similar tools at their disposal, many people whose rights have been violated, particularly those with disabilities, are poor and may lack resources to access the courts. The statutory human rights system plays an important role, both as a more efficient and affordable option when compared to courts, and as a means of fulfilling the public interest purpose of human rights protections. As such, it has the potential to serve the public interest in ways that a private law model of tort or contract litigation does not.

¹³³ BC Human Rights Tribunal, *2007-2008 Annual Report* at p. 2–3. The Tribunal's Annual Reports are available on its website at www.bchrt.bc.ca/annual_reports/index.htm.

