

**Human Rights Complaints: Lodging Them and Dodging Them**  
**A Practical Consideration of Fora and Strategies for Dealing With Human Rights**  
**Complaints for Unions and Employers**

**Civil Rights and Education: CAPSLE 2006**

**Montréal, Québec**

**May 1, 2006**

**Joshua S. Phillips (jphillips@greenchercover.ca)**  
**David A. Wright (dwright@greenchercover.ca)**

**Green & Chercover**  
**Barristers & Solicitors**  
**30 St. Clair Avenue W., 10<sup>th</sup> Floor**  
**Toronto, Ontario**  
**M4V 3A1**

**Tel: (416) 968-3333**  
**Fax: (416) 968-0325**

## **Human Rights Complaints: Lodging Them and Dodging Them**

### **A Practical Consideration of Fora and Strategies for Dealing With Human Rights Complaints for Unions and Employers**

#### **Introduction**

In recent years, there has been a proliferation of human rights complaints extending from the workplace. In tandem, there has been a proliferation of fora that will consider and render judgements with respect to an employee's human rights complaint. Each of the fora under consideration has advantages and disadvantages from the employee's, the union's and the employer's perspective. Interestingly, the sides may sometimes even be in agreement as to which forum may be most favourable and supportive of their interests as a result of the chosen systems' conceptual underpinnings and alleged "benefits" and "flaws". This paper will provide a detailed account of the fora available to unions and workers who want to lodge human rights complaints as well as practical strategies for dealing with these complaints. We have chosen to focus more extensively on the human rights tribunals and labour arbitrations as these are the systems most frequently encountered, particularly in the educational context.

The question, "which is the best forum in which to lodge a human rights complaint?" is not a simple one to answer. In fact, the available and preferred fora will depend upon contextual factors such as the nature of the complaint, the relevant statutory framework and the interests of the parties. The purpose of this paper is to alert the parties to options, issues and the strategic considerations involved in forwarding or defending a human rights complaint. While we have focussed on the Ontario experience with which we are most familiar, the issues we discuss are relevant to most legislative contexts.

### **The Courts, Human Rights Tribunals and Non-Unionized Employees: the Impact of *Bhadauria***

For the most part, the courts consider that they do not have jurisdiction to entertain human-rights based actions from either unionized or non-unionized employees. For non-unionized employees, this is primarily because of the impact of *Bhadauria v. Seneca College*,<sup>1</sup> which has been taken to stand for the proposition that a human rights claim cannot be brought before the courts using a civil cause of action. Rather, such claims must be brought through the statutory human rights tribunal/commission administrative process in the relevant jurisdiction.

In *Bhadauria*, the plaintiff alleged that the defendant college refused to hire her for a teaching position because of her race. As such, she brought a civil action stating that the defendant had discriminated against her. The trial judge refused to hear the matter stating that the court lacked jurisdiction given that the claim could be considered by the Human Rights Commission and Tribunal. The Court of Appeal attempted to re-claim jurisdiction by proposing a common law tort of discrimination. The court reasoned that the *Human Rights Code's* (the "Code") mandate of eliminating discrimination was evidence of a widespread public policy that enjoyed legal protection. The Supreme Court, however, overturned the Court of Appeal's decision, holding that this unique common law tort was foreclosed by the existence of the *Code*. The court held 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".<sup>2</sup> Therefore, the Supreme Court ultimately decided that

---

1 [1981] 2 S.C.R. 181

2 *Ibid.* at p. 195

Bhadoria's claim that the college had violated her right to be free from discrimination was beyond the jurisdiction of the courts and should have been brought at the Human Rights Commission.

The jurisdictional exclusivity proposed in *Bhadoria*, however, has not completely prevented the courts from considering human rights violations. In fact, many courts have distinguished *Bhadoria* in cases where the plaintiff's claim may form the basis of a human rights complaint but is being asserted as part of a different cause of action recognized by the common law. For example, in *McKinley v. B.C. Tel* (1996), 23 B.C.L.R. (3d) 366, although the plaintiff had claimed that his employer had discriminated against him, his claim was based on a breach of contract. Drost J. denied the defendant's motion to strike out the claim on jurisdictional grounds stating that the employer's conduct amounted to a breach of contract. The fact that the employer's conduct could also be characterized as a breach of the *Canadian Human Rights Act* was only incidental to the issue of breach of contract, according to the Court. Drost J. went on to state that the court in *Bhadoria* "only decided that discrimination as defined in the relevant human rights legislation does not, by itself, provide the basis for a civil cause of action" and did not "oust the jurisdiction of this Court to try an action for damages based on an independent tort or breach of contract" (para. 82).

Ultimately, the impact of *Bhadoria* has resulted in some apparent inconsistencies in the courts' treatment of what may be defined as a "human rights" complaint. For example, in *Nicholas v. Mullin*,<sup>3</sup> the plaintiff claimed that she had been sexually harassed in the workplace and brought an action for negligence, breach of fiduciary

---

<sup>3</sup> [2005] O.J. No. 1159 (S.C.J.)

duty, assault, battery and deceit. At trial, the Court relied on *Bhadoria* to dismiss the plaintiff's claim on jurisdictional grounds. The Court noted that, although the employer's actions could amount to a common law tort, they could also be caught under human rights legislation.

A court used the same line of reasoning when dismissing a claim of unfair treatment in *Richards v. Catney*.<sup>4</sup> In this instance, the plaintiff attempted to pursue a civil claim for unfair treatment after she had been shunned upon returning to work after undergoing cancer treatment. The plaintiff had concurrently made a claim at the Human Rights Commission and had a grievance filed by her union. Ultimately, Hill J. decided that she could bring her complaint to the Human Rights Commission or file a grievance and, as such, the court did not have jurisdiction.

However, the courts have not always followed this line of reasoning and often the courts have been able to distinguish *Bhadoria* when faced with an action, for example, alleging torts of battery, assault and infliction of mental stress.<sup>5</sup>

Finally, a very recent Supreme Court of Canada decision in a different context signals perhaps a willingness to move away from the approach set out in *Bhadoria*. The issue in *Tranchemontagne v. Ontario (Director, Disability Support Program)*<sup>6</sup>, released by the Court on April 21, 2006, was whether the Ontario Social Benefits Tribunal could determine whether a provision of legislation it was required to apply was contrary to the *Code*. In a 4-3 decision, the majority of the Court held that the *Code* "must be recognized as being the law of the people... Accordingly, it must not only be given

---

4 [2005] O.J. No. 1159 (S.C.J.).

5 See, e.g. *Cohen v. Wilder* [1996] B.C.J. No. 856, *Petrivics v. Cannon* (1999), 210 N.B.R. (2d) 109.

6 2006 SCC 16.

expansive meaning, but also offered accessible application".<sup>7</sup> The decision holds that all administrative tribunals should apply the *Code* in the course of rendering their decisions, and it seems anomalous to suggest that the courts cannot do so. Accordingly, *Tranchemontagne* is a signal that the Supreme Court may be more willing to allow aspects of human rights decisions to be made in different fora, including the courts.

In conclusion, for non-unionized employees the question of whether and how a complaint based upon an event in the workplace that could also be characterized as a human rights violation will depend upon the particular circumstances and, to some extent, the approach of the particular Court making the decision. Creative lawyers on behalf of plaintiffs in wrongful dismissal actions have various openings to skirt *Bhadoria* by incorporating human rights-like arguments, if not the specific text of human rights codes, into their legal arguments. They can bring forward such claims by alleging that the human rights violations form part of torts committed by the employer, that the employer has violated alleged implied terms of the contract of employment that require respect for human rights, and by alleging that the breach of human rights is a violation of the employer's implied duty of good faith and fair dealing that extends the period of notice to which a wrongfully dismissed employee may otherwise be entitled.<sup>8</sup>

### **The Courts, Arbitrators, and Unionized Employees: The Impact of *Weber***

It is clear that unlike the courts, a labour arbitrator applying a collective agreement does have the jurisdiction and the obligation to apply human rights codes. This arises in a

---

<sup>7</sup> *Ibid.* at para. 23.

<sup>8</sup> See *Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701.

number of ways. First, many collective agreements have incorporated human rights legislation into their text and arbitrators have accordingly concluded that the collective agreement therefore includes all of the rights in the collective agreement. Second, labour relations legislation such as the *Ontario Labour Relations Act, 1995*,<sup>9</sup> has specifically granted labour arbitrators the power to determine grievances based upon violations of human rights codes. Third, similar to its decision in *Tranchemontagne*, the Supreme Court held in 2003 that the rights and obligations of human rights and related legislation are incorporated into every collective agreement, whether this is specifically enumerated or not, and that arbitrators consequently have a duty to apply any human rights legislation that is applicable to a grievance.<sup>10</sup> The result is that unionized workers, unlike their non-unionized counterparts, have ready access to a forum outside the human rights commission/tribunal process: grievance arbitration.

The effect of this is that it is clear that unionized employees have no ability to bring human rights claims in the courts in any form. The 1995 Supreme Court of Canada case of *Weber v. Ontario Hydro*<sup>11</sup> determined that civil actions cannot be commenced when an issue is covered by the collective agreement. According to Justice McLachlin, where a dispute between the parties “arises from the collective agreement, the claimant may proceed by arbitration and the courts have no power to entertain an action in respect of that dispute”.<sup>12</sup> As such, there is no overlapping jurisdiction between the courts and arbitrators in matters arising from the collective agreement. As a consequence, “the task of the judge or arbitrator in determining the appropriate forum

---

9 S.O. 1995, c. 1, Sched. A., s. 48 (12) (j).

10 *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157.[w

11 [1995] 2 S.C.R. 929.

12 *Ibid*, at para. 49.

for the proceeding centres on whether the dispute or difference between the parties arises out of the collective agreement".<sup>13</sup> *Weber* has had a significant impact on a unionized worker's ability to advance a human rights claim in the courts. The case seemingly decided that whenever an arbitrator has jurisdiction to decide a matter the courts will refuse to adjudicate upon it.

Until recently, however, it was not conclusively decided whether, in light of *Weber* unionized employees' only legal option to bring forward a human rights complaint was through the grievance and arbitration process, or whether filing a human rights complaint was also an option. Since human rights commissions generally refused to deal with complaints where arbitration was available, it seemed grievance arbitration was the way to go.

However, a recent Supreme Court decision has made clear that human rights tribunals still have a role in complaints which arise from the unionized workplace. In *Quebec v. Quebec (Attorney General)*,<sup>14</sup> a group of younger teachers complained to the human rights commission that they were discriminated against on the basis of age by the terms of a provincially-negotiated collective agreement. The Court held that the issue of jurisdiction required an examination of the relevant legislation and the nature of the dispute. Here, the complaint related more to the negotiation of a discriminatory provision, rather than the "interpretation and application" of the agreement, which was the source of the jurisdiction of the arbitrator. Therefore, there might be no grievance, particularly considering that the union may be a party to the discrimination and therefore

---

<sup>13</sup> *Ibid.*, at para. 51.

<sup>14</sup> [2004] 2 S.C.R. 185.

adverse in interest to the complainants. Finally, because hundreds of teachers were affected by the complaint, it was held the human rights process was a better "fit" for the complaint. As such, the Court held that the human rights tribunal had jurisdiction to hear the matter, notwithstanding the exclusive jurisdiction of arbitrators established in *Weber*. Like the other cases considered above, the *Quebec* case is a signal that the courts are more willing to allow employees choice of forum than it previously appeared.

### **Other Fora: Internal Complaint Procedures**

Many collective agreements or employer policies contain procedures for the making and investigation of human rights complaints. The scope and nature of such policies are varied, but they are typically oriented toward resolving the issue, at least from the perspective of the employer. A complainant who is dissatisfied with the result will usually remain free to file a grievance or a human rights complaint. Similarly, a bargaining unit member who is subject to discipline as a result of the process may allege the discipline was imposed without just cause.

Internal processes provide a unique opportunity for employers and unions to co-operate in the creation and enforcement of a discrimination-free workplace. Allowing unions or employee representatives in the non-unionized workplace a prominent role in the development and administration of such procedures can have several benefits, including:

- ensuring that policies have a proper balance with respect to the rights and interests of complainants and respondents

- lending legitimacy to the process among employees
- affirming the union's commitment to the issue of equity and human rights
- permitting the facts relevant to the complaint to emerge in a less adversarial process
- providing a process more suited to addressing issues of relationship than litigation
- allowing the union access to information as it becomes available, which will assist it in formulating a position and, if possible, reach resolution with the employer before either of the parties have had to commit to a position

Examples of such co-operation may include union input in developing the complaint process; where appropriate, diversion of the complaint to an internal union mediation process to avoid disciplinary consequences; joint investigations or joint appointment of third party investigators.

However, unions may be legitimately wary of involvement in any process which may lead, or be perceived as leading, to an impairment of their ability to represent all members involved in such complaints, whether complainants or respondents. A union member who has been found "guilty" of discrimination by an investigation condoned by the union may question the union's ability to represent the member where he or she wishes to plead "not guilty" and pursue a grievance in respect of discipline imposed.

Similarly, employers may be reluctant to allow unions to participate in a process which may ultimately pass judgment on and impose a sanction in respect of the conduct of

managerial employees, or otherwise delegate management rights to a process in which the union has an equal voice.

The success of any internal complaint process may be measured, in part, by the extent to which it provides a final resolution of the complaint without resort by any party to further processes. While we believe union involvement in such processes is essential, the challenge is to find the proper balance between shared union-management responsibility and preserving all parties' ability to bring the matter forward through litigation, generally in either a complaint to a human rights commission or a grievance under the collective agreement.

**Exclusive or Concurrent Jurisdiction:**

**Process: the Essentials of Human Rights Complaints and Grievance Arbitration:**

If both human rights complaints and grievance arbitration are available, parties must consider the essential features of each process when deciding how they would prefer the matter to proceed. The following chart outlines many of the salient features to be considered:

**Human Rights Complaint**

**Grievance Arbitration**

<p><b>Who Initiates the Complaint</b></p>	
<ul style="list-style-type: none"> <li>• the complainant, although the complaint itself may be drafted by Commission staff</li> <li>• the Commission may also initiate a complaint</li> </ul>	<ul style="list-style-type: none"> <li>• the union</li> <li>• if permitted by the collective agreement, the complainant</li> </ul>
<p><b>Who Investigates the Complaint</b></p>	
<ul style="list-style-type: none"> <li>• the Human Rights Commission pursuant to statutory powers, may enter premises, request production of and remove documents and obtain search warrants</li> <li>• the parties may conduct their own investigation</li> </ul>	<ul style="list-style-type: none"> <li>• the parties may conduct their own investigation</li> <li>• the union can use its rights and persuasive role as exclusive bargaining agent to obtain necessary information</li> </ul>
<p><b>Who Has Carriage Rights of the Complaint</b></p>	
<ul style="list-style-type: none"> <li>• the Commission</li> <li>• the Commission may refuse to deal with a complaint if it is untimely; trivial, frivolous or vexatious; or the complaint is one which may more appropriately be dealt with under another Act</li> <li>• the Commission has discretion whether to refer an unresolved complaint to the Tribunal for adjudication</li> <li>• referral is not solely based on the merits of the complaint; meritorious complaints may not be referred for various reasons</li> <li>• a very small percentage of complaints are referred to adjudication</li> </ul>	<ul style="list-style-type: none"> <li>• typically the union, subject to a collective agreement or union constitutional provision granting complete or limited carriage rights to individual grievors</li> <li>• the union's decision as to whether and how to advance a grievance will be subject to its statutory or common law duty of fair representation, which requires it to act in a manner which is not arbitrary, discriminatory or in bad faith</li> <li>• the union "prosecutes" the grievance</li> <li>• the union may also provide representation to other affected members who are responding or witnesses to the complaint (see</li> </ul>

<ul style="list-style-type: none"> <li>• the Commission “prosecutes” the complaint</li> <li>• the complainant may also retain counsel</li> <li>• some jurisdictions, such as British Columbia, have direct access to the Tribunal, placing carriage rights in the hands of complainants. Direct access has now also been proposed in Ontario (see “Future Directions”, below)</li> </ul>	<p>below)</p>
<p><b>Who Adjudicates</b></p>	
<ul style="list-style-type: none"> <li>• the Tribunal</li> </ul>	<ul style="list-style-type: none"> <li>• the arbitrator or board of arbitration</li> </ul>
<p><b>Available Remedies:</b></p>	
<ul style="list-style-type: none"> <li>• very broad statutory authority, including:</li> <li>• declarations and cease and desist orders</li> <li>• capped amounts for “pain and suffering”, special compensation (<i>Canadian Human Rights Act</i>)</li> <li>• capped amounts for “mental anguish”, per infringement (<i>Ontario Human Rights Code</i>)</li> <li>• general damages – there is no upward limit</li> <li>• pecuniary damages</li> <li>• reinstatement (not as common as in labour arbitration)</li> <li>• systemic remedies, such as sensitivity training, voiding of offending collective agreement provisions, implementation of policies and procedures (more common than in labour arbitration)</li> </ul>	<ul style="list-style-type: none"> <li>• traditionally have used a contract law model, which seeks to “make whole” a loss arising out of a violation of the collective agreement</li> <li>• declarations and cease and desist orders</li> <li>• more recently, in connection with an expanded jurisdiction to interpret and apply human rights and adjudicate tort claims, additional damages including general damages (“pain and suffering”), and aggravated or punitive damages (not as common as in human rights tribunals)</li> <li>• all remedies that are available to human rights tribunals, where there is an authority to interpret and apply human rights legislation</li> <li>• arbitrators must now also consider the remedies which will advance the policy objectives of human rights legislation, not just the intention of</li> </ul>

	<p>the parties</p> <ul style="list-style-type: none"><li>• systemic remedies are less likely to be imposed than in human rights tribunals</li><li>• where a perpetrator is a bargaining unit employee, discipline may be upheld</li><li>• a no-contact order between victim and perpetrator</li></ul>
<b>Appeal or Review:</b>	
<ul style="list-style-type: none"><li>• statutory reconsideration, appeal or review</li></ul>	<ul style="list-style-type: none"><li>• typically judicial review</li><li>• reconsideration as permitted by statute</li><li>• a complaint alleging a breach of the duty of fair representation may be brought in respect of the role of the union in discrimination or the prosecution of the grievance</li></ul>

## **Strategic Considerations:**

### **Arbitrators vs. Human Rights Tribunals: Conceptual Differences**

The outcome of a discrimination complainant may be affected by the orientation of the adjudicator. The different perspectives of human rights tribunals and labour arbitrators have been apparent in the decisions they render and the remedies they impose.

Human rights tribunals have been focused on the statutorily-based individual rights. Parties may not “contract out” of such rights, and any contract term – including those found in collective agreements – will be shown no deference if it is found to result in discrimination. Indeed, where the collective agreement is the source of discrimination, both employers and unions who are the authors of such agreements may be held liable. Remedies must not only compensate those directly affected by discrimination, but should also advance the broader policy objectives of human rights legislation.

Labour arbitrators have traditionally been the interpreters of private contracts. Provided collective agreements comply with minimum statutory standards, including human rights and employment standards legislation, the intention of the parties is paramount and must be enforced. The rights under consideration are collective rights, shared by the members of the bargaining unit, and often reflect compromise arrangements, in which individuals or groups may in some aspect be disadvantaged in favour of the collective interest. Remedies are generally designed to restore an aggrieved party to the position she would have been in but for the contractual breach.

Although generalizations can be dangerous, certain trends can be discerned. Human rights tribunals appear more likely to strike down collective agreement provisions,

including those that relate to critical job interests such as seniority, if found to have a discriminatory effect.<sup>15</sup> Labour arbitrators, on the whole, will attempt to remedy discrimination with minimal incursion into the legitimate expectations of the parties and bargaining unit members as reflected in the provisions of the collective agreement. They will be more reluctant to strike down a provision alleged to be discriminatory if the union agreed to it.<sup>16</sup> Although fully empowered to do so, arbitrators also appear, on the whole, more reluctant to impose systemic remedies and anything other than pecuniary damages, although this is starting to change.<sup>17</sup>

### **The Choice of Forum: Practical Considerations for the Union**

For many of us representing unions and employees, grievance arbitration has become the preferred forum. Factors militating toward this forum include:

- a growing legal trend toward bestowing exclusive jurisdiction on labour arbitrators with respect to matters arising out of a collective agreement, coupled with the recognition that substantive human rights are incorporated into collective agreements, clarifying arbitrators' obligation to adjudicate complaints of discrimination
- a growing trend of human rights commissions to exercise their discretion not to deal with a complaint where arbitration is available

---

<sup>15</sup> See, for example *Bubb-Clarke v. Toronto Transit Commission*, [2002] O.H.R.B.I.D. No. 6, and *Regina (City) v. Kivela*, [2006] S.J. No. 195 (C.A.)

<sup>16</sup> See, for example, *Upper Canada District School Board and Ontario Secondary School Teachers' Federation, District 26* (2004) 126 L.A.C. (4th) 158 (Keller), upheld on judicial review, *Ontario Secondary School Teachers' Federation v. Upper Canada District School Board* (2005), 78 O.R. (3d) 194 (Div. Ct.)

<sup>17</sup> See *Toronto Transit Commission and A.T.U. (Stina)* (2004), 132 L.A.C. (4th) 225 (Shime) where general damages of \$25,000 were awarded for harassment

- speed: labour arbitration is generally considerably faster-moving than human rights processes
- carriage rights: with the union's support, the matter will be referred to adjudication if a satisfactory resolution cannot be reached. The discretion of human rights commissions not to deal with a complaint or not to refer a complaint to adjudication means the vast majority of cases are not adjudicated, even if they are not resolved by agreement
- resources: unions are able to provide experienced representatives, adequate resources and counsel to guide a complainant through the process and prosecute the complaint
- remedy: arbitrators are now recognized to have the full panoply of remedial tools available to them

However, individual complainants may still prefer to avail themselves of human rights commissions and tribunals. Factors which militate toward choosing this forum include:

- where the complaint is directed against the operation of a collective agreement provision, where both the employer and union may be held liable, for example where the union has been reluctant to accommodate an employee by waiving the operation of the collective agreement
- where the complaint alleges misconduct against other members of the bargaining unit, such that there may be an appearance of a conflict of interest on the part of

union who must provide representation to both the complainant and respondent bargaining unit members (see below for more on this)

- where the proper investigation of the case may require the vast resources and extraordinary investigative powers of a human rights commission
- where the required remedy involves a voiding of a collective agreement provision or compromising the interests of other bargaining unit members

### **Choice of Forum: Employer Considerations**

As respondents, employers will generally have less flexibility in choosing a forum because the initial choice, at least, will be made by the union or complainant. Nevertheless, in negotiations with union representatives or counsel, and through legal strategies, employers will be able to put forward strategies to move the matter forward in one forum or another. Among the primary considerations for the employer, in our view, should be both speed of resolution and the particular orientation of the tribunal in question.

Perhaps even more so than for the union or employee, a speedy resolution to human rights complaints will generally be in the employer's interest. First, of course, if the complaint involves potential ongoing liability and the employer is found to be liable, a speedy decision will minimize the costs of any award. More important, perhaps, an active human rights complaint implicating employees, members of management, and/or the employer's practices may have a tremendously negative impact on the workplace in

terms of morale, productivity, and relations among employees and managers. Further, it is unquestionable that being a respondent to a human rights complaint, even one eventually dismissed, may carry significant stigma and affect individuals' and employers' reputations. Removing the stigma as soon as possible through a final resolution of the complaint one way or the other will often be a significant goal for the employer. Thus, for example, while it may be more likely that there will be no hearing with a complaint filed with a human rights commission because of their power to dismiss complaints following an investigation and the large number that are dismissed, the time this process may take should be of concern to an employer.

At the same time, as noted above, human rights tribunals, arbitrators, other workplace tribunals, and courts all approach such complaints from different perspectives with different procedures and employers will need to consider such perspectives in utilizing the power they have to direct complaints toward certain decision makers. Human rights tribunals are currently more likely to award broader, systemic remedies and to subject the employer's operations and practices to greater scrutiny. Damages awards may also potentially be higher. Human rights tribunals' reluctance to give significant consideration to collective rights and collective agreement practices may also disadvantage unionized employers.

### **Unique Representational Issues for the Union**

A unique feature of discrimination complaints is that unions may be called upon to represent either or both the complainant and respondent. The nature and degree of

assistance will vary in each case, depending upon the type of proceeding invoked, the needs of the member and the degree to which the employer is supporting the member. In most cases, members will require emotional support, representation through the grievance process and/or legal representation.

The union has a particularly challenging role to play when both the complainant and respondent are union members. In such scenarios, the union must strive to strike an appropriate balance between a) providing support for complainants who have been subject to harassment; and b) representing members who face disciplinary action. This can be enhanced by adopting the following process:

- advise both members that the union will be providing appropriate representation to the complainant and respondent. Make clear that the union is committed to due process for all its members;
- appoint separate staff/executive to represent each member exclusively;
- adequately investigate the matter in order to determine whether the union should or must take a position on the allegations (e.g. to file a grievance alleging harassment by the respondent member);
- advise both members in the event the union elects to take a position in support of one of the members, and assure both that the union will continue to provide support within that framework; and

- in appropriate cases, provide separate legal counsel to the member whose position the union will not advance, in order to provide advice and representation in a grievance, disciplinary or other proceeding.

A. Representing the complainant

The union should provide an avenue of redress for those who have been subject to harassment or discrimination in the workplace. A complainant should be able to step forward and know that his or her complaint will be taken seriously and treated in a confidential manner. Appointing a member of the union staff or executive to deal with such claims may assist in assuring confidentiality insofar as possible, and in ensuring that complaints are dealt with adequately and appropriately.

Once an individual has come forward with a complaint, the union should inform that member of his or her options in pursuing a remedy for the discrimination with regard to the considerations set out above.

Once the choice is made, the role of the union depends in part on the procedure. During an investigation, the union may play a neutral role, and provide support and advice to all involved, including witness members. Where permitted, the union may form part of the investigating team.

Where a grievance is filed, the union's role is to "prosecute" the complaint and advocate on behalf of the complainant, often providing legal counsel. Here, the union will have carriage rights of the grievance, allowing it to have final say as to how the matter goes forward and whether a settlement can be achieved.

Where a complaint is filed under the *Human Rights Code*, the union will have no official standing, but may elect to provide financial or other support.

B. Representing the respondent

The union has an obligation to represent members who have been accused of harassment or discrimination, and may be or have been disciplined as a result.

In almost any case, it is most useful for the union to assist the respondent in understanding the perspective of the complainant, even where the allegations are denied. Many individuals accused of discrimination are genuinely surprised that their actions were considered objectionable. Promoting understanding and empathy can go a long way to resolving complaints.

Where there is a grievance alleging discrimination by a fellow member – and management's failure to adequately respond to it – the representation required will depend upon the circumstances. For example, if the employer takes the position that no discrimination occurred, the respondent member's interests may be adequately canvassed by the employer. However, where the employer does not deny the harassment, the respondent may have an independent interest in defending him or herself and may seek limited standing to intervene in the arbitration for that purpose only. The union may consider providing legal counsel for such a respondent.

Where the employer has disciplined a member and a grievance alleging no "just cause" is filed, the union will process and represent the member in the grievance process in the usual way. The union must of course ensure that the employer can prove the

allegations against the member before imposing discipline, and ensure that the response is appropriate.

### **Strategic Considerations for the Employer**

There are a variety of equally significant, although different, strategic considerations for the employer in addressing human rights complaints. Most important is that the employer be able to demonstrate that, from the moment the complaint was received, it was investigated and taken seriously. The employer's liability is likely to be much more limited if it can be shown that the employer took all possible steps, from the time the complaint was brought to its attention, to deal with the complaint and remove any discriminatory treatment that appeared to be present. This will minimize potential liability to employees and to third parties and assist in reducing any negative effects that may result from the presence of a serious human rights complaint in the workplace.

At the same time, it is important that the employer, like the union, not be seen to favour one side or the other, particularly where an accusation may be made against a member of management. An employer wishing to minimize any potential liability should not reflexively support a manager over an employee, for example, or a senior over a junior employee, even one in whom it has general faith and confidence. An employer should, as much as possible, approach any investigation from a neutral point of view, gathering the facts without prejudging. For this reason, it may be advisable to hire an external consultant or at least someone outside the workplace to ensure that an investigation is

carried out from a position of neutrality by someone who has no prior views of the people and situations involved.

Thus, a fast and neutral reaction on the part of the employer serves many goals. It minimizes liability, demonstrates to employees that the employer takes complaints seriously, and combats as much as possible the negative effects that a complaint may have in the workplace. Including the union in this process can also establish the union as partner in the goal of determining the facts, and minimizing conflict as much as possible subject to the union's representational obligations.

### **Future Directions**

In Ontario at least, the introduction on April 26 of Bill 107, the *Human Rights Code Amendment Act, 2006*, may change significantly the strategic considerations around the forum for the filing and processing of human rights complaints. The bill will establish direct access to a tribunal to adjudicate human rights complaints, with the Ontario Human Rights Commission no longer filling a role as "gatekeeper". As in British Columbia, complaints will be filed directly with the Ontario Human Rights Tribunal, although there are significant differences between the British Columbia and the new Ontario model. Most significant among these is that the Commission will continue to play a role in both systemic and individual complaints, although it will no longer determine whether they go forward to the Tribunal.

A copy of Bill 107 in its entirety is attached. The following are the significant features of the proposed new regime.

- complaints will be filed directly with the tribunal (s. 35)
- complaints must be filed within six months but the time limit is to be extended if the delay was incurred in good faith and no substantial prejudice will result to any persons affected by the delay. (s. 35 (2))
- Tribunal processes are governed by rules prepared by the Tribunal. Tribunal need not hold a hearing, may limit the parties' rights to present evidence, may require investigations, and Tribunal may "prescribe practices and procedures that are alternatives to traditional adjudicative practices and procedures". (s. 34)
- The Commission may apply to the Tribunal if a case involves systemic discrimination (s. 36)
- In a civil proceeding, a Court may find that a right under the *Human Rights Code* has been infringed and may require monetary compensation for the violation of the person's injury to dignity, feelings and self-respect. However, there is no cause of action in court based solely on the violation of the *Human Rights Code*. (s. 46.2)
- If a civil claim has been commenced under s. 46.2, no complaint may be made to the Tribunal. (s. 35(5))
- A complaint may be dismissed without a hearing on various grounds, including that it is frivolous, vexatious, or in bad faith, there is no jurisdiction, and if the facts, even if true, do not disclose a violation of the *Code*. (s. 41)

- The Tribunal may dismiss a proceeding without a hearing if it is of the opinion that another proceeding has appropriately dealt with the substance of the application. (s.41(g))
- Decisions of the Tribunal are not subject to appeal and are judicially reviewed on the standard of patent unreasonableness. (s. 45)
- The government has promised that complainants will have full legal representation.
- The Commission's emphasis will be the promotion of respect for human rights and the elimination of systemic discriminatory practices. The legislation establishes an Anti-Racism secretariat and a Disability Rights secretariat.

These changes, if passed and if they form a model for other jurisdictions, will have a dramatic impact on the law and strategic considerations set out above. Most significantly, many of the disadvantages of proceeding to a human rights commission will hopefully be eliminated in the new system, since all complaints will be decided on their merits and should be processed in a much timelier manner. Equally important, as we read it the philosophy of the legislation is to allow complainants choice as to where to bring their complaint. While much will depend on the jurisprudence developed at the tribunal under the new system, gone is the power of the Commission to decide (under s. 34 of the old legislation) that the complaint could or should be dealt with more appropriately under another Act. It seems to us likely that the new legislation, combined with the Supreme Court's approach in the *Quebec* case, will lead to a system where

unionized employees' human rights claims can be determined at arbitration or before the Human Rights Tribunal.

It also remains to be seen what the effect of a substantially larger tribunal and greater body of jurisprudence in the human rights system will be on the differing philosophical approaches of arbitrators and human rights decision makers. The new Tribunal will have to be a much larger body with a greater number of adjudicators, making many more decisions. It seems likely that there will be a greater exchange of ideas, jurisprudence, and personnel between these systems, which will result in a greater harmonization of jurisprudence and approaches, particularly toward remedies and the approach to collective rights. In our view, the future is one where many of the differences between the systems, and the frustrations of litigating human rights issues because of the differences, may well be minimized.

## **Conclusion**

Dealing with human rights complaints, both because of their nature, the emotions behind them and the current legal framework, is one of the most difficult labour relations challenges for unions and employers. The present largely ineffective human rights system has not assisted the parties in achieving the goal of achieving discrimination-free workplaces and resolving disputes about these issues in a timely manner. As a result, human rights issues in the unionized workplace have been largely decided in arbitration hearings, although arbitrators have often taken a somewhat different philosophical approach to human rights.

The new model being proposed in Ontario, if passed and if duplicated in other jurisdictions, has the potential to lead to significant changes for all parties. While much will depend, of course, upon its implementation and interpretation, it will likely lead to more complaints in the unionized workplace being decided at human rights tribunals, and to a greater harmonization of jurisprudence between these fora and with the courts, who will interpret the Code in the course of deciding civil litigation. Most importantly, if it is successful in developing an efficient, timely, and effective enforcement mechanism, it will mean that all employees will have a meaningful way to have human rights claims decided, which has not been the case in recent years.