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The Ontario *Human Rights Code*'s Distributive and Recognitional Functions in the Workplace

Claire Mummé*

In her analysis of the purpose of the Ontario Human Rights Code, the author draws on Nancy Fraser's distinction between the two main strategies that have been used to combat inequality. Strategies of redistribution, which prevailed among equality activists in the early twentieth century, see inequality as arising from unequal access to economic resources. Strategies of recognition, which have come into prominence more recently, see inequality as arising from sociocultural prejudices that deny equal recognition to disadvantaged groups. Although the Ontario Human Rights Code is often seen as focusing on recognitional issues, the author argues that through the market relationships the Code regulates and the remedial powers it grants, it also adopts a redistribution strategy designed to address the economic impact of prohibited discrimination: that is, the Code aims to change how resources and opportunities are to be allocated for those with protected identity traits. An understanding of the interaction between the Code's recognitional and redistributive functions sheds light on its purpose and method of operation, as well as on its relationship to other equality-seeking legal mechanisms such as collective bargaining and the equality rights provisions of the Canadian Charter of Rights and Freedoms. Thus, the need for a range of legal tools to counter inequality in different contexts comes more clearly into focus.

1. INTRODUCTION

Andrew Pinto's recent review of Ontario's statutory human rights regime¹ offers us a useful opportunity to reflect on the Ontario *Human Rights Code*'s² particular role in addressing inequality. This

* Assistant Professor, Faculty of Law, University of Windsor. My thanks go to the organizers and participants in the workshop, "Adjudicating Human Rights in the Workplace: After Ontario's Pinto Report, Where Do We Go Next?" at the Queen's University Centre for Law in the Contemporary Workplace, for helpful feedback and stimulating conversation.

1 Ontario, Ministry of the Attorney General, *Report of the Ontario Human Rights Review 2012*, by Andrew Pinto (Ottawa: Queen's Printer for Ontario, 2012) [*Pinto Report*].

2 RSO 1990, c H.19 [*OHRC*].

paper focuses that reflection on the workplace context. To do so, it draws from the writing of Nancy Fraser, who suggested that there have historically been two main strategies for addressing inequality — strategies of redistribution and strategies of recognition.³ Applying that typology to the *Code*, I argue that human rights statutes are concerned with the psychosocial and economic effects of misrecognition discrimination. I emphasize that although the *Code* is commonly seen as dealing only with recognitional issues, it is also fundamentally concerned with the distributional effects of discrimination. Through an analysis of obligations and remedial powers under the *Code*, I aim to demonstrate that its primary purpose is to regulate the socio-economic effects of identity-based and status-based discrimination on the market.

Thinking about the *Code*'s redistributive and recognition functions permits us both to identify its core operational features and to compare it with other equality-seeking legal mechanisms. Examining the different goals and methods of operation of diverse legal tools that seek to meet the problem of inequality may enable us to build a more robust and cohesive approach to social and economic inequality. Given the centrality of the workplace to strategies of distribution and recognition, I will focus on the *Code*'s application to the employment relationship.⁴ In Part 2 of this paper, I briefly outline different conceptions of inequality that dominated 20th century North American political discourse. In Part 3, I argue that the *Code* addresses what Fraser called misrecognition discrimination in market-based relationships. In Part 4 I sketch the *Code*'s distributive operation, and suggest how the Human Rights Tribunal of Ontario (HRTO) can tighten some of its remedial jurisprudence to fully achieve the statute's purposes. I conclude by comparing the *Code*'s approach to issues of recognition and redistribution with the approaches of other equality-seeking legal mechanisms, such as collective bargaining and the constitutional equality guarantee in section 15 of the *Canadian Charter of Rights and Freedoms*.⁵ Some of the narrative in this paper will cover familiar

3 Nancy Fraser & Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (New York: Verso Books, 2003).

4 *OHRC*, *supra* note 2. The analysis also broadly applies to other Canadian human rights codes, but may differ in detail with the wording of the particular code.

5 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

ground for those who work in the area of human rights, but this is necessary in order to identify the *Code's* underlying rationale and distributional features.

2. VISIONS OF EQUALITY: REDISTRIBUTION OR RECOGNITION?

At different times in the 20th century, two perspectives on inequality dominated North American political discourse, each with a different view of inequality's root causes. The first perspective, the distributional approach, sees differential access to economic resources as the cause of inequality.⁶ In other words, marginalization is due to the unequal distribution of wealth: inequality is not primarily rooted in identity-based factors, but is rather a structural feature of a liberal capitalist system. From a distributional perspective, discrimination on the ground of race (for example) is perceived as a function of class and the poverty that emerges from a history of unequal access to economic opportunities such as education, jobs and housing. The necessary response is to change the distributive basis of entitlements, which will eliminate any difference in access to opportunities based on race and other marginalized identity traits.

The second perspective, which Fraser called misrecognition, came to prominence in the 1970s during the post-Civil Rights era in the United States. It sees inequality as stemming from socio-cultural prejudices against identity-based traits. These prejudices deny trait-holders the dignity of equal community participation and recognition.⁷ From the misrecognition perspective, adopting facially neutral rules of market access is insufficient to address inequality, because equalizing the rules of resource distribution will not stop the operation of identity-based prejudices and stereotypes in the market and in social relationships. For example, even if men and women were given equal access to education, differential assumptions would likely persist in the labour market to shape ideas about female and

6 Recent historical research emphasizes the degree to which early legal strategies for dealing with racial discrimination in the United States pursued claims to equal entitlement to economic resources. See Risa Goluboff, *The Lost Promise of Civil Rights* (Cambridge, Mass: Harvard University Press, 2007).

7 Charles Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge, Mass: Cambridge University Press, 1989).

male workers' skills and interests. The way to address misrecognition discrimination, then, is to attack cultural norms that attach value to certain identity traits and not others.⁸ This requires recognizing differences rather than creating formal equality of opportunity.⁹

Writing in the 1990s, Fraser sought to draw attention to the relationship between economic and identity-based inequality. She described the tension in the 1980s and 1990s between strategies of redistribution and strategies of recognition, which seemed to pit against each other two visions of the causes of inequality. Redistribution strategies have historically called for *a priori* changes in mechanisms of resource allocation, aiming for large-scale political and legislative changes to methods of capital accumulation, to rules on taxation and property, and to social wage protection schemes. Those strategies also looked to resource reallocation within employment relationships, through trade unionism and collective bargaining.¹⁰ Their overall aim was to reduce or eliminate material inequality across the social spectrum.

By contrast, strategies for addressing misrecognition and identity-based discrimination have looked primarily to statutory reforms aimed at eliminating differential treatment in such private-sector areas as housing, services and employment. These strategies centred on the individual anti-discrimination rights of those with denigrated identity traits, rather than on the community as a whole or on resource distribution.¹¹ Their emphasis was on the *ex post facto* enforcement of individual anti-discrimination rights in the courts. Fraser argued that in the 1960s and 1970s, when issues of recognition first emerged with force, they were very closely tied to concerns about inequality

8 Fraser & Honneth, *supra* note 3 at 15.

9 Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43:6 *Stan L Rev* 1241.

10 In other parts of the world, redistribution of economic resources through trade unionism has had a different shape, because of industry-wide collective bargaining or because of an explicit bargaining relationship between trade unions and the state.

11 Owen Fiss, "A Theory of Fair Employment Laws" (1971) 38:2 *U Chicago L Rev* 235. See also *Racial Discrimination Act 1944*, SO 1944, c 51; *Fair Employment Act*, SO 1951, c 24; *Fair Accommodation Practices Act*, SO 1954, c 28.

of wealth, but that by the 1980s and 1990s they had displaced those concerns. In her words, “questions of recognition [were] serving less to supplement, complicate and enrich redistributive struggles than to marginalize, eclipse and displace them.”¹² Thus, through the 1980s and 1990s, the structural effects of unequal wealth distribution on the market were politically separated from the social and psychological questions of identity and difference.

But, Fraser argued, positing a tension between the two strategies is analytically and politically unsound, because most grounds of marginalization are constructed along both economic and identity-based lines.¹³ Since neither is a subset of the other, no one strategy can fully address the oppression produced by inequality:

Rooted at once in the economic structure and the status order of society, [two-dimensional divisions] involve injustices that are traceable to both. Two-dimensionally subordinated groups suffer both maldistribution and misrecognition in forms where neither of these injustices is an indirect effect of the other, but where both are primary and co-original.¹⁴

12 Fraser & Honneth, *supra* note 3 at 92; Nancy Fraser, “Rethinking Recognition” (2000) 3 *New Left Review* 107 at 110-112.

13 Fraser’s argument is compatible with but different from the concept of intersectionality that has been so influential in discussions of structural inequality. Intersectionality emphasizes the fact that we do not identify solely on the basis of one characteristic: I am not only a woman, not only white, not only short in stature. Just as our identities are constructed around the knitted facets of our characteristics and experiences, so too are the ways we experience discrimination. Describing the experience of discrimination by a woman of colour as based only on race or gender prioritizes the experience of the majority group within each category (white women, men of colour). Intersectional analysis emphasizes the differences within groups and the specific ways in which the multiple facets of identity can compound the occurrence and experience of discrimination. Fraser asked different but complementary questions. She sought to draw out the relationship between economic inequality and the inequality of identity-based misrecognition, to get at the interconstructed nature of socioeconomic subjugation along economic and identity-based lines. See Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) *U Chicago Legal F* 139.

14 Fraser & Honneth, *supra* note 3 at 19.

The argument is that misrecognition and maldistribution are separate but interconnected issues, which must both be addressed in dealing with the structural inequality of marginalized groups.¹⁵

Since about 2000, equality activists have increasingly recognized the relationship between systems of economic distribution and status-based discrimination.¹⁶ It has become increasingly clear that the economic inequality experienced by minority groups cannot be eliminated in a system of general inequality premised on differential access to economic resources, but also that instituting facially neutral rules for access to and distribution of economic resources will not eliminate the operation of social and cultural prejudices in the market.¹⁷ Fraser has argued, as have Sandra Fredman and Judy Fudge, that we need strategies which can dismantle discrimination on the basis of identity and status traits as well as strategies that concentrate on unequal economic resource distribution.¹⁸ Moreover, although these two types of strategies will have different methods and targets, they must be interlinked. Identifying and elaborating on the particular functions of different equality-seeking legal tools will help with that project. It is with this task in mind that I address the Ontario *Human Rights Code*'s distributive and recognitional functions.

15 Fraser offers gender as an example of two-dimensional subordination. On the one hand, gender is used to separate paid and unpaid labour, and to divide access to higher-paid and lower-paid jobs. It therefore serves as a "class-like differentiation" which creates a form of distributional inequality. On the other hand, there is also a status-based differentiation that relies on gender, in which cultural perceptions of ability and worth operate to form assumptions about women's roles in society. In this sense gender discrimination is also a form of misrecognition. In Fraser's words, "redressing gender injustice, in any case, requires changing both the economic structure and the status order of society." See *ibid* at 21-22.

16 Sandra Fredman, "Redistribution and Recognition: Reconciling Inequalities" (2007) 23:2 SAJHR 214 at 214-215.

17 Interest in the relationship between the social experience of inequality and its material basis is most apparent at the international level, with the growing constitutional jurisprudence on socioeconomic rights in such countries as South Africa and India. Those two countries have led the way in giving jurisprudential meaning to socioeconomic rights, although how that should be done remains the subject of deep debate. On South Africa's socioeconomic constitutional rights jurisprudence, see Marius Pieterse, "Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited" (2007) 29:3 Hum Rts Q 796.

18 Fraser & Honneth, *supra* note 3; Fredman *supra* note 16; Judy Fudge, "The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts" in Tom Campbell, Keith Ewing & Adam Tomkins, eds, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 335.

3. DISCRIMINATION IN MARKET-BASED RELATIONSHIPS

How does the *Human Rights Code* fit into Fraser's dual typology of equality? As I will seek to demonstrate, the *Code* is an instrument that addresses the problem of misrecognition, but it has a particular concern with the economic and social effects of misrecognition in the *market*.

Since the late 1990s, the Supreme Court of Canada's constitutional equality jurisprudence under section 15 of the *Charter* has focused on the social indignity and the psychological effects of state discrimination (what I will call psychosocial harm), rather than on its economic consequences.¹⁹

19 The Supreme Court's initial account of equality and discrimination under the *Charter* in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1, provided some scope for distributional concerns, but this has been slowly whittled away, beginning with the Court's decision in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 51, 170 DLR (4th) 1, where it explained the purpose of section 15(1) as follows:

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society.

In *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at para 40, [2004] 3 SCR 381, the Supreme Court explained that the repeal of Newfoundland's pay equity legislation was discriminatory, not because of the female hospital workers' monetary loss but because they "were being told that they did not deserve equal pay despite making a contribution of equal value." Thus, rather than focusing on the actual economic loss, the Court was concerned with the psychological and social effects of being given less legal protection by the state. In *R v Kapp*, 2008 SCC 41, 2008 2 SCR 483 and more recently in *Withler v Canada (AG)*, 2011 SCC 12, 2001 1 SCR 396, the Court has moved away from *Law* and has reaffirmed the test set out in *Andrews*. However, it appears to have done so primarily to eliminate the formalism associated with comparator group analysis. It remains to be seen whether the Court's current approach will open more space for thinking about the perpetuation of disadvantage in economic terms as well as in social and political terms. On what the *Withler* decision suggests for future equality jurisprudence, see Jenner Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16:1 Rev Const Stud 31.

The Court has explained discrimination as a process that denigrates an individual's sense of self-worth by suggesting that she is less able than others to participate in the community. As we know, however, discrimination does not merely *suggest* that an individual is less capable of participating in the community; it creates *actual* barriers to socio-economic participation. The *Code* is focused on attacking those barriers in regulated relationships.

The *Code* primarily regulates market-based relationships (including employment, housing services and contracting) among private parties as well as with government entities.²⁰ The rationale is that those are the socioeconomic relationships that are most significant for constructing and reproducing discriminatory exclusions. They are the most central to our economic and social lives; they are where we find the means to support ourselves financially, to obtain housing, to enter into economic transactions, and to amass the social and financial security which permits active political participation in our communities. As Denise Réaume has noted, “[t]hese areas are covered because of their historical implication in social patterns of inequality that have been deep and damaging, as well as their ongoing importance in giving people a modicum of control over the shape and quality of their lives.”²¹

Within the regulated relationships, the *Code* enumerates a closed list of prohibited grounds of discrimination, which range from immutable personal characteristics such as race, ancestry, and ethnicity²² to

20 *OHRC, supra* note 2, ss 1-8. Through its regulation of services, the *Code* also applies to the state in its public capacity. As I have argued elsewhere, however, the regulation of public services engages a number of issues otherwise absent from the *Code*'s operation. Its overall design and historical evolution primarily target private-sector relationships, as well as action by the state operating in market-based relationships. On the democratic issues raised by the application of the *Code* to government services, see Claire Mummé, “At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the *Charter* in Canadian Government Services Cases” (2012) 9 JL & Equality 103.

21 Denise Réaume, “Defending the Human Rights Codes from the *Charter*” (2012) 9 JL & Equality 67 at 69.

22 The protected grounds under the *Code* are race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, disability or the receipt of public assistance. *OHRC, supra* note 2, ss 1-8.

more class-based grounds such as receipt of government assistance.²³ The use of prohibited grounds of discrimination in market-based decision-making is regulated through a two-stage process. At the first stage, to make out a *prima facie* claim of workplace discrimination in Ontario, a claimant must prove that there has been differential treatment or adverse effect in access to employment or in the course of employment, that the treatment was on the basis of a prohibited ground, and that it has had a detrimental impact on the claimant. This assumes that all direct and adverse-impact differential treatment violates human dignity unless the respondent can justify its necessity. Once a *prima facie* case is made, the burden at the second stage shifts to the employer to demonstrate that the differential treatment was a *bona fide* occupational requirement (BFOR). The employer must show that the impugned policy, practice or decision was rationally connected to the performance of the job, that it was adopted in good faith, and that it was necessary to fulfill a legitimate work-related purpose.²⁴

As Réaume has argued, this analytical structure is designed to require justification of the use of a protected status trait or proxy measure in decision-making, and justification of the workplace goal itself.²⁵ In a case of direct discrimination, the question is whether the actual use of a prohibited ground is an accurate measure for the legitimate workplace goal. In a case of adverse-effect discrimination, the targets of the inquiry are otherwise neutral proxy measurements that have a differential impact on those with a protected attribute — for example, very high physical endurance requirements for firefighters, which disproportionately disqualify women.²⁶ A proxy will act as

23 Other provinces have similar provisions: *Alberta Human Rights Act*, RSA 2000, c A-25.5, Preamble; *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s (1) (m.01); *Human Rights Act*, RSY 2002, c 116, s 7(1); *Human Rights Act*, RSPEI 1988, c H-12, Preamble; *Human Rights Act*, RSNS 1989, c 214, s 5(1)(t).

24 *British Columbia (Public Service Employee Relations Commission) v BCGEU*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 21, 181 DLR (4th) 385 [*Grismer*].

25 Réaume, *supra* note 21 at 76-77.

26 Sujit Choudry, "Distribution vs. Recognition: The Case of Anti-Discrimination Laws" (2000) 9 *Geo Mason L Rev* 145 at 155.

an imperfect predictor where some of the people with the particular attribute cannot meet the legitimate workplace goal, even if some of them can. Where a prohibited ground is a perfect proxy for the ability to do the job, a BFOR defence is not necessary because, in Réaume's words, "the perfect correlation between ground and qualifications for the job means that discrimination is negated. Only when a ground is an imperfect proxy is there something that the respondent has to justify according to the BFR test."²⁷ In such cases, the BFOR analysis requires an employer to demonstrate that "it is not possible to identify and include the members of the excluded group who are qualified" except by using the challenged proxy.²⁸ The last step of the BFOR analysis requires employers to demonstrate that the challenged decision is the least discriminatory method of achieving the legitimate objective because it is impossible to accommodate individual employees short of undue hardship. The BFOR test therefore requires an employer to justify both its workplace goals and the measures chosen to attain them.

It is clear that in subjecting regulated behaviour to a test of accuracy and relevance, the *Code* does not challenge the market's general operation. Rather, it seeks to bar the use of decision-making tools that are inaccurate predictors of capacity and behaviour.²⁹ Market transactions operate on the basis of conscious and unconscious evaluations of capacity and worth, which encode subtle cultural perceptions of individual and group value. The use of such proxy measurements builds up in the market over time, creating social and economic blockages for those with protected identity traits, to the point of becoming

27 Réaume, *supra* note 21 at 77-78.

28 *Ibid* at 82.

29 As Kenneth Arrow noted, what is or is not relevant to decision-making is a normative issue. Someone who holds prejudiced views may indeed view the protected identity traits as very relevant to making a decision aimed at fulfilling that discriminatory purpose. See Kenneth Arrow, "The Theory of Discrimination" (Paper delivered at Conference on Discrimination in Labor Markets, Princeton University, 7 October 1971) at 1 [unpublished]. What the *Code* does is to announce that it is the legal policy of Ontario that the protected identity traits will rarely be a relevant consideration for decision-making in the workplace.

self-fulfilling.³⁰ The *Code* seeks to halt the continued deployment of inaccurate and discriminatory notions of personal value in regulated market relationships.

4. THE ONTARIO HUMAN RIGHTS CODE'S DISTRIBUTIVE FUNCTION

As explained in Part 3 above, the *Code* targets the use of inaccurate or irrelevant protected identity traits in regulated market relationships. The *Code* seeks, in Fraser's terminology, to remedy the psychosocial and distributional consequences of misrecognition discrimination. In this sense, it engages with the interrelationship of distributional and misrecognition discrimination. How does it do this? And what does distribution mean in this context?

On one level, all legal rights and entitlements (or their absence) create mechanisms for distributing resources within relationships.³¹ Human rights statutes operate in this way, as do all legal regimes. When people speak of distributional strategies, however, they are usually referring to something more than the small-scale wealth transfer that occurs in any legal proceeding. Distributive mechanisms are often described as those which have an effect beyond the parties. Obvious examples are statutes and constitutional provisions

30 Ian Ayres explains the following example of the way stereotypes and misperceptions can be reinforcing using the example of car sales: "Beliefs that are based on erroneous stereotypes may not be tested by the market equilibrium. If market experience does not teach sellers that their preconceptions are false, disparate treatment that is both inequitable and inefficient will persist. For example, if sellers refuse to bargain seriously with blacks because of a belief that they are generally too poor to buy cars, then blacks will continue not to buy cars because of inflated prices, and that will only reaffirm the sellers' original mistaken belief." Ian Ayres, "Fair Driving: Gender and Race Discrimination in Retail Car Negotiations" (1991) 104:4 Harv L Rev 817 at 850-851. Although prejudices may be inaccurate in that they do not speak to individuals' innate capacities, they may create systemic economic blockages that build up in self-fulfilling ways. For instance, the denial of job opportunities may have a follow-on effect on other economic opportunities for workers and their families, leading to generational differentials in levels of education and training, so that the prejudicial assumption becomes factually accurate over time.

31 Duncan Kennedy, "The Stakes of Law, or Hale and Foucault!" (1991) 15:4 Legal Studies Forum 327.

regulating state resources: for instance, tax and property legislation and section 15 of the *Canadian Charter of Rights and Freedoms* serve to set the rules of resource entitlement. In the private sector, collective bargaining is a central distributional mechanism, instituting a process of negotiation over the allocation of work-related resources between collective units of workers and their employers. Legislation and collective bargaining both effect distribution through an *a priori* determination of which categories of people can access the particular resources as of right.

Because human rights codes do not set *a priori* rules for resource entitlements, they are less often thought of as distributional mechanisms. Nonetheless, because they regulate how resources and opportunities are allocated for those with protected identity traits within market-based relationships, they do play a central distributional role, imposing obligations that are either self-enforced or enforced through litigation. The remedial powers provided for in the codes aim to remedy the effects of discrimination rather than to place blame for it. In *O'Malley v. Simpson-Sears*, the Supreme Court of Canada explained: "The Code aims at the removal of discrimination Its main approach 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."³²

To dismantle discriminatory barriers and provide relief for victims, the HRTO has been given very broad remedial powers, particularly since the 2006 amendments to the *Code*. If the Tribunal determines that a *Code* violation has occurred, it can order the infringing party to pay monetary compensation for "loss arising out of the infringement including for injury to dignity, feelings and self-respect,"³³ to make restitution "other than through monetary compensation,"³⁴ and "to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act."³⁵ The *Code*

32 *Ontario (Human Rights Commission) and O'Malley v Simpson-Sears Ltd*, [1985] 2 SCR 536 at 547, 23 DLR (4th) 321; *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 40 DLR (4th) 193 [*Action Travail des Femmes*].

33 *OHRC*, *supra* note 2, s 45.2(1)1.

34 *Ibid*, s 45.2(1)2.

35 *Ibid*, s 45.2(1)3.

also specifies that the power to order a party “to do anything” can include directions about future practices, and may be exercised even in the absence of a request to exercise it.³⁶

Prominent among the remedial powers which are central to the *Code*'s distributional functions are the Tribunal's authority to order systemic rights and remedies³⁷ and public interest remedies,³⁸ as well as the authority to enforce the duty to accommodate.³⁹ In exercising these powers, the Tribunal seeks to change decision-making structures to create socioeconomic space for workers who have been discriminatorily excluded. The *Code* is also distributional in authorizing individual remedies for past harms, which seek to put claimants in the position they would have been in had it not been for the breach of the *Code*. This aspect of the Tribunal's remedial authority permits compensation (both monetary and non-monetary) for “losses arising out of the infringement,” including injury to dignity and self-respect.⁴⁰ In that way, the *Code* acts to shift the economic losses that arise from discrimination to the respondent — the party who is usually best able to absorb or spread those losses.

(a) Systemic Remedies in Systemic Discrimination Claims

The *Code* permits claims by individuals and groups on the basis of systemic discrimination.⁴¹ These types of claims have the greatest

36 *Ibid*, ss 45.2(2)(a)-(b).

37 *Ibid*, ss 45.2(1)(3) and 45.2(2).

38 *Ibid*, s 45.3(1).

39 *Ibid*, s 11(2).

40 *Ibid*, s 45.2(1)(1).

41 *Ibid*, s 34(4) allows two or more people who have individual claims to join them together. The Ontario *Code* has more limited standing rules than those in other jurisdictions: a person or organization can bring a claim on behalf of another only with the consent of someone who is entitled to bring an application. In other jurisdictions, public interest groups may bring claims on behalf of a marginalized group without a directly affected applicant. This is particularly useful in systemic discrimination claims. See Karen R Spector, Tess Sheldon & Laurie Letheren, “Barriers to the Claims of Systemic Discrimination Brought By People with Disabilities” (Paper delivered at the Ontario Bar Association Annual Update on Human Rights: Keeping on Top of Key Developments, Toronto, 8 June 2012) at 7-10.

reach because they apply beyond the parties to the litigation. In *Action Travail des Femmes*, the Supreme Court of Canada described systemic discrimination as consisting of “practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than actual characteristics.”⁴² The Court went on to say:

It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone’s potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.⁴³

In other words, systemic discrimination claims are concerned with institutionalized policies, procedures and cultural environments which create patterns of exclusion for groups with protected characteristics and encode subtle ideas of capacity based on stereotypes of skill and ability that preclude full workplace participation by members of the group. As the Canadian Human Rights Tribunal said in *PSAC v. Canada (Treasury Board)*, “long-standing social and cultural mores carry within them value assumptions that contribute to discrimination in ways that are substantially or entirely hidden and unconscious.”⁴⁴

Remedies for systemic discrimination are distributional because they seek to identify, eliminate and transform structural processes of group exclusion. As Dickson C.J.C. explained in *Action Travail des Femmes*, “[t]he goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotions in the past . . . [but] to ensure that future applicants and workers from the affected group will not face

42 *Action Travail de Femmes*, *supra* note 32 at 1138-1139.

43 *Ibid.*

44 (1991), 14 CHRR D/341 at paras 36-38. As Colleen Sheppard has noted, there is often a conceptual slippage between adverse-effect discrimination and systemic discrimination, although they are conceptually distinct. Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Kingston, Ont: McGill-Queen’s University Press, 2010) at 22-23. Systemic discrimination is broader than adverse-effect discrimination. Rather than aiming solely at one particular policy or decision, it aims at directly and indirectly discriminatory social and operational practices which may be individually unproblematic but together embed and replicate complicated patterns of exclusion.

the same insidious barriers that blocked their forebears.”⁴⁵ Systemic remedies have sometimes required such changes as amending workplace policies that adversely impact certain groups,⁴⁶ introducing pay equity systems,⁴⁷ creating race relations committees,⁴⁸ or appointing monitors to oversee the implementation of accommodation plans.⁴⁹ These types of remedies require employers to transform the future access of marginalized workers to opportunities and resources by dismantling cultures of exclusion. Their reach extends beyond the specific parties to include workers not yet hired.

(b) Systemic Remedies in Individual Discrimination Claims

HRTO decisions sometimes suggest that systemic remedies are not available in individual discrimination claims.⁵⁰ Others, however, recognize that “the Tribunal may make systemic remedies in any

45 *Action Travail des Femmes*, *supra* note 32 at para 40.

46 *Forrester v Peel (Regional Municipality) Police Services Board*, 2006 HRTO 13, [2006] 56 CHRR D/215. This was not an employment case, but concerned police strip search policies for transsexual detainees.

47 *Action Travail des Femmes*, *supra* note 32 at para 40.

48 *McKinnon v Ontario (Correctional Services)*, 2005 HRTO 15, 52 CHRR D/387 [McKinnon].

49 *Lepofsky v Toronto Transit Commission*, 2007 HRTO 23 at paras 9 & 15, 61 CHRR 511. See also *National Capital Alliance on Race Relations v Canada (Department of Health & Welfare)*, 28 CHRR 179, [1997] CHR D No 3 (QL). The remedial authority of human rights tribunals in regard to systemic discrimination is very broad, but systemic remedies face significant enforcement difficulties. See Dianne Pothier, “Adjudicating Systemic Equality Issues: The Unfilled Promise of *Action Travail des Femmes*” (2014) 18:1 CLELJ 177. In some cases, tribunals have remained seized of the matter to ensure compliance with an order. See *Lepofsky*, *supra*. Compare *Coast Mountain Bus Co Ltd v National Automobile, Aerospace, Transportation and General Workers of Canada (CAW – Canada), Local 111*, 2010 BCCA 447 at paras 100-103, 10 BCLR (5th) 65, where the Court held that a tribunal member had exceeded her jurisdiction by ordering (in addition to a cease-and-desist order) tribunal-supervised mediation with a view to the negotiation of a new non-discriminatory policy to replace the discriminatory one, and by remaining seized of the matter. The Court held that such orders would do nothing, beyond what the cease-and-desist order had done, to help alleviate the effects of discrimination.

50 For a recent example, see *Filion v Capers Restaurant*, 2010 HRTO 264 (CanLII).

case.”⁵¹ In Ontario there is neither a separate definition of systemic discrimination nor provision for any special remedial rules for it, and there is in fact considerable room for claimants to access structural remedies in individual claims.⁵² As noted above, the Tribunal may make an order directing any party to an application “*to do anything* that, in the opinion of the Tribunal, the party ought to do to promote compliance with the Act.”⁵³ Such an order may concern future practices, and may be made even if not requested.⁵⁴ Remedies of this sort have been described as public interest remedies, and are equivalent to systemic remedies. Thus, the HRTO appears to have the same power to order forward-looking remedies in individual claims as in systemic claims.⁵⁵

The Ontario *Human Rights Code* does not provide any direction as to when the Tribunal should exercise its discretion to order a public interest remedy if the claimant has not asked for one, and there is no case law on the question. That discretion has so far been exercised in an *ad hoc* way. The Pinto Report said that some form of public interest remedy had been ordered in approximately “60% of the cases in which discrimination was found,” but often consist of no more than a requirement of human rights training.⁵⁶

There are good reasons why the Tribunal should be more proactive in ordering public interest remedies. It is not clear whether claimants know that such remedies can be requested, or what those remedies might entail. As the Pinto Report noted, 53% of claimants

51 *GA (Next friend of) v York Region District School Board*, 2009 HRTO 1269 at para 2, [2009] OHRTD No 1245 (QL). Because of the limited standing provisions of the *Code*, the HRTO often holds that only claimants whose individual rights have been violated can bring systemic claims. This is problematic but consistent with the *Code*'s provisions. More questionable is the growing practice of limiting evidence of systemic discrimination if it is not sufficiently connected to the individual claimant, thus limiting the contextual evidence that a claimant can introduce. For an example, see *Carasco v University of Windsor*, 2012 HRTO 195 (CanLII).

52 *Human Rights Code*, CCSM, c H-175, s 9(3) has a definition of systemic discrimination, but no code provides for special remedies for systemic discrimination claims. The *Canadian Human Rights Act*, RSC 1985, c H-6, s 40.1(2)(b), specifies that a claim cannot be based solely on statistical evidence demonstrating the under-representation of a designated group.

53 *OHRC*, *supra* note 2, s 45.2(1)(3) [emphasis added].

54 *Ibid*, s 45.2(2).

55 *Ibid*, s 45.2(1)(3).

56 *Pinto Report*, *supra* note 1 at 75.

were unrepresented at Tribunal hearings. The instructional materials prepared to help applicants through the process do not clearly set out the nature of a public interest remedy. The *Applicant's Guide* notes that the Tribunal may order remedies to prevent further human rights violations, whereas the claim application form itself simply allows a claimant to check off a request for a future compliance remedy and to explain what order the claimant is asking from the Tribunal.⁵⁷ This is not sufficient to justify the assumption that most claimants, especially those without legal representation, will understand what a public interest remedy is or will realize that they may ask for one. It would therefore be useful for the Tribunal itself to raise the possibility of a public interest remedy in appropriate cases, particularly where the evidence suggests that the employer might be unclear about its obligations or that there is an entrenched culture of discrimination. Where the Tribunal identifies a problematic practice, policy or workplace culture, it should not be content with merely ordering human rights training.⁵⁸

Systemic and public interest remedies requiring specific steps to dismantle systems of exclusion are powerful tools available to the Tribunal. They are distributional in nature, in that they require employers to change how decisions are made in order to ensure that opportunities are equally accessible to everyone in the workplace.

(c) **The Duty to Accommodate: The Dynamics of Workplace Change**

Like systemic and public interest remedies, the duty to accommodate operates as a distributional mechanism. It imposes positive

57 *Ibid* at 45; Human Rights Tribunal of Ontario, *Applicant's Guide* at 11, online: <<http://www.hrto.ca>>.

58 The HRTO appears to grant more complex public interest remedies primarily in cases where the Commission intervenes. This is presumably because the Commission will have given thought to the content of a useful public interest remedy in the circumstances. Indeed, while there does not appear to be a political interest in such a move, the Commission's statutory mandate would permit it to take a more active advisory role in helping those found to have breached the *Code* to improve their policies and procedures, which would alleviate the burden on small businesses. Moreover, although this is not within its current mandate, the Commission might also usefully consider taking on a more direct role in monitoring the implementation of systemic and public interest remedies, which have proven notoriously difficult to enforce in the absence of a trade union.

obligations on the employer to undertake a process of communication with the worker in order to craft a flexible working arrangement that meets the worker's needs and abilities as closely as possible. As the Supreme Court recognized in the *Eldridge* case, "the principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field."⁵⁹ The *Code* requires accommodation in all regulated relationships. Once a *prima facie* case of discrimination is established, an employer may argue that it was not obligated to accommodate because the discriminatory practice or exclusion was based on a BFOR. Proving a BFOR requires an employer to demonstrate that the challenged policy was adopted for a rational purpose connected to the position, that it was adopted in good faith, and that the complainant cannot be accommodated without imposing undue hardship on the employer.⁶⁰ As explained in Part 3 above, this requires an employer to justify both its workplace goals and the characteristics it has identified as necessary to meet those goals. The employer must then demonstrate that there is no way to accommodate a worker who has been excluded on a prohibited ground and still achieve its goals. The Ontario Human Rights Commission's *Guidelines on Disability and Accommodation* say:

[T]he rule or standard itself must be inclusive and must accommodate individual differences up to the point of undue hardship rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. This ensures that each person is assessed according to his or her own personal abilities instead of being judged against presumed group characteristics.⁶¹

The standard for undue hardship is exacting. It is fact-specific, requiring an individualized consideration⁶² of safety, cost, interference with a collective agreement, size of the employer's operation,

59 *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at para 78.

60 *OHRC*, *supra* note 2, ss 11(1)-11(2); *Meiorin*, *supra* note 24.

61 Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate*, 2000, revised in 2009 [*Guidelines on Disability and Accommodation*], §4.2, online: <<http://www.ohrc.on.ca>>, quoting from the Supreme Court of Canada decision in *Grismer*, *supra* note 24 at para 19.

62 *Entrop v Imperial Oil Ltd (No 6)* (1995), 23 CHR D/196 (Ont Bd Inq), *aff'd* (2000), 50 OR (3d) 18 (CA); *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at para 22, [2007] 1 SCR 161.

employee morale and the interchangeability of the workforce and facilities.⁶³ It has recently been held also to include a consideration of the legitimate operational requirements of the workforce.⁶⁴ As Michael Lynk has put it, the accommodation case law requires the employer to demonstrate that its “efforts were serious, conscientious, genuine, and represented its best efforts.”⁶⁵ Moreover, if the employer cannot prove that the impugned standard, policy or decision has a legitimate objective, or that no accommodation can be provided short of undue hardship, then the entire standard or policy is struck down.⁶⁶ This affects not just the worker bringing the claim, but also others who are similarly situated in the workplace. In this sense, the duty to accommodate can operate as a systemic remedy, reaching

63 *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489, 72 DLR (4th). Some codes specify factors that may be considered in the undue hardship analysis. The OHRC, *supra* note 2, s 11(2), for example, lists cost, health and safety, and outside sources of funding.

64 In *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 SCR 561, the Supreme Court specified that the question was not whether it was impossible to accommodate the worker, but whether it was impossible to do so short of undue hardship. This is correct as far as it goes. However, the Court went on to say: “The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship” (*ibid* at para 14). The test, the Court explained, “is not whether it was impossible to accommodate the employee’s characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work” (*ibid* at para 16). The problem with this analysis arises from the need to decide what is meant by “fit to work” and by “fundamental changes to the working conditions.” Again, it appears correct to say that the duty to accommodate does not require an employer to *create* work that it does not need. But an employer does have a duty to analyze how its needs are to be met, and how equal opportunity to meet those needs can be provided in the light of the individual worker’s capacities, short of undue hardship. Despite the way the Court framed the undue hardship standard in *Hydro-Québec*, the weight of the case law continues to see that standard as an exacting one.

65 Michael Lynk, “Disability at Work: The Transformation of the Legal Status of Employees with Disabilities in Canada” in R Echlin & C Paliare, eds, *Law Society of Upper Canada Special Lectures 2007: Employment Law* (Toronto: Irwin Law, 2008) 189 at 227.

66 Pothier, *supra* note 49 at 201.

beyond the individual claimant to require transformation in workplace decision-making.

A worker who remains in the employment relationship may argue that more appropriate accommodation should be provided than that offered by the employer.⁶⁷ Although such claims do not have a direct reach beyond the parties, they are important because they show how the duty to accommodate operates to transform resource distribution in the workplace. To determine an appropriate accommodation, human rights decision-makers undertake a detailed substantive review of what the duty mandates in the particular circumstances.⁶⁸ Unlike the analysis of the justifiability of a breach of a constitutional right under section 1 of the *Charter*, this is not a proportionality-based review. Instead, it looks to what both the claimant and the employer have to do (procedurally and substantively) to make room for the claimant to participate in the workplace, in light of the claimant's capacities and restrictions and in light of any constraints on the employer.⁶⁹

67 Because a claim for appropriate accommodation does not seek to strike down a standard but to modify its application, such a claim may be impractical in the absence of a union, which can help to monitor the ongoing conversation required for proper accommodation

68 *Guidelines on Disability and Accommodation*, *supra* note 61 at §4.3.

69 *Meiorin*, *supra* note 24. Once accommodation is requested, the employer must examine what methods are available to provide the employee with duties that they can fulfill. Michael Lynk describes four steps in the accommodation investigation process:

- (1) [F]irst determining whether the employee can productively fulfill her existing job as presently constituted; (2) if not, then determining whether she can perform the core aspects of the original job in a modified or re-bundled form; (3) if not, determining whether the employee can accomplish the duties of another job in its present form; and finally (4) if not, then determining whether she could perform another job in a modified or re-bundled fashion.

Lynk, *supra* note 65 at 229. In some circumstances, the search for accommodation may permit a disabled worker to displace a co-worker, or may require the employer to modify a co-worker's duties. In cases of physical disabilities, work schedules and the physical requirements of the job often have to be modified. For mental disabilities, social and environmental modifications may also be required, as well as scheduling changes. *Ibid* at 228; *Guidelines on Disability and Accommodation*, *supra* note 61 at 15-20; Canadian Human Rights Commission, *Policy and Procedures on Accommodation and Mental Health* (Canadian Human Rights Commission, October 2008) at 6, online: <<http://www.chrc-ccdp.ca>>.

The duty to accommodate obviously has limits. The employer does not have to create a position that does not provide value to its operations, and can expect the worker to be able to perform the core aspects of the accommodated position.⁷⁰ Nonetheless, the duty imposes on the employer an ongoing requirement to engage with the worker about her limitations and capacities and to creatively adjust the physical, operational and social environment of the workplace with a view to enabling her to participate meaningfully.

The duty to accommodate is at the heart of the statutory human rights analysis; it reflects the dignity value inherent in interaction between the parties about their needs, and it leads to the creation of actual opportunities for work. Where an impugned standard is found not to be a BFOR, it is struck down, creating the space for a new process to be set in place that meets the *Code's* standards. Thus, just as systemic remedies can be used to change policies and processes that distribute resources in the workplace, the duty to accommodate requires employers and workers to work together to change the workplace environment to provide access to economic resources based on each party's capacities and needs.

(d) Remediating the Effects of Discrimination on an Individual

Because human rights claims are concerned with the *effects* of discrimination, the purpose of individual remedies is to put claimants in the position they would have been in had it not been for the discrimination.⁷¹ The Tribunal is empowered to order compensation for the losses that arise from infringements of the *Code*, including monetary compensation for economic loss and for injury to dignity and self-respect, as well as non-monetary restitution for harm suffered.⁷² Individual remedies act as cost-shifting mechanisms which lift the economic burden of discriminatory exclusion from the worker and place it on the party that is usually better able to bear or reallocate it.

70 Lynk, *ibid* at 228. If there is no reasonable prospect of a return to work, the duty to accommodate may not require the employer to go any further. *Hydro-Québec*, *supra* note 64 at para 18.

71 *Impact Interiors v Ontario (Human Rights Commission)* (1998), 35 CHRR D/477 (Ont CA).

72 OHRC, *supra* note 2, s 45.2(1)(1).

(i) *Reinstatement*

Reinstatement is a make-whole remedy in the full sense of the term, because it puts the worker back in his or her job. However, informal discussions with lawyers who practise in the area, as well as Tribunal members, suggest that reinstatement is infrequently requested before the Human Rights Tribunal. Despite the HRTO's clear power to order reinstatement, there also appears to be some confusion over how that power should be used. In hearing employee complaints of dismissal for reasons prohibited under the *Code*, the Tribunal has sometimes adopted a viability approach similar to that taken by arbitrators in the unionized sector and by adjudicators under section 240 of the *Canada Labour Code*.⁷³ In *Krieger v. Toronto Police Services Board*,⁷⁴ HRTO Vice-Chair Naomi Overend said: "The goal of human rights legislation, which is remedial in nature, is to put the applicant in the position that he or she would have been in had the discrimination not taken place."⁷⁵ She went on to add the following: "*Where viable*, reinstatement is sometimes the only remedy that can give effect to this principle."⁷⁶

In unionized workplaces, labour arbitrators under collective agreements have long treated reinstatement as the presumptive remedy when they find that an employee was discharged without just cause.⁷⁷ In the 2004 case of *Alberta Union of Provincial Employees v. Lethbridge Community College*,⁷⁸ the Supreme Court of Canada said:

As a general rule, where a grievor's collective agreement rights have been violated, reinstatement of the grievor to her previous position will

73 RSC 1985, c L-2. See *Krieger v Toronto Police Services Board*, 2010 HRTO 1361 at para 172, 70 CHRR D/405 [*Krieger*]; *Moffatt v Kinark Child and Family Services*, 37 CHRR D/409, [1999] OHRBID No 15 at para 96 (QL) (Ont Bd Inq).

74 *Krieger*, *ibid* at para 182.

75 *Ibid*.

76 *Ibid* [emphasis added].

77 Probably because of the presence of a union to protect reinstated employees against reprisals after they return to the job, studies have shown that the remedy has worked quite well, in the sense that employees usually remain in the workplace for a substantial time after being reinstated. See, for example, Peter J Barnacle, *Arbitration of Discharge Grievances in Ontario: Outcome and Reinstatement Experience* (Kingston, Ont: Queen's IRC Press, 1991).

78 2004 SCC 28 at para 56, [2004] 1 SCR 727, 238 DLR (4th).

normally be ordered. Departure from this position should only occur where the arbitration board's findings reflect concerns that the employment relationship is no longer viable. In making this determination, the arbitrator is entitled to consider all of the circumstances relevant to fashioning a lasting and final solution to the parties' dispute.

The Supreme Court's 2003 decision in the *Parry Sound* case held that "the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which the Board has jurisdiction."⁷⁹ But while continuing to undertake a viability analysis, in the vast number of arbitration cases in which employers are alleged to have discriminated against employees on grounds prohibited by the *Code*, arbitrators have continued to treat reinstatement as the presumptive remedy for discrimination.

In Ontario, non-unionized employees have no recourse to an adjudicative forum for complaints of unjust dismissal; their only recourse is to a common law wrongful dismissal action in the courts, where reinstatement is not available. In the federal sector, however, employees do have statutory protection against unfair dismissal under section 240 of the *Canada Labour Code*,⁸⁰ and adjudicators hearing claims under that provision have the authority to award reinstatement. At one time, many section 240 adjudicators took what Geoffrey England called the "lion's jaws" approach⁸¹ — the approach that it was futile (in the absence of a union) to put an employee whom the employer wanted to get rid of back into the workplace, because the employee was unlikely to last and would be better off with a monetary award. England argued strongly that if an employee had indeed been unfairly dismissed and wished to take on the risks of reinstatement, that wish should be respected — that it was not the adjudicator's role to decide what remedy was in the employee's best interests.⁸²

Section 240 adjudicators now generally accept England's view, refusing reinstatement only on the basis of a viability approach quite

79 *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 324*, 2003 SCC 42 at para 23, [2003] 3 SCR 157 [*Parry Sound*].

80 *Supra* note 73.

81 Geoffrey England & Innis Christie, *Employment Law in Canada* (Markham, Ont: LexisNexis Butterworths), 4th ed (looseleaf) (principal revising author, Peter Barnacle) at §17.161.

82 *Ibid.*

similar to that taken by arbitrators under collective agreements: i.e., only when they find that the employee's overall conduct (before the dismissal, or perhaps more often, after it) provides objective and not merely subjective support for the employer's claim that the employee has forfeited the trust needed for a viable employment relationship. As the Federal Court of Appeal recently noted in the section 240 case of *Payne v. Bank of Montreal*, "while reinstatement is not a right, in practice it is the remedy favoured by adjudicators for unjust dismissal, save for exceptional circumstances."⁸³ In *Payne*, the Court said that a crucial question was whether the employer could "ever have confidence in the employee's judgment again, such that it should be prepared to run the risk of further misconduct"⁸⁴ — a question which the Court described as having "a pronounced forward-looking character."⁸⁵

Given that reinstatement is a strong presumption both where arbitrators have a mandate to think about the employment relationship's long-term viability, and where there may be an issue of worker misconduct, as with unjust dismissal claims under Part III of the *Canada Labour Code*, it should surely be a strong presumption before the Human Rights Tribunal, where neither viability nor worker misconduct are at issue.

(ii) *Individual Monetary Awards*

The *Code* provides for individual monetary awards for economic loss arising from an infringement, as well as for injuries to dignity and self-respect.⁸⁶ In calculating compensation for injuries to dignity and self-respect, the HRTTO looks to the seriousness of the injury, as well as to the applicant's particular experience and his or

83 Adjudicators look closely at the overall nature of the relationship between the worker, the employer and other employees, and to other institutional factors which may make reinstatement unviable, such as the abolition of the job or the bankruptcy of the employer. *Bank of Montreal v Payne*, 2013 FCA 33 at para 86, 443 NR 253 [*Payne*]. See also England & Christie, *supra* note 81 at §17.157, citing *Ella v Trans-Northern Pipelines Inc.*, [1992] CLAD No 7 (QL); *Anthony and Kamloops Indian Band*, [1997] CLAD No 49 (QL).

84 *Payne*, *ibid* at para 88.

85 *Ibid.*

86 *OHRC*, *supra* note 2, s 45.2(1).

her reaction to what happened.⁸⁷ The aim is to provide monetary compensation for the psychosocial effects of discrimination. The basis on which the *Code* provides compensation for monetary loss is less clearly articulated. Section 45.2(1) states that financial compensation may be ordered for “loss arising out of the infringement” The Tribunal takes a make-whole approach to its remedial authority, seeking to put claimants in the position they would have been in but for the *Code* violation. Financial losses usually involve wages and employment-related benefits.⁸⁸ Where a claimant asserts the loss of a job opportunity or promotion, the prevailing approach in Ontario is to assess the likelihood that he or she would have realized the particular opportunity; if there was at least a 50% chance, the claimant recovers the full loss.⁸⁹ Tribunals in some other jurisdictions award compensation on the basis of the probability that the complainant would have realized the opportunity in question.⁹⁰

Once in a while, a claim is made for compensation for losses that do not stem directly from a breach of the complainant's terms of employment but do arise from a discriminatory act by the employer. For instance, a claimant recently requested a remedy on account of Employment Insurance (EI) maternity benefits for which she did not qualify because of her discriminatory termination by the employer.⁹¹ The Tribunal denied the request on the ground that EI benefits were not “income that would have been earned from the [employer] had there been no discrimination.”⁹² Instead, it ordered that her Record of Employment form⁹³ be reissued to reflect the higher amount she

87 *Arunachalam v Best Buy Canada Ltd*, 2010 HRTO 1880 at paras 53-54 (CanLII).

88 Workplace benefits that would have accrued but for the discrimination are usually compensable. *Jodoin v Ciro's Jewellers (Mayfair) Inc*, [1996] OHRBID No 1 at paras 29-33 (QL). Where there is a discriminatory demotion or an accommodation plan that imposes a reduction in wages, a worker may be able to claim the difference between the old and new rates.

89 *DeSouza v 1469328 Ontario*, 2008 HRTO 23 at paras 82-83, 63 CHRR D/197; *Davis v Toronto (City of)*, 2011 HRTO 806 at paras 149-151 (CanLII).

90 *Chopra v Canada (AG)*, 2007 FCA 268, 283 DLR (4th) 634 [*Chopra*].

91 *Purres v London Athletic Club (South) Inc*, 2012 HRTO 1758, 75 CHHR D/252.

92 *Ibid* at para 40.

93 This is “the form . . . that employers complete for employees receiving insurable earnings who stop working and experience an interruption of earnings. The ROE is the single most important document in the Employment Insurance (EI) program.” Online: <<http://www.servicecanada.gc.ca>>.

would have earned had it not been for the discrimination, so that she could apply for reconsideration of her EI benefits. This allowed her to be made whole without imposing the cost of doing so on her employer. Where no such option is available, the assessment of damages should focus on losses that arose from the infringement rather than on the narrower concept of “income from employment.”

Indeed, section 45.2(1) of the *Code* sets out a very broad remedial power, permitting compensation for far-ranging economic consequences that may flow from discrimination. Exclusion from an economic opportunity in the workplace will often have a significant impact on one’s ability to support oneself, to afford one’s home, or to access social benefits. As long as a claimant’s financial losses are the result of a chain of events set in motion by a *Code* infringement, they are theoretically compensable.

That the *Code* envisages compensation for the broad socio-economic consequences of discrimination was implicitly accepted in the 2012 HRTO decision in *Hayes v. Workplace Safety and Insurance Board*. The Tribunal found that the refusal by the Ontario Workplace Safety and Insurance Board (WSIB) to permit direct deposit of WSIB benefits payable to the claimant was discriminatory on the basis of disability, because it was physically difficult for him to deposit the cheques at his bank.⁹⁴ One of the people whom he therefore had to rely on to deposit the payments stole some of them. He alleged that he was thereby forced to declare bankruptcy, and that the resulting stress led to the dissolution of his marriage and to significant difficulties for his children. He argued that the losses for which he should be indemnified under the *Code* included the stolen benefits, his declaration of bankruptcy and the dissolution of his marriage, because none of these events would have occurred without the discrimination.

The Tribunal was prepared to accept that the theft was causally connected to the discrimination, because the claimant would not been vulnerable to theft if direct deposit had been available.⁹⁵ It refused to award compensation for the claimant’s bankruptcy, as he was

94 2012 HRTO 2126 (CanLII).

95 The Tribunal ordered the WSIB to pay to the applicant “\$5,000 for his losses arising from the infringement of his rights under the *Code*” and “\$1,800 for the direct loss occasioned by its refusal to directly deposit his benefits into his account.” *Ibid* at para 53. It is not clear from the decision how much compensation the claimant requested for the bankruptcy and the breakdown of his marriage.

severely in debt before the theft and it was not evident that the loss of his WSIB benefits caused the bankruptcy. It is not clear how the Tribunal would have ruled if the bankruptcy had been more closely tied to the breach of the *Code*. As for the marriage dissolution, the Tribunal found an insufficient causal nexus between the discrimination and the loss, and went on to note that in any case it was unclear that the respondent should be held responsible for this type of loss.⁹⁶ The Tribunal offered no additional explanation for why that loss would be outside the scope of what was compensable.

In short, the broad powers given to the HRTO under the *Code* to remedy individual discrimination are designed to put claimants in the position they would have been in but for the violation of the *Code*, with a view to shifting the psychosocial and financial costs of discrimination from the claimant's shoulders. Far-reaching obligations are imposed on respondents because they have engaged in discriminatory market behaviour that has led to a loss, and because they are the best placed to change that behaviour and absorb the losses.

5. THE HUMAN RIGHTS CODE'S RELATIONSHIP TO OTHER EQUALITY-SEEKING LEGAL MECHANISMS

As I have emphasized throughout this paper, the *Code* is designed to regulate both the distributional and the psychosocial

96 *Ibid* at para 43. Because section 45.2(1) permits compensation for “loss arising out of the infringement” of the *Code*, the Tribunal hinted that there might need to be some limitations on the potential scope of employer liability. While in this case there was an insufficient causal nexus between the loss that arose and the infringement, in other cases human rights decision-makers have sometimes invoked the tort concepts of remoteness and foreseeability to circumscribe the scope of the damages for *Code* violations. In *Chopra, supra* note 90, the Federal Court of Appeal held that the use of the concept of remoteness was not appropriate in the human rights context because (unlike tort law), human rights law does not seek to limit liability to fault but to compensate for discrimination and to remove barriers to equality. Moreover, the Court explained, the *Canadian Human Rights Act* had its own limiting device — a provision specifically enumerating the kinds of losses that were recoverable. This provision, in tandem with the concept of causal nexus, does the limiting work that the concept of remoteness does in tort law, by stating that a compensatory remedy is available for “any or all of the wages that the victim was deprived of and . . . any expenses incurred by the victim as a result of the discriminatory practice” (*ibid*, ss 53(2)(c)-(d)) [emphasis added]. A similar logic applies under the Ontario *Human Rights Code*.

effects of status and identity discrimination (or misrecognition discrimination) in market-based relationships. It deals with the relationships that most centrally affect our social and economic lives, where we live and work, and how we participate in our communities. It does so by restricting decisions which are explicitly or implicitly based on protected status traits, and which rely on those traits in an inaccurate or unjustified way.

In the workplace, the *Code's* systemic remedies seek to dismantle employment systems and cultures that have an exclusionary impact, and thereby to redistribute opportunities. Redistribution is also done through the duty to accommodate, which forbids an employer from using decision-making factors that adversely affect a protected group unless there is no other way for the employer to achieve its legitimate goals without incurring undue hardship. The duty to accommodate transforms workplace relationships in ways that foster inclusivity and economic opportunity, and that sometimes reach beyond the parties themselves in order to effect systemic change.

Analyzing the *Code's* distributional and recognition functions also allows us to think about its relationship to other legal tools concerned with inequality. Like the *Code*, section 15 of the *Charter* regulates the problem of misrecognition based on status traits. However, because the *Code* primarily regulates misrecognition in *market-based* relationships, it does something different from and complementary to the constitutional equality guarantee. The *Code* primarily applies to actors in regulated market activities, while the *Charter* applies to the state's legislative, administrative and resource distribution functions. This difference is significant in three ways. First, distributional decisions by the state have a democratic grounding that distributional decisions by private actors do not have.⁹⁷ Second, while both the

97 As I have argued elsewhere, decisions on the allocation of public resources engage democratic principles and electoral mandates, while relationships between private actors do not. One can argue that there are also democratic implications when the state acts in a more "private" capacity — for example, as an employer, landlord or contract provider. However, my analysis here focuses on the relationships between non-state actors in private-sector relationships, because those relationships are the core concern of human rights codes. As we continue to flesh out the conceptual and operational structure of those codes in relation to the distributional consequences of discrimination, it will be necessary to consider how proceedings involving the "Crown in right of" should be addressed. See Mummé, *supra* note 20.

Code and section 15 of the *Charter* are concerned with the psychosocial and economic effects of misrecognition discrimination, their scope is different.⁹⁸ The *Code*'s distributional force lies in its application to certain types of decision-making in the workplace and in other regulated relationships. In contrast, a successful challenge under section 15 of the *Charter* may change the rules of citizen entitlement to governmental benefits and thereby affect public resource distribution. The difference is mainly one of scale, but scale is important to thinking through the impact of distributional mechanisms. Finally, it can be argued that a different logic underlies the imposition of human rights obligations on non-state as opposed to state actors. Human rights codes seek to preclude regulated market actors from creating and perpetuating exclusions in relationships that are central to the ability of people to participate economically and socially in their communities. Those actors are best situated to meet the cost of discrimination in their market activities. The *Charter*'s equality guarantee, on the other hand, imposes an anti-majoritarian check on government power, to ensure that electoral mandates are not exercised in ways that unjustifiably deprive people of equal opportunities or impose differential treatment on prohibited grounds. Thus, while both the *Code* and section 15 of the *Charter* are concerned with the psychosocial and economic effects of misrecognition, they seek to eliminate those effects in different types of relationships, and with a different structural logic.

But what about the *Code*'s relationship to the more private phenomena of collective bargaining and union representation? The argument presented in this paper is that the *Code* is centrally concerned with both the economic and social effects of discrimination and inequality. While collective bargaining is also centrally concerned with resource redistribution and workers' dignity, it is often presented as being in tension with the objectives of the *Code*. Trade unions are thought to bargain distributional rules in the interests of the entire bargaining unit, while human rights statutes impose distributional obligations only in regard to certain types of workers. On that reasoning, the *Code* acts as an anti-majoritarian check on the

98 Here again, I leave aside the *Code*'s application to government services, because (as noted above) it raises a host of questions that do not apply to other market-based relationships regulated by the *Code*.

process of collective bargaining and on the enforcement of collective agreements. At the same time, as Elizabeth Shilton argues, unions are deeply engaged in ensuring the implementation of *Code* obligations through grievance arbitration.⁹⁹

Nancy Fraser's distinction between the distributional and misrecognition aspects of inequality adds another dimension to our understanding of the relationship between the *Code* and trade unions. Her analysis suggests that neither collective bargaining nor human rights legislation can by itself overcome both forms of inequality in the workplace. Trade unions collectively bargain resource distribution decisions at the workplace level, giving workers greater economic security and opportunity as well as an enhanced voice at work. While instituting neutral rules for distributing resources in the workplace will not be sufficient to eliminate cultural value systems which disadvantage minority workers, it may put those workers in a position to address human rights issues with their unions and their employers while remaining on the job. Moreover, unions can provide institutional support for reinstatement, they can monitor the implementation of tribunal orders, and they can work with employers to devise non-discriminatory policies and procedures. In other words, the distributional consequences of misrecognition discrimination can best be dealt with where (as in unionized workplaces) there is both a way of influencing the shape of *a priori* rules of resource distribution and a protected space in which to challenge the implementation of those rules to individual workers.

6. CONCLUSION

At a broad level, the analysis in this paper suggests that we need multiple legal tools oriented toward different types of inequality and different types of socioeconomic actors. Thinking about the recognition and redistribution functions of each of those tools allows us to bring them into closer conversation with one another. Because human rights codes only interact with parties once a regulated relationship exists, they cannot remove the structural barriers that impede access

99 Elizabeth Shilton, "‘Everybody’s Business’: Human Rights Enforcement and the Union’s Duty to Accommodate" (2014) 18:1 CLELJ 209.

to such a relationship in the first place, and they cannot alone redress the histories of economic deprivation that determine people's social and economic opportunities. In the end, identifying the specific role and contribution of human rights codes enables us to think about the full panoply of legal resources needed to address discrimination and socioeconomic inequality, and shines a spotlight on the need to bring those resources into alignment with one another.