COBA Human Rights Workshop
November 1, 2007, 10:30-12:00

Applying the *Ontario Human Rights Code* – Who, When and How?

Introduction

In this short paper, I deal with three issues. In the wake of *Tranchemontagne v. Ontario (Director, Disability Support Program)*[1]:

1. What tribunals have the capacity to, indeed must decide issues pertaining to the *Ontario Human Rights Code* ("the Code")[2] that arise in proceedings otherwise properly before them?

2. In what contexts are those questions likely to arise?

3. How procedurally should the tribunal deal with such an issue?

I leave to Kathy Laird issues of overlapping jurisdiction, particularly as between the tribunal and the Ontario Human Rights Commission and Tribunal, and the impact of the recent amendments to the *Code*.[3]

Who

In *Tranchemontagne*,[4] the Supreme Court of Canada in effect appropriated for *Code* purposes the tests that it developed in *Nova Scotia (Workers' Compensation Board) v. Martin*[5] for determining whether a tribunal has the authority to determine questions involving the *Canadian Charter of Rights and Freedoms* ("the *Charter*") that arise in the course of their proceedings.[6] Very briefly, this capacity exists whenever a tribunal is

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1 2006 SCC 14, [2006] 1 S.C.R. 513.

2 R.S.O. 1990, c. H.19 (as amended).

3 S.O. 2006, c. 30 and particularly ss. 45 and 45.1 with respect to overlap. The amended Act is to come into effect on June 30, 2008.

4 *Supra*, note 1, at paras. 23-27, particularly.

5 2003 SCC 54, [2003] 2 S.C.R. 504.

6 One reservation may have to be added to this proposition. In *Tranchemontagne*, Bastarache J. (delivering the judgment of the majority) made a very peculiar statement that may indicate that the Court was having second thoughts about the scope of its decision in *Martin*. At paras. 24-25, he seemed to suggest that where the *Charter* question involved the validity of a statutory provision, the tribunal had to have explicit authority to deal with questions as to the validity of that particular provision. What precisely that means is difficult to fathom, particularly as it seems to run directly counter to what the Court said in *Martin*, *id.*, at para. 45, when stating that, in this context, there was no distinction to be drawn between specific and general questions. However, in any event, the only purpose in making that statement seemed to be to contrast it with the general authority of tribunals to consider other sources of external law, which, given the outcome in *Tranchemontagne*, extends to questions of consistency between a tribunal's constitutive statute and the *Code*. In other words, whatever, if any limitations Bastarache J. was imposing on a tribunal's capacity to consider whether a statutory provision conformed to the *Charter* did not affect what in effect is an at large jurisdiction to deal with questions about a statute's conformity to the *Code*.

specifically given authority to deal with questions of law that arise in the course of its proceedings unless there is explicit statutory direction to the contrary. Indeed, even where there is no specific authority to decide questions of law that arise in the course of its proceedings, an adjudicative tribunal will presumptively have the ability to deal with such questions. Moreover, as the terms of *Martin*[7] and the *ratio* of *Tranchemontagne* make clear, unless the tribunal has discretion to decline to deal with such questions, it must do so. It has no choice to leave it to the courts or default to another tribunal.

The consequence is that if a tribunal was one that prior to *Tranchemontagne* had authority to deal with *Charter* questions, it equally has authority to deal with *Code* questions. Moreover, as the critical ruling of the Supreme Court in *Tranchemontagne* makes clear, an explicit statutory exclusion of the right to deal with constitutional questions does not include *Code* questions. For those tribunals for which such an exclusion exists, the determination will be whether, by reference to the *Martin* and *Tranchemontagne* criteria, this is a tribunal with the capacity to deal with questions of law in the course of the exercise of its jurisdiction.

When

Code questions can arise in the course of tribunal proceedings in a number of ways. The principal sources of *Code*-based claims are likely to be the following:

1. To deny the applicant what the applicant is seeking would violate the *Code* (as in *Tranchemontagne* itself);

2. To take this away from a person or to make this kind of order against a person would violate the *Code*; and

3. To give this to another person would constitute a violation of the *Code*.

Moreover, as Raj Anand made clear in the course of his presentation, questions may arise before a tribunal as to whether its operations are in compliance with the *Code*. For these purposes, operations will include, for example, issues of physical access as well as the procedural rules of the tribunal (such as those governing access to translation facilities).

On many occasions, the *Code* argument will be developed in the context of a statutory interpretation exercise or for the purposes of asserting that the provisions of the *Code* constitute a mandatory relevant consideration or imperative in the exercise of a statutory discretion. On other occasions, once again as in *Tranchemontagne*, the argument will be that a provision in the tribunal's constitutive statute conflicts with the provisions of the *Code* and must yield to the *Code* by reference to section 47(2), the paramountcy provision in the *Code*.

It is also of significance that the Ontario legislature has withdrawn the capacity to deal with *Charter* questions from very few tribunals. As a consequence of this and the

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[7] *Supra*, note 5, at para. 63.

frequent dual *Charter* and *Code* aspects to questions of discrimination, it is to be expected that, in many situations, the tribunal will be confronted with arguments based on both the *Charter* and the *Code*. Most commonly, the combination will be with section 15, the equality provision of the *Charter*. However, the dual aspect can also clearly arise in the context of section 7 and the freedoms (such as section 2(a), freedom of religion).

How

Presumably, in the wake of *Martin* and the realization that they may henceforth be obliged to deal with *Charter* questions, some Ontario tribunals have developed procedural rules and protocols for dealing with such questions when they arise in the course of their proceedings, particularly in cases involving challenges to the validity or applicability of provisions in their constitutive or other relevant statutes. To the extent that those procedures pass muster for the determination of *Charter* questions, it is almost certainly the case that they will also be appropriate for situations where *Code* questions arise.

This may even extend to cases that involve issues as to the duty to accommodate under the *Code*[8] given the rough equivalence that exists between the methodology for determining such issues and that for determining whether what would otherwise be a violation of the *Charter* is demonstrably justifiable in a free and democratic society in terms of section 1.

What about the duty to provide notice to and allow the participation of the Attorneys General of both Canada and Ontario in situations where constitutional questions arise?[9] Recollect that, in *Tranchemontagne*, the Supreme Court determined that questions as to the paramountcy of the *Code*'s provisions over the provisions in the tribunal's constitutive statute were not constitutional questions for the purposes of that constitutive statute's exclusion of the tribunal's capacity to deal with constitutional questions. I would venture to say that the collateral impact of that ruling also excludes such questions from the range of situations where the party asserting a claim has to provide the Attorneys General with notice of a constitutional question. However, even if that is so, I can also foresee situations where it would be appropriate and desirable for the tribunal to direct that notice still be given to at least the provincial Attorney General.

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8 See ss. 11(2) and 17(2).

9 *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 109(1), made applicable to proceedings before boards and tribunals by s. 109(6).