Workshop #3
The *Human Rights Code* and the *Charter*

Moderator: Caroline King, Landlord and Tenant Board
Speakers: Katherine Laird, Human Rights Tribunal of Ontario
Raj Anand, Weir Foulds, LLP
David Mullan, Integrity Commissioner, Toronto

Caroline King opened this session by identifying that the Supreme Court of Canada, in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 (CanLII) found that tribunals have a responsibility to administer the *Human Rights Code.* With this mandate, the SCC raised a concern about the potential for unevenness in decision-making and a lack of expertise in human rights issues. For this reason, it is important that tribunals become familiar with human rights law and the challenges that are faced when dealing with human rights issues.

Katherine Laird began the session by providing an overview of the basic principles of human rights law and discussing why it is important for all tribunals to be aware of human rights issues. The *Human Rights Code (*the *Code)* is the primary source for human rights law but is not the only source. Tribunals may also be asked to apply the *Charter*. Under *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 (CanLII), a tribunal that has the authority to decide questions of law, may presumptively go beyond their own statute to decide issues of statutory interpretation that arise in the proceedings properly before them, including the application of the *Charter* to those issues.

The general rule is that tribunals that can decide questions of law also have the authority to apply the *Charter* to interpret an issue properly before them under their own statute. The exception is where a tribunal is called upon to scrutinize a statutory provision for inconsistency with the *Charter*. To have jurisdiction to scrutinize a provision of their statute, the tribunal must have jurisdiction to decide questions of law relating to that specific provision. (*Martin, Tranchemontagne*)

The SCC in *Tranchemontagne* found that Ontario tribunals can and must apply the *Code* if it applies to a legal issue properly before the tribunal, unless their own statute specifically provides otherwise. In coming to this conclusion, the court relied on the *Code's* primacy clause and the fact that the Human Rights Tribunal was not given exclusive jurisdiction to apply the *Code.* When a tribunal applies the *Charter* and finds a provision is contrary, it does not declare it invalid, it simply does not apply the provision. The *Charter* trumps provincial legislation. However, when the *Code* is being applied by a tribunal, we are dealing with two pieces of provincial legislation. We must look to the constituent legislation, as the *Code* does not automatically trump. But the legislation sets out the primacy of the *Code* over other provincial legislation.

In *Tranchemontagne* the court found that the tribunal would in most cases be the most appropriate forum to deal with the human rights issue before it. If properly seized it would be rare for it not to be the right forum. The court was not swayed by factors such as expertise in human rights and found that the human rights issue being dealt with by the tribunal supports the laudable goal of bringing justice closer to the people.

Ms. Laird also talked about the fact that human rights decisions under the *Code* are influenced by the *Charter* and vice versa. As well, discrimination is defined in both laws. Discrimination does not have to be intentional, it can be direct or indirect/constructive. The definition of constructive discrimination is found in section 11 which says that constructive discrimination occurs when there is no discrimination on a prohibited ground on its face, but the act results in discrimination nonetheless. The *Code* goes on to say that we must look at whether there was a *bona fide* reason for the act that resulted in discrimination, whether there was a reasonable limitation. However a limitation cannot be found to be reasonable unless the needs of the affected group can be accommodated without undue hardship. Harassment is a course of vexatious conduct, reasonably known to be

unwelcome. Harassment is usually found where more than one incident has occurred, but there have been cases where the workplace was found to be poisoned from just one incident.

Ms. Laird spoke briefly about the changes that will occur with the new legislation. The key difference is that a complainant's claim will be made directly to the tribunal instead of going through the Commission. In turn, the Commission will take on a new role as champion of human rights. Currently the Commission has a neutral role in deciding whether to send a complaint to the Tribunal. The Commission now will advocate, intervene, and appoint investigators.

The question of undue hardship in accommodation was raised in discussion and Mr. Anand spoke of two main elements that are considered. Where the cost of the accommodation may threaten the economic viability or essential character of the business it will likely be found to be an undue hardship. The second element considered in undue hardship assessments is the potential for risk to health and safety of others potentially resulting form the accommodation.

David Mullan then addressed the human rights cases that are likely to arise in relation to tribunals and issue identification. Mr. Mullan emphasized that human rights law is complex, difficult and highly specialized and that all tribunals face human rights issues following *Tranchemontagne*. *Tranchemontagne* said clearly that a tribunal deciding a case properly before it could not default on dealing with a human rights issue also before it. The court gave a general mandate in *Martin* for tribunals to deal with *Charter* issues. *Tranchemontagne* expropriated that principle in finding that questions of law include both the *Charter* and the *Human Rights Code*. In fact the court found that there exists an almost irrebuttable presumption, an obligation for tribunals to take on human rights issues. The court went on to say that even if the constituent legislation does not say that the tribunal can decide questions of law, there is still a presumption that tribunals can decide human rights issues.

Mr. Mullan identified the kinds of arguments likely to be advanced under the *Code.* In *Tranchemontagne*, denial of benefits under the constituent legislation was found to be discriminatory. The court found that the constituent legislation had to defer to the *Code*. As a denial of benefits may amount to discrimination, so too can a decision that takes something away, as can an order made against an individual. Decisions made with respect to discrimination must be made referring to and in accordance with the *Charter* and the *Code*. This in itself limits the discretion of decision makers. Also, if there is a collision between the tribunal's constituent legislation and the *Charter* or the *Code,* the constituent legislation is trumped.

Mr. Mullan finished by talking about the need for tribunals to develop policies and procedures to deal with *Charter* and *Code* questions. After *Martin***,** many tribunals recognized that the decision effectively reversed other Supreme Court decisions and then moved to establish processes and procedures for dealing with *Charter* issues. If so, then the decision in *Tranchemontagne* should not be a problem for these tribunals as the processes for dealing with *Charter* and *Code* issues are similar. The justification found in section 1 of the *Charter* is similar to the principles of the duty to accommodate and undue hardship as set out in the *Code*.

Raj Anand spoke about the reality that many procedural issues for tribunals emerge as a result of the intersection of different legal regimes, of the *Code* and the *Charter* being superimposed on the tribunals' constituent statutes. As we are all carrying out services in one of the 5 social areas covered by the *Code,* we are likewise subject to it. And as government services, we are all covered by the *Charter*. Access to benefits controlled by tribunals and access to administrative justice in terms of the appeals that tribunals hear, both carry many possibilities for a *Tranchemontagne* analysis. Seemingly neutral criteria for defining access to justice, defining access to and denial of benefits, and for controlling access to practising a trade, may have adverse impacts that trigger complaints of discrimination.

Mr. Anand also talked about the choice of forum for deciding human rights complaints. The court was clear in *Tranchemontagne* that the choice of forum is that of the complainant. The complainant's concern is on an

individual level and it would be inappropriate to impose a public interest issue on them by moving the forum to the court system. The court also said that human rights are meaningless if they cannot be enforced at the tribunal that the complainant is forced to go to make application for these very benefits. Under the new legislation the tribunal has the authority to defer but not to dismiss a human rights matter. So if two fora are in play, the tribunal may defer the human rights matter until the other forum has appropriately dealt with the matter before it.

The Panel discussed some practical suggestions for dealing with issues related to the obligation of tribunals to deal with *Code* and *Charter* issues. Procedurally, it was said that we are masters in our own houses, that each tribunal will need procedures that deal with the *Code* and the *Charter* in their own arena. If a tribunal's procedure is challenged, it will raises questions such as: who should be a party to the proceeding; whether the Attorney General needs to be brought in; should a substantive decision be stayed pending the determination of the human rights issue; and should a proceeding be stayed pending an application of judicial review on a human rights issue.

Remedies and relief in human rights issues are varied according to the particular tribunal and may be forward looking. Orders that relate to damages may not be appropriate in these cases. Interpretation in accordance with the *Charter* and the *Code* is required when there is more than one interpretation possible. Legislation may be read down so as not to offend the *Code* or the *Charter*. A declaration about procedures or the legislation may be a more appropriate remedy than a substantive one. It is important to remember that the relief that is available must be in accordance with the constituent legislation.

After *Canada (Attorney General) v. Mossop* 1993 CanLII 164 SCC, the law on the standard of review for human rights matters is fairly clear; a standard of correctness is applied. However the standard in systemic discrimination, constructive discrimination and adverse impact criteria scenarios is less clear. Recent jurisprudence has found that different parts of a decision may be reviewed on different standards of review, and that includes human rights issues. While the law is still a standard of correctness for human rights issues, it may be possible to avoid the human rights issue if it can be decided for the claimant on other grounds.