

***The Future of Human Rights  
Institutions in Canada:***

Interdisciplinary and Interinstitutional  
Collaboration



# THE ONTARIO HUMAN RIGHTS COMMISSION AND THE FRAMEWORK FOR MAPPING AND ADDRESSING COMPETING HUMAN RIGHTS<sup>1</sup>

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## A. INTRODUCTION

The Ontario Human Rights Commission (OHRC) has been a leader in Canada and internationally in its efforts to address competing human rights through education and policy development. The OHRC released its *Policy on Competing Human Rights*<sup>3</sup> in April 2012, culminating a six-year program of research and consultation focused on detailing effective ways to address competing human rights claims. In general, competing human rights claims are situations in which legally codified human rights are claimed by two or more parties to a dispute, thus complicating the normal approach to resolving a human rights dispute where only one side claims a human right in relation to an alleged violator of

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1 This chapter draws in part on Shaheen Amzi, Lorne Foster, & Lesley Jacobs, eds, *Balancing Competing Human Rights Claims in Diverse Societies: Institutions, Policy, Principles* (Toronto: Irwin Law, 2012), especially the Introduction and Chapters 2 and 8.

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3 Ontario Human Rights Commission, *Policy on Competing Human Rights* (Toronto: OHRC, 2012) [OHRC, *Policy*], online: OHRC [www.ohrc.on.ca/sites/default/files/policy%20on%20competing%20human%20rights\\_accessible\\_2.pdf](http://www.ohrc.on.ca/sites/default/files/policy%20on%20competing%20human%20rights_accessible_2.pdf).

rights. This chapter is designed to both explain the OHRC's competing human rights and contextualize the role of the OHRC in the formulation of Canada's first competing rights policy. It stresses in particular the importance of social constructivism for making sense of how human rights policy in Canada is developed and implemented as a response to increasing diversity.

## **B. COMPETING HUMAN RIGHTS IN THE FACE OF DIVERSITY**

In the context of globalization, diversity has become an increasingly valued characteristic of contemporary societies. Diverse societies are viewed as remarkable for their variety in terms of religious practices, spoken languages, ethnicities, sexualities, and expressions of multiculturalisms. Such societies are said to allow for a measure of openness and adaptability that enable them to meet efficiently and effectively the ever changing needs and demands of a global economy.

Yet, as societies have embraced and indeed aspire towards diversity, certain challenges and tensions have become visible that were not fully anticipated. With increased diversity comes the ordeal of more visible conflicts between different beliefs about how people should best lead their lives and what sorts of accommodations should be made for persons with different beliefs out of respect for human dignity and mutual recognition. Competing human rights claims are one reflection of this ordeal.

Our point is that the practice of human rights has taken on increasing complexity in Canada and other diverse societies because more and more often around the world the claim to a right of one individual or group directly affects the claim to the human rights of another group. Such competing human rights claims can be played out in many places, from the classroom to workplaces, from the public square to the international stage, where ever individuals or groups actively claim the recognition of rights that may interfere with the access to rights of others.

Examples of these sorts of competing human rights should be familiar to all of us. Think about religious organizations that object on the grounds of the right to religious practice to prohibitions against discrimination against gays and lesbians or measures that promote the inclusion of women. Imagine, for example, a barber who refuses to cut

the hair of a woman as a matter of religious conscience or a pharmacist who refuses to dispense birth control for similar reasons. The rights of parents to excuse their children from exposure to topics like world religions or evolutionary biology in schools provide other examples. Imagine likewise a situation where an individual with a Seeing Eye dog seeks to enter the taxi of a driver who is allergic to dog hair. The rights of one person with a disability are here in competition with the rights of someone else with a different sort of disability. The rights of individuals to wear certain types of religious dress or carry symbolic weapons in public places such as schools or courts compete with the rights of others to security or a fair trial. Claims from immigrant groups to be protected from expressions of racism or hate can compete with the rights of journalists or academics to express critical or controversial views about immigration policy or practices.

Recognition that human rights claims can come into conflict or be in competition with each other is not new. Among rights theorists, the potential for conflict between rights claims has been an important theme in philosophical debates throughout the twentieth century. But the conflict was conceived of in a particular way, that is to say, between the right to liberty and the right to equality, or the right to private property and the right to equality. These debates yielded innovative approaches to thinking about these conflicts. Some philosophers such as John Rawls<sup>4</sup> argued that in the case of conflicts, some rights to basic liberties should have lexical priority over others. Legal theorist Ronald Dworkin<sup>5</sup> argued on the contrary that equality should always have priority. Others argued that these conflicts should be resolved in favour of a calculation about what rights serves the greatest overall good for society.<sup>6</sup> Others still such as Isaiah Berlin<sup>7</sup> believed that there is no single principle for resolving conflicting rights claims and that we should draw on our intuitions in particular instances to decide what to do.

Competing human rights claims in diverse societies are, in our view, not best thought of abstractly in terms of a conflict between the demands of equality and liberty but rather as arising from different beliefs about

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4 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

5 Ronald Dworkin, *Taking Rights Seriously, New Edition* (Cambridge, MA: Harvard University Press, 1977).

6 LW Sumner, *The Moral Foundation of Rights* (Oxford: Oxford University Press, 1987).

7 Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969).

how people should best lead their lives and what sorts of accommodations should be made for persons with different beliefs out of respect for human dignity and mutual recognition. These sorts of differences are not new but in diverse societies people with these differences live together in close proximity, which brings the possibilities for conflicts and competing human rights claims to the forefront.

Unlike the conflict between equality and liberty, balancing or reconciling competing human rights claims in diverse societies has received scant systematic academic attention nor has it been the site for significant policy development and innovation. Instead, until recently, the popular media and the courts have been the major sites for discussing how to balance competing human rights claims in diverse societies. Those discussions have rarely been careful nor probed deeply into what it means for human rights claims to be in competition nor how best to balance them in a diverse society.

### C. SOCIAL CONSTRUCTIONIST MAPPING OF COMPETING HUMAN RIGHTS

The institutions at the core of the Canadian human rights system — the courts and human rights commissions — are currently struggling to respond to the challenges presented by competing human rights claims in Canada. These challenges for human rights commissions in particular are multi-dimensional, involving deep philosophical questions about the nature of human rights, juridical questions about how cases involving competing human rights should be judged and decided, and policy questions about how in principle and practice issues involving competing human rights should be framed and approached in Canadian society.

Human rights commissions in Canada assume a *social constructionist* engagement with human rights. In our view, social constructivism is integral for making sense of how Canadian human rights commissions are mapping the phenomena of competing human rights claims that arise from diversity and the vision of inclusive citizenship that underpins how they address this phenomena. Social constructionism is a sociological theory of knowledge that considers how social phenomena develop in social contexts, and seeks to explore rigorously the nuances, contingencies, contestations, and meanings that are part and parcel of

the social construction of reality. Within constructionist thought, rights are considered as a construct or “artifact” that is dependent on contingent variables of our social selves. There is now a substantive body of literature examining various aspects of the social practice of human rights. Here, rights are not simply given as divine will, or as transhistorical being, or as universal ontology — but are considered products of human social interaction with all its imbalances and imperfections. From this perspective, human rights are invariably the product of the balance of power between normatively-oriented social actors in social-historical context. Practically, human rights commissions in Canada and the codes that guide them are all the products of legislation. They are, in other words, the outcome of political processes, not idealized instruments of social justice.

The idea of the “universality” of rights, argued Malcolm Waters, “is itself a human construct.”<sup>8</sup> The social constructionist approach examines what actors’ actually do with human rights in everyday life, in institutional settings, and in other specific fields of political contestation. In developing a framework for understanding the social construction of rights, research has begun a move toward foreclosing on the age-old philosophical and ontological status debates, and focusing on the investigation of their meaning, use, and mobilization. Moreover, by declaring an interest in the “indeterminacy” of rights, social constructionist research is well placed to investigate the shifting dynamics of rights disputes, or *competing human rights claims*, which are becoming increasingly prevalent in our transnational and diverse world. By investigating the social relationships, practices, and struggles that mobilize rights claims and rights talk, and animate rights disputes, the social constructionist approach can “bracket” the prevailing dominant discourses and provide a more dynamic and textured understanding of rights.

From a social constructionist perspective, human rights claims should be seen as the product of a particular place and time, and in this respect historically and socially contingent. This observation is significant in a number of ways. First, rights are not simply inalienable or natural; and they are not necessarily beneficial for the right holder to exercise. Second, human rights were invented in the modern age both as a product of the exercise of a particular type of political power and as

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8 Malcolm Waters, “Human Rights and the Universalisation of Interests: Towards a Social Constructionist Approach” (1996) 30:3 *Sociology* 593 at 593.

a response to a particular form of power.<sup>9</sup> Contrary to Lockean political philosophy, “rights” and “freedom” were not in existence before “power,” but rather are the distinctive products of the “new mode of life” that is modern global capitalism.<sup>10</sup> They have a paradoxical nature in that they allow us to challenge inequalities whilst contributing to the production of social divisions. Third, although human rights typically find expression in law, they have a life in society outside the law and do not rely solely on the juridical sphere to dictate their meaning. For this reason, the doctrine of human rights can go beyond law and form a fundamental moral basis for regulating contemporary social order.

Viewed through the lens of a social constructionist perspective, competing rights in Canada are best understood as a product of broad structural factors related to the imbalance of power between marginalized and dominant cultures. The tensions between the power, beliefs, norms, and values of marginalized minorities and the dominant majority culture in Canada act as push and pull factors that continue to increasingly challenge Canada’s human rights regime along national and international lines, and in terms of legislative and public policy safeguards. For instance, allegations of competing human rights scenarios in which legally codified human rights are claimed by two or more parties to a dispute have been identified in Ontario’s new competing human rights policy to include:<sup>11</sup>

- *Code right v Code right*: For example, a blind college professor’s guide dog is affecting one of her students who has a severe allergy to dogs. Both individuals might make *Code* based human rights claims on the ground of “disability.”
- *Code right v Code/legal defence*: For example, a religious organization, providing supportive group living to persons with disabilities of any denomination, requires staff to abide by a religious code of behaviour and dismisses a support worker once it becomes aware she was in a same-sex relationship. The dismissed worker might claim *Code*-based discrimination on the ground of sexual orientation

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9 See Lynn Hunt, *Inventing Human Rights* (New York: WW Norton, 2007).

10 Anthony Woodiwiss, *Human Rights* (New York: Routledge, 2005) at 32.

11 See OHRC, *Policy*, above note 3. In the following, *Code* refers to the Ontario *Human Rights Code*, RSO 1990, c H.19 and *Charter* refers to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

while the religious organization might claim a *Code* defence that allows restrictions on terms of employment for religious and other fraternal types of organizations with conditions.

- *Code* right v other legislated right: For example, school curriculum: Some parents want the Ministry of Education to modify sex education curriculum so as not to interfere with their beliefs; some for religious-based reasons, some for personal reasons. Other parents support the new curriculum changes; some based on the *Code* ground of family status and sexual orientation. Others want the new curriculum based on the legislated right to public education. Parents opposed to some types of sex education because of their beliefs might claim *Code*-based discrimination on the ground of creed. Other parents might claim a *Code* right based on family status, sexual orientation, and a legislated right to the curriculum based on the broader purpose and requirements of the *Education Act*.<sup>12</sup>
- *Code* right v *Charter* right: For example, a Muslim woman observes the niqab (a face veil) and is required to act as a witness against an accused in a court. The woman might claim a right to accommodation of religious observance based on the *Code* ground of creed while the accused might claim the right to observe the woman's face while she provides witness in the court based on *Charter* rights to full answer and defence.
- *Code* right v common law right: For example, a Jewish family is asked to remove a temporary sukkah hut placed on their balcony for religious celebration because it does not comply with the condominium's bylaws and is interfering with the neighbours' enjoyment of their balcony. The Jewish family might claim *Code*-based discrimination on the ground of creed while the condominium might claim a right to peaceful enjoyment of property for its members based on both common law and Ontario's *Residential Tenancies Act*.<sup>13</sup>
- International treaty right v *Code/Charter* defence: For example, non-Catholic religious school users claim a right to non-discriminatory religious school funding based on provisions of the United Nations

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12 RSO 1990, c E.2.

13 SO 2006, c 17.

*International Covenant on Economic, Social and Civil Rights*.<sup>14</sup> The UN treaty body responsible for the Covenant found that Ontario's public funding of the Catholic school system to the exclusion of all other religions to be discriminatory. The government claimed provisions of the *Education Act*, an exemption in the *Code*, the *Charter*, and related caselaw in its defence.

- *Charter right v Charter right*: For example, an accuser in a sexual harassment criminal proceeding wishes to testify wearing her Niqab in accordance with her section 15 *Charter* religious equality rights. The accused claims this would violate his section 7 *Charter* right to make full answer and defence. Both sides claim *Charter* rights.

This social constructivist mapping of competing human rights claims in Ontario open up possibilities to expand the protections of the *Code*, address new and emerging human rights issues and trends, incorporate international perspectives on human rights, and provide a broad understanding of the social and economic aspects of human rights. Fundamentally, this mapping exercise is designed to provide clear policy direction in new unexplored areas or in areas of ambiguity for a wide variety of citizens concerned with competing human rights claims.

## D. SOCIAL CITIZENSHIP AND HUMAN RIGHTS CLAIMS

Although in diverse societies there is a high degree of fragmentation and potential for conflict, members of these societies share a common citizenship.<sup>15</sup> Citizenship means, for our purposes, "the collection of public claims and duties bestowed on people by the political order."<sup>16</sup> Social citizenship is at base a form of community membership, as opposed to a legal status bestowed by state. (On this definition even undocumented immigrants or unsuccessful refugee applicants are social citizens.) From a social constructivist perspective, the public claims and duties that define citizenship are not changeless but rather socially

14 16 December 1966, 993 UNTS 3, 6 ILM 368 (entered into force 3 January 1976).

15 Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1996).

16 Lawrence Mead, "Citizenship and Social Policy: TH Marshall and Poverty" (1997) 14(2) *Social Philosophy and Policy* 197 at 198.

contingent. In countries like Canada, the public is more than just the state; there is no doubt that the public nature of the claims and duties of citizenship regulate the relations between citizens. In other words, shared citizenship defines in part what we owe each other.

Human rights in a society that values and aspires to diversity should be, in our view, a constitutive component of full citizenship and standing on human rights claims is an expression of that shared citizenship. In a social constructionist ideal world, social actors go through human rights discourses to get to citizenship. In this ideal world, the mutual recognition of others as human rights bearers is a function of shared citizenship, which shifts the terms of debate from the problems of balancing or reconciling competing human rights claims to their democratic citizenship potential. Here, competitive practice and conflicting rights claims at the individual and collective level are conceived as disciplinary threads in weaving the social fabric of a fulsome and expanded “social citizenship.” This social ideal is an emergent reality that extends the meaning of citizenship rights beyond conventional notions of legal and political equality to encompass rights of inclusion. These social citizenship rights of inclusion refer to guarantees of equal opportunity, equity, and non-discrimination for socially disadvantaged groups, such as women, Aboriginal peoples, and other people of colour, to participate fully in the public as well as economic life and to expect a reasonable level of respect and recognition from others. In this ideal social constructivist world, the task of state and institutional social actors, the courts, and human rights commissions is to increase the access points to justice. Shared citizenship provides, in other words, the context for these actors to advance competing human rights claims against each other and the state.

This idea that shared citizenship frames competing human rights claims differs from how too often parties in these disputes as well as the media and other interpretative communities frame competing human rights. Rather than identify shared citizenship, these conflicts are framed often in terms of the rights of “others.” “Others” are precisely not people with whom we share anything other than perhaps a common humanity. This language of the rights of others is exemplified in the cases of the human rights claims of refugees or recent immigrants.<sup>17</sup> And the most often cited examples of disputes involving competing human

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17 Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004).

rights claims in Canada revolve around immigrants or refugees with their “foreign” cultural practices. Framed in terms of the rights of others, there is unfortunately little promise of striking a fair balance between competing human rights claims, for there is no common ground. Framing these disputes instead as ones involving parties who share a social citizenship means that there is some common ground between them, for citizenship defines in part what the parties owe each other. What do these parties owe each other? At minimum, they owe each other mutual respect and recognition, which is in most cases enough to sway the parties to join a process where the competing human rights claims are balanced against each other.

The modern concept of citizenship, as we noted, entails recognition of a full and inclusive membership in society. The extent of this membership is the outcome of political contestation. Following World War II, the British sociologist TH Marshall offered an important analysis of citizenship that concerns the content of mutual recognition and empowerment and how they may be realized in the context of market-based inequalities.<sup>18</sup> Marshall divided citizenship into three elements: civil, political, and social. Civil rights include “liberty of person, freedom of speech, thought and faith, the right to own property . . . and the right to justice.” Political rights for Marshall included the right to vote and the right to run for political office. The institutions he associated most closely with these first two elements were the courts and Parliament.<sup>19</sup> But Marshall was also concerned with social rights — “the right to a modicum of economic welfare and security . . . according to the standards prevailing in society” — and he viewed the welfare state as the institutional mechanism for the distribution of these rights.<sup>20</sup> Through the welfare state, provisions are made for public education, universal health care, and public housing and income security programs. Thus, social rights make possible a fuller expression of citizenship for those groups who would be disadvantaged in terms of resources and power and, hence, would suffer most acutely from insecurities generated by a market economy. Without the provision of social rights, gross inequalities would

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18 See TH Marshall, “Citizenship and Social Class” in TH Marshall & Tom Bottomore, eds, *Citizenship and Class* (London: Pluto Press, 1991) 18 [Marshall].

19 *Ibid* at 8.

20 *Ibid*.

undermine the equality of political and civil rights inherent in the idea of citizenship.<sup>21</sup>

Marshall's argument for social citizenship can be read as a dynamic account of the social-historical development of citizenship in Western society, and as a relentless struggle between the extension of political equality and social rights on the one hand, and the capitalist market and social class on the other hand.<sup>22</sup> In this account, civil citizenship becomes the arena for this struggle with each side trying to limit the reach of the other by defining the scope of civil rights in terms favourable to its side. And this struggle is then deflected back into the political arena. That is, Marshall provides a picture of a dynamic struggle in which the proponents of the market are continually seeking to reign in the spread of social rights by redefining civil protections in individualist terms while seeking to confine political equality to the sphere of the state. The proponents of social citizenship, by contrast, are seeking to expand not just a steadily higher level of social services rendering money income less relevant, but more significantly, forging within civil society a sphere of "citizenship" that complements political citizenship in the state. Thus the struggle for social rights against the market and social class becomes a struggle for the very definition of civil society itself.<sup>23</sup>

In Marshall's view, through this historical struggle of equity-seeking groups, the meaning of citizenship rights in capitalist societies have been expanded beyond formal legal and political equality to encompass social equality rights, including the right to a minimum level of economic security and social welfare assured by the state. Here is contained Marshall's notion of an emergent universal dictate that all members of the political community ought to have a fundamental claim to certain social services and programs such as food security, health care, education, unemployment insurance, environmental safety, and so on. The degree of universality of these reforms is the degree to which the concept has been realized. Social citizenship implies an equality of status in

21 Ruth Lister, *Citizenship: Feminist Perspectives* (London: MacMillian Press, 1997).

22 Peter Breiner, "Is Social Citizenship Really Outdated? TH Marshall Revisited" (Paper delivered at the annual meeting of the Western Political Science Association, Hyatt Regency Albuquerque, Albuquerque, New Mexico, 17 March 2006), online: All Academic Research [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/9/7/5/7/pages97572/p97572-1.php](http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/9/7/5/7/pages97572/p97572-1.php).

23 *Ibid.*

the social realm, in the same way that contemporary or prevailing versions of citizenship denotes equality in the political realm: just as there is universal enfranchisement, there ought to be universal entitlement to certain social security guarantees within civil society and the contemporary global order.

The dynamic vision we are advancing sees shared social citizenship being extended from a form of membership that is a response to the challenges of class inequality in a capitalist economy to one that addresses the challenges of increased diversity in Canadian society. Human rights institutions grounded on shared citizenship are invaluable for the recognition, protection, and promotion of rights of inclusion and developing policy for balancing competing human rights claims that arise from that diversity.

## **E. THE NEW MANDATE OF THE ONTARIO HUMAN RIGHTS COMMISSION**

The Ontario Human Rights Commission (OHRC) developed their new policy on competing human rights claims in the wake of historic changes in its role and mandate. The fact that the role and mandate of the OHRC has been reinvented<sup>24</sup> enforces our point above that its actions can be best understood in terms of social constructivism. Until July 2008, the OHRC mandate included the responsibility to take and process human rights complaints. This included mediation, investigation, and referral of complaints to the Ontario Human Rights Tribunal (OHRT) and litigation of complaints before the OHRT and the courts. Changes to the *Code* in 2008 resulted in the responsibility for processing complaints being passed to the OHRT, providing the public with direct access to a formal hearing, and leaving the OHRC to focus on the promotion of human rights. Promotion methods include: establishing human rights policy, conducting research and inquiry, intervening in legal proceedings, and providing public education. The OHRC is the only human rights commission in Canada that no longer receives and processes human rights complaints.<sup>25</sup>

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24 *Human Rights Code Amendment Act*, SO 2006, c 30 [HRC Amendment Act].

25 Andrew Pinto, Ontario Human Rights Commission, *Report of the Ontario Human Rights Review 2012* (Toronto: Ministry of the Attorney General of

The establishment of a direct access to the OHRT combined with relieving the OHRC of its historical compliance and enforcement functions is consistent with the current forces of neoliberalism and the trend toward downloading responsibility for anti-discrimination and social justice from the state to the individual. It is now well established that “the politics of neoliberalism”<sup>26</sup> in the age of the global economy involves “processes of privatization” which act to shift the construction of the public and private spheres and (re)conceive state and citizen duties accordingly.<sup>27</sup> In an attempt to transform all forms of state intervention into market functions, that which was once considered a public responsibility of the state is now constructed as the responsibility of individual citizens, under the auspice of the privatization of justice.

Hence, many critics have charged Ontario’s *direct access* human rights system with off-loading of the public mandate to combat discrimination onto the marginalized minority communities who are the usual victims of human rights violations and the under-resourced not-for-profit sector in the area of legal supports. In this regard, it has been recently observed<sup>28</sup> that while the new legislation promised speedy tribunal hearings and free access to lawyers for every Ontarian, in reality the tribunal system is based on a “stage-by-stage approach to litigation and case management” that has been far from expeditious, free, and all-inclusive, and is often financially prohibitive and bureaucratically daunting for claimants from vulnerable minority groups. Financial

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Ontario, 2012) [Pinto Report], online: Ministry of the Attorney General [www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human\\_rights/Pinto\\_human\\_rights\\_report\\_2012-ENG.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/Pinto_human_rights_report_2012-ENG.pdf).

26 See Fiona MacDonald, “(Re)conceiving Citizenship: the Welfare-Multiculturalism Dynamic” (Paper delivered at the Annual Meeting of the American Political Science Association, University of Manitoba, 30 August–2 September 2007).

27 Paul Starr, “The Meaning of Privatization” in Sheila Kamerman & Alfred Kahn, eds, *Privatization and the Welfare State* (Princeton: Princeton University Press, 1989).

28 See, for example, Neil Stammers, “Social Movements and the Social Construction of Human Rights” (1999) 21:4 *Hum Rts Q* 980; Ken Plummer, “Rights Work: Constructing Lesbian, Gay and Sexual Rights in Late Modern Times” in Lydia Morris, ed, *Rights: Sociological Perspectives* (New York: Routledge, 2006); Lydia Morris, ed, *Rights: Sociological Perspectives*, *ibid*; Bryan S Turner, *Vulnerability and Human Rights* (University Park, PA: The Pennsylvania State University Press, 2006); Mark Goodale & Sally Engle Merry, *The Practice of Human Rights: Tracking Law Between the Global and Local* (Cambridge, NY: Cambridge University Press, 2007).

support for claims brought forward is reassessed at every stage in the process. Here, the progressive privatization of the complaint carriage is actually a challenge to access, absent to power imbalances between parties, and represents a distinct move away from the progressive formalization of human rights complaints.

Meanwhile, there seems to be growing evidence (distinguished by the dearth of public interest cases brought forward by the Commission to date) that decoupling of the individual complaint from the other commission functions results in undermining public interest goals by encouraging a privatized view of wrongs (which impact not only the individual, but also the social environment and the public atmosphere more broadly). Most importantly, there seems to be clear evidence today that those equity-seeking minorities that are most impacted by the human rights system have the least influence on its development and direction. The preponderance of white people in the new system seems troubling. It seems most senior decision-maker positions in the new system are held by white people; it also seems that appointments in the new system fail to represent the people they are expected to serve — ergo, this accounts for it being dubbed by some as “The Human Whites System.”<sup>29</sup>

These historic changes have surprisingly also presented the OHRC with some new opportunities to be innovative and take on a leadership role on emerging human rights issues in Canada.<sup>30</sup> The redrawing of the administrative boundaries of the human rights system in Ontario has by coincidence allowed the OHRC to consolidate its own organizational energies and gain an agility and dexterity in its human rights promotion and public education role that it formerly did not have. The new challenge of the Commission living under reduced circumstances has also afforded a unique opportunity to refine current promotional methods and policy instruments, and ensure that they are responding to today’s problems.

Comprehending the history of human rights protection in Ontario through the lens of social constructivism provides a fruitful vocabulary

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29 See Accessibility for Ontarians with Disabilities Act Alliance, *Supplemental Brief To The Andrew Pinto Ontario Human Rights Code Review* (Toronto: AODA, 2012), online: AODA [www.aodaalliance.org/strong-effective-aoda/04122012.asp](http://www.aodaalliance.org/strong-effective-aoda/04122012.asp); African Canadian Legal Clinic, *Written Submissions to the Ontario Human Rights Review* (Toronto: ACLC, 2012); Federation of Asian Canadian Lawyers, *FACL Submissions: Ontario Human Rights Review 2011–2012* (Toronto: FACL, 2012).

30 Pinto Report, above note 25.

for situating the new role of the OHRC. In more concrete terms, this approach to competing human rights claims can be shown to fit well with the new mandate of the OHRC given by the 2006 *HRC Amendment Act*.<sup>31</sup> The new mandate requires the Commission to bridge the gap between public policy and justice administration. Thereby, the Commission is now responsible for developing public policy as well as addressing tension and conflict in the province, in order to bring people and communities together to help resolve differences. This new mandate bestows the unique capacity to address multi-faceted social issues with a broad range of processes — those both rule and policy-based, and those left to discretionary decision makers.

Section 30 of the *Code* authorizes the OHRC to prepare, approve, and publish human rights policies and to provide guidance on interpreting its provisions. The power to develop policies is part of the OHRC's broader responsibility under section 29 to promote, protect, and advance respect for human rights in Ontario, to protect the public interest, and to eliminate discriminatory practices. Section 45.5 of the *Code* states that the OHRT may consider policies approved by the OHRC in its proceedings. Where a party or an intervenor in a proceeding requests it, the OHRT shall consider an OHRC policy. Where an OHRC policy is relevant to the subject matter of a human rights application, parties and intervenors are encouraged to bring the policy to the OHRT's attention for consideration. Section 45.6 of the *Code* states that if a final decision or order of the OHRT is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to have the OHRT state a case to the Divisional Court to address this inconsistency.

Although OHRC policies and guidelines are not binding on the OHRT or on courts, they are often given great deference and applied to the facts of human rights cases before courts or tribunals, and are quoted in the decisions of these bodies. In addition, the OHRC's policies contain practical guidance relevant to the everyday lives of Ontarians. They aim to influence social behaviour to prevent human rights violations before they occur and to promote social change. They set standards for how individuals, employers, housing providers, service providers, and policy makers should act to ensure compliance with the *Code*. OHRC policies are widely used as a source of guidance by those responsible for applying the *Code*, such as lawyers, unions, human resource managers, and

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31 *HRC Amendment Act*, above note 24.

others. They are perceived as useful and instructive because they respond to day-to-day human rights issues.

The OHRC has become a leader in the development of human rights policy in the country. There are currently twenty-one Commission-approved policies that are accessible through the OHRC's website.<sup>32</sup> The first of these was the *Policy on Height and Weight Requirements*,<sup>33</sup> which was released in 1996. One of the most recent is the *Policy on Human Rights and Rental Housing*<sup>34</sup> released in 2009. These policies range in style from short, focused policy positions on issues such as drug and alcohol testing,<sup>35</sup> to comprehensive and detailed policy documents addressing multiple issues and positions related to major *Code* grounds like "race" or "disability," or significant social areas such as "employment."<sup>36</sup> These more substantive policies typically contain sections on historical, legal, and social context, linguistic and conceptual clarification, identification of specific types of discrimination, and detailing of best practices and approaches to addressing these types of discrimination. The most widely used OHRC policies such as the *Policy and Guidelines on Disability and the Duty to Accommodate*<sup>37</sup> (2000), the *Policy and Guidelines on Racism*

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32 "Policies and guidelines," online: OHRC [www.ohrc.on.ca/en/our\\_work/policies\\_guidelines](http://www.ohrc.on.ca/en/our_work/policies_guidelines).

33 Ontario Human Rights Commission, *Policy on Height and Weight Requirements* (Toronto: OHRC, 1996), online: OHRC [www.ohrc.on.ca/sites/default/files/attachments/Policy\\_on\\_height\\_and\\_weight\\_requirements.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Policy_on_height_and_weight_requirements.pdf).

34 Ontario Human Rights Commission, *Policy on Human Rights and Rental Housing* (Toronto: OHRC, 2009), online OHRC [www.ohrc.on.ca/sites/default/files/attachments/Policy\\_on\\_human\\_rights\\_and\\_rental\\_housing.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Policy_on_human_rights_and_rental_housing.pdf).

35 See, for example, Ontario Human Rights Commission, *Policy on Drug and Alcohol Testing* (Toronto: OHRC, 2000), online: OHRC [www.ohrc.on.ca/sites/default/files/attachments/Policy\\_on\\_drug\\_and\\_alcohol\\_testing.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Policy_on_drug_and_alcohol_testing.pdf).

36 See, for example, Ontario Human Rights Commission, *Policy on Employment-Related Medical Information* (Toronto: OHRC, 1996), online: OHRC [www.ohrc.on.ca/sites/default/files/attachments/Policy\\_on\\_employment-related\\_medical\\_information.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Policy_on_employment-related_medical_information.pdf).

37 Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: OHRC, 2000), online: OHRC [www.ohrc.on.ca/sites/default/files/attachments/Policy\\_and\\_guidelines\\_on\\_disability\\_and\\_the\\_duty\\_to\\_accommodate.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_disability_and_the_duty_to_accommodate.pdf).

and *Racial Discrimination*<sup>38</sup> (2005), and *Human Rights at Work*<sup>39</sup> (2008) are more substantive in nature.

Under the mandate of the new *HRC Amendment Act*,<sup>40</sup> the OHRC is responsible for monitoring the state of human rights and report directly to the people of Ontario. It has been given the power to:

- expand its work in promoting a culture of human rights in the province;
- conduct public inquiries;
- initiate our own applications (formerly called “complaints”);
- intervene in proceedings at the HRTO; and
- focus on engaging in proactive measures to prevent discrimination using public education, policy development, research, and analysis.

The interpretive principles governing the *Code* have been left to the courts and tribunals. But the new mandate shifts the institutional focus of the OHRC from a more legalistic to a more social policy approach. In the words of the Attorney General of Ontario,

the Ontario Human Rights Commission works to promote, protect and advance human rights. Its main focus is to address the root causes of discrimination. Activities include research and monitoring, policy development, and education and training. The Commission also conducts human rights inquiries and may initiate human rights applications or intervene in important cases before the Tribunal. Through outreach, cooperation and partnership the Commission aims to advance Ontario’s human rights culture.<sup>41</sup>

In the old human rights structure, the issues of Commission gate-keeping and delay certainly reveal the limitations of the system. The challenge for the new Commission is affecting social policy by bringing

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38 Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination* (Toronto: OHRC, 2005), online: OHRC [www.ohrc.on.ca/sites/default/files/attachments/Policy\\_and\\_guidelines\\_on\\_racism\\_and\\_racial\\_discrimination.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_racism_and_racial_discrimination.pdf).

39 Ontario Human Rights Commission, *Human Rights at Work 2008*, 3d ed (Toronto: OHRC, 2008), online: OHRC [www.ohrc.on.ca/en/human-rights-work-2008-third-edition](http://www.ohrc.on.ca/en/human-rights-work-2008-third-edition).

40 Above note 24.

41 Ministry of the Attorney General of Ontario, *Human Rights in Ontario* (Toronto: Ministry of the Attorney General, 2008), online: Ministry of the Attorney General [www.attorneygeneral.jus.gov.on.ca/english/news/2008/20080630-ohrc-brochure-en.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/news/2008/20080630-ohrc-brochure-en.pdf).

people and communities together to help resolve differences, while being at risk of becoming an object of the tension and conflict they seek to resolve. Yet it must be said that, as sophisticated articulations of constitutionally-protected rights emanate from the courts and laypersons perceive a broad spectrum of wrong treatment as at least potentially actionable discrimination or harassment, the commission system cannot be expected to bear the full weight of responsibility for achieving anti-discrimination social goals. Rosanna Langer<sup>42</sup> has argued that government-sponsored anti-discrimination enforcement must be situated within a broader set of common practices such as municipal accessibility plans, for example those stipulated under the *Accessibility for Ontarians with Disabilities Act*,<sup>43</sup> progressive employment legislation, in-house corporate and employer anti-discrimination and anti-harassment “best practices,” and community-based educational initiatives. The new mandate of the OHRC can constructively be situated within a broader human rights system grounded in the belief that a healthy network of anti-discrimination practices is the best insurance of a vital normative fabric of human rights protections.

Meanwhile, the pragmatism of seeking social policy solutions, as opposed to judicial ones, fits comfortably within the new mandate of the OHRC. Its new flexibility can also mean increasing the range and repertoire of remedies for fulfilling social justice goals. This includes, and also opens up, the possibility of incorporating Alternative Dispute Resolution (ADR) and “win-win approaches,” rights-based mediation, and the collaborative problem-solving techniques that integrate practical experience with theoretical knowledge.

ADR, for example, has experienced increasing acceptance and utilization primarily because of a perception of greater flexibility, costs below those of traditional litigation, and speedy resolution of disputes. In recent years there has been more discussion about taking a systems approach in order to offer different kinds of options to people who are in conflict, and to foster appropriate and effective dispute resolution. Some cases and some complaints are viewed to be appropriate for formal grievance or to court or to the police or to a tribunal and the like. Other

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42 Rosanna Langer, “Publics and Counter-Publics: Exploring the Contested Nature of the Public Interest in Domestic Human Rights Administration” in *Symposium Proceedings, Values, Ethics and the Public Sector: How to Serve the Public Interest?* (Ottawa: St. Paul University Centre for Ethics, 2006).

43 SO 2005, c 11.

conflicts could be settled by the parties if they had enough support and coaching, and yet other cases need third-party mediation or arbitration. Thus alternative dispute resolution usually means a method that is not the courts, and involves processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. Dispute resolution considers all the possible responsible options for conflict resolution that are relevant for a given issue. There is indeed serious consideration of making mediation mandatory for all complaints brought to the OHRT.<sup>44</sup>

Ultimately, the social justice mandate of the OHRC is configured by the assurance of neutral (non-advocate, non-adversarial) communicative interactions, which open up the possibility for contextual problem solving for the mutual empowerment of human rights bearers. In this world, access to justice ought not to require formal processes for its assurance. The ideal OHRC would be responsible for engaging the public interest goals in anti-discrimination beyond a formulaic rigidity of law, by broadening the constellation of remedies, and preventing the premature legalization of individual and social harms.

## F. THE OHRC'S 2012 POLICY ON COMPETING HUMAN RIGHTS

At the core of the OHRC's new policy on competing human rights<sup>45</sup> is a multi-step approach for balancing competing rights claims. Development of the policy in effect involved identifying possible types of competing rights claims and then mapping out a process for approaching different scenarios. These scenarios derive from human rights principles, Canadian and international caselaw, research in the social sciences, and input from community organizations and other stakeholders. The policy framework is summarized in the table below, which identifies three stages and five steps in the OHRC process for recognizing and reconciling competing human rights claims.

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44 Pinto Report, above note 25.

45 OHRC, *Policy*, above note 3.

## **PROCESS FOR ADDRESSING COMPETING HUMAN RIGHTS SITUATIONS**

### **Stage One: Recognizing competing rights claims**

Step 1: What are the claims about?

Step 2: Do claims connect to legitimate rights?

(a) Do claims involve individuals or groups rather than operational interests?

(b) Do claims connect to human rights, other legal entitlements or bona fide reasonable interests?

(c) Do claims fall within the scope of the right when defined in context?

Step 3: Do claims amount to more than minimal interference with rights?

### **Stage Two: Reconciling competing rights claims?**

Step 4: Is there a solution that allows enjoyment of each right?

Step 5: If not, is there a “next best” solution?

### **Stage Three: Making decisions**

- Decisions must be consistent with human rights and other laws, court decisions, human rights principles, and have regard for OHRC policy.
- At least one claim must fall under the Ontario Human Rights Code to be actionable at the Human Rights Tribunal of Ontario.

This policy framework is designed to guide organizations facing competing human rights claims such as schools and workplaces. It is intended to provide those facing competing claims with a step-by-step process for moving forward. It is also designed to inform decision making by the OHRT when it addresses applications that involve competing human rights claims.

## G. MAKING SENSE OF THE COMPETING HUMAN RIGHTS POLICY

Under section 29 of the *Code*, the OHRC has been designated the broad responsibility to promote, protect, and advance respect for human rights in Ontario, to protect the public interest, and to eliminate discriminatory practices. As we noted above, section 30 authorizes the OHRC to prepare, approve, and publish human rights policies to provide guidance on interpreting its provisions. These powers to both promote a culture of human rights and develop anti-discrimination policy do not “beef-up” the province’s human rights administration system so much as simplify its focus making it less cumbersome organizationally than the old enforcement and compliance model, and potentially more responsive in addressing an increasingly diverse population and more complex rights scenarios. The new discrimination prevention model provides the necessary administrative space from which to undertake more robust and progressive intervention into the ever-increasing intricacies of modern rights claims and growing intractability of rights conflicts and disputes.

In a discrimination prevention model, the OHRC can assume a role as the instrument of the positive state, facilitating the realization of human potential by developing human rights policies that provide cutting-edge and innovative interpretations of human rights law, opening up possibilities for expanding the protections of the *Code* in order to address new and emerging human rights issues and trends, incorporating international understandings of human rights, and breaking down social and economic barriers to the exercise of positive freedom. In this regard, the discrimination prevention model should be understood as an authorization to deal in areas of new and more inclusive citizenship. The OHRC’s role in dealing with “tension and conflict” and bringing people and communities together to help resolve differences recommends a foundation for mutual recognition and empowerment of human rights claimants, consistent with the remedial objectives of the *Code*. This model has to have the capacity to effectively address human rights scenarios and disputes by building on a pattern of practices, and creating the necessary social space for rights parties with rights claims and disputes to engage in interpersonal responsiveness and constructive interaction. In a discrimination prevention model, the norm of human rights administration shifts to a more inclusive and respectful approach to marginalized

and historically disadvantaged persons with the goal to give people a voice and diminish any power imbalances.

How does the idea of shared social citizenship in a diverse society help us to make sense of the OHRC's new mandate? For Marshall and social constructionist thought, citizenship is a dynamic phenomenon that flexes the dimensions of political, social, and civil life. In a human rights context, it is a logical extension of inclusive citizenship for legal rights to be reinforced and further developed in civil society through self-reflective social policy initiatives that create opportunities for empowerment and recognition. The discrimination prevention model affords the opportunity for the new Commission to use its mandate to promote rights of inclusion in diverse Ontario by resolving human rights claims and disputes in a manner that is respectful, efficient, transparent, and more in-line with anti-oppression principles and transformative approaches than the former process. More than simply enforcing the provisions of the *Code*, the OHRC is now mandated as a positive state actor exposing the dimensions of power embedded in historical, social, and political contexts, and making more room for power considerations when balancing competing human rights claims.

## H. CONCLUSION

Issues of competing human rights claims arising from diversity have become in Canada one of the most important and pressing challenges for the human rights system. Different provinces have responded in different ways to this challenge. In Québec, for example, the provincial government mandated in 2007 the Bouchard-Taylor *Consultation Commission on Accommodation Practices Related to Cultural Differences* to hear from the public on “reasonable accommodations” of religious and ethnic minorities and issue a report of their findings and recommendations. The Commission reported back to the Québec government in 2008<sup>46</sup> but few of its recommendations have been followed. In Ontario, in contrast, the OHRC has taken the lead to develop and implement the first policy in Canada to address competing human rights claims. This

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46 Gérard Bouchard & Charles Taylor, Québec, *Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, Building the future: a time for reconciliation* (Québec: Gouvernement du Québec, 2008).

policy development included extensive consultation with the public, academics, human rights commissions elsewhere in the country, and stakeholders in the human rights community in Ontario. It also included significant efforts to map the nature of competing human rights in Ontario. These efforts by the OHRC resulted in a policy for Ontario, released in April 2012. We are now just beginning to witness the implementation of this policy.

