LOOKING FORWARD: SOME CONSIDERATIONS POST PINTO REPORT ON BUILDING A CULTURE OF HUMAN RIGHTS COMPLIANCE IN ONTARIO

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1. Introduction

Are we building towards a sustainable and effective human rights culture in Ontario based on equality and social inclusion? The release of the Pinto Report provides an important opportunity to consider the effectiveness and future of Ontario’s overall human rights enforcement system. That system is much wider than the three “pillars” addressed in the Pinto report – the Human Rights Tribunal of Ontario (“HRTO”), Human Rights Legal Support Centre (“HRLSC”) and the Ontario Human Rights Commission (“OHRC) and the fourth “pillar” the Courts. This paper raises some of the key issues which lawyers, policy makers, civil society organizations and those with rights obligations need to consider about the system as a whole. In doing so, references are made to the Pinto report in that context.¹

1. Is the Province moving in the right direction to effectively and significantly reduce the discrimination experienced by equality seekers?

2. Are Code rights more accessible, more readily enforceable and more realized in Ontario consistent with Canada’s domestic and international human rights obligations?

3. Are the institutions and practices flowing from the 2008 reform helping the disadvantaged to practically realize their rights and inspiring public confidence in the system?

4. Is the system facilitating those with human rights obligations – governments, employers, and service and accommodation providers “mainstreaming” human rights compliance (i.e. removal of barriers and prejudice or equality-promoting actions) into their policies and practices?

5. Is the system providing support to these obligation holders so that they can effectively discharge their obligations? What lessons have been learned and what best practices could be recommended to ensure "sustainable" human rights compliance in the future?

6. In assessing the effectiveness of the 2008 reforms, it is necessary to consider not only the reforms that were made by the Government and their

¹ This paper is drawn from a paper by the co-authors, “Some Background Notes To Consider In Assessing Whether Ontario’s Human Rights System Is Building A Culture Of Human Rights Compliance , November 8, 2012 Prepared For The Adjudicating Human Rights In The Workplace: After Ontario's Pinto Report – Where Do We Go Next?  Centre For Law In The Contemporary Workplace – Faculty Of Law, Queen's University, Kingston, Ontario – November 9-10,2012. This paper is also part of foundational work for a Chapter to be published in a book flowing from this Queen's University conference. This paper also relies on work from the book by the co-author Mary Cornish with Fay Faraday and Jo-Anne Pickel, "Enforcing Human Rights in Ontario: Canada Law Book, 2009.
implementation, but also whether additional legislative or other actions are necessary to ensure that Ontario's entire, multi-layered and intersecting human rights system is heading in the right direction.

7. Can we say that Ontario's system is achieving reductions in discrimination? Also, what needs to be done to ensure we are building a culture of pro-active human rights compliance.

Ontario's Attorney General started off the 2011-12 Human Rights Code reform review process by stating "All Ontarians have a right to live free from discrimination, inequality and intolerance, and the protection of human rights is a fundamental principle in this province."\(^2\) Ontario's 2008 Code reforms brought significant changes to Ontario's human rights enforcement system at a time when inequality was still deeply entrenched in Ontario's social and economic fabric.

In 2012, reports still show that Ontario is a long way from having the Code's equality rights realized, since Code-protected groups continue to experience systemic discrimination or "equality gaps" in their lives. Ontario's employers, service and accommodation providers all contribute to that inequality, as do governmental laws and actions. Reducing the "equality gaps" is an essential part of making sure that Ontario's economy grows and prospers for everyone.

Ontario has a multi-dimensional and intersecting framework of human rights laws and policies. This system of rights and obligations starts with international human rights obligations and the Canadian Charter of Rights and Freedoms and includes such specialized laws as the Accessibility for Ontarians with Disabilities Act, 2005 and the Pay Equity Act as well as the collective bargaining human rights system provided for in the Labour Relations Act and collective agreements.

As a quasi-constitutional law, Ontario's Human Rights Code and related human rights laws represents society's fundamental values – the legal guarantee that all Ontarians have equal rights and opportunities in the three key social areas of employment, services and accommodation. The quality and extent of human rights enforcement across the entire system shapes the degree to which all Ontarians are able to work, obtain services and housing without discrimination.

Building a compliance culture means that all those with human rights obligations (e.g. governments, employers, service and accommodation providers) are "mainstreaming" pro-active human rights compliance into the operation of their organizations so that the necessity for complaints is minimized. Mainstreaming is key to a successful human rights enforcement system since the pro-active auditing of policies and practices properly leads to the removal of discriminatory barriers and/or the development of positive equality measures.

\(^2\) Letter from Attorney General Chris Bentley dated August 12, 2011 re Pinto Review
A system which focusses primarily on its "complaints" system to obtain compliance will not see significant progress towards reducing the equality gaps experienced by disadvantaged groups. As those suffering from discrimination are already vulnerable and disadvantaged, the last thing they want to do is to file a complaint. They need a human rights system where those with rights obligations in their lives are facilitated and required to abide by them. Eliminating discrimination therefore is not simply a matter of designing a good tribunal complaints process with representation, although that is a key building block. An effective human rights system must also support and enforce the broader actions required to transform the dynamics that support discrimination. An effective human rights system therefore should focus primarily on measures to promote compliance not complaints.

The 1992 "Achieving Equality" or "Cornish" Report of the Ontario Human Rights Code Review Task Force" (stated by the Government to be the starting point for the 2008 reforms) made recommendations not only with respect to the above-noted "pillars", but also addressed the necessary actions to be taken by government and other public bodies, employers, service and accommodation providers, and the role of training and education as a pro-active human rights tool. It is time to again look back at this Report and its recommendations which called for all those with human rights obligations to effectively play their distinct but complementary equality roles. The Cornish Report also found the real measure of success for any enforcement system is whether it is able to achieve significant reductions in the inequalities faced by those who experience discrimination.

The Pinto Review flows from a legislative promise in section 57(1) of the Human Rights Code to review after three years the effectiveness of the "Bill 107" reforms enacted in the Human Rights Code Amendment Act, 2006 The Review’s Terms of Reference explicitly refers to a consideration of the “three pillars” of a human rights model, but also provides that "where appropriate the Reviewer will offer advice to the government regarding any best practices that should be supported and any advice for enhancing the effectiveness of Ontario’s human rights system." The Terms further provide that "any advice developed should be cognizant of the challenging fiscal context for government and should provide corresponding costs and relative benefits."

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3 S.O.2006, c.30 "Bill 107".

4 “Whether the redesigned Human Rights Tribunal of Ontario (HRTO) is providing quicker and direct access for applicants, and a fair dispute resolution process for all parties, including respondents"; 2) “Whether the new Human Rights Legal Support Centre (HRLSC) is effective in providing information, support, advice, assistance and legal representation for those seeking a remedy before the Human Rights Tribunal of Ontario (HRTO)”; 3) “Whether the Ontario Human Rights Commission (OHRC), in its revised role, is proactively addressing systemic human rights issues through activities such as research and monitoring, policy development, and education and training.” Terms of Reference, Ontario Human Rights Review, 2011-2012, p. 1

5 Terms of Reference, Ontario Human Rights Review, supra p. 1
The Review’s Consultation Paper noted that while the Ontario’s human rights system is “vast and complex”, the Review was limited to the terms set out in s.57, which were to analyze the effectiveness of the statutory reforms. The Review examined whether the new system is effective in its goal to provide quicker, less costly direct access to the Human Rights Tribunal of Ontario; whether the new Human Rights Legal Support Centre is effective in providing information, support, advice, assistance and legal representation for those seeking a remedy before the Tribunal; and, whether the Ontario Human Rights Commission is proactively addressing systemic human rights issues. Its 33 recommendations were limited to the Bill 107 system and most of the larger issues highlighted in this paper were not addressed.

In the public debate in Ontario in 2006, everyone had criticisms of enforcing human rights through the existing enforcement model. Both equality seekers and those with equality obligations wanted change Bill 107 implemented some of the recommendations put forward by equality seeking groups. However, there was significant disagreement amongst equality seeking groups about how the system should be changed. This disagreement continues. However, there was general agreement that the new system should have a strong focus on systemic discrimination and pro-active compliance measures. This paper focuses on systemic compliance measures and institutions such as the Government and those with rights obligations rather than complaint-based system measures and institutions, such as the HRLSC and the HRTO.

2. What are Ontario’s Human Rights Systems?

In order to consider the effectiveness of Ontario’s human rights systems, it is important to consider what it is composed of. The Code has evolved over the years to protect people in Ontario against discrimination in employment, accommodation, goods, services and facilities, and membership in vocational associations and trade unions. There are now sixteen grounds of discrimination under the Code: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, disability and record of offences (in employment only).

As the overarching human rights law of the province, the Code is subject only to the Canadian Charter of Rights and Freedoms. Section 47(1) of the Code provides that it binds the Crown and its agencies and section 47(2) provides for the Code’s primacy over other Acts. This primacy is the basis for the Supreme Court of Canada’s decision in Tranchemontage v. Ontario, which held that all Ontario adjudicative tribunals with the power to interpret and apply law are required to interpret and apply the Code, and where appropriate, to decline to apply provisions of their constituent statute where they conflict with the Code.

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7 Human Rights Code, s.47(2). “Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.” p. 176 and 178
As well, human rights obligations are intended to be enforced pro-actively by the Ontario Government and those with delegated provincial power. The Ontario government is the primary institution responsible both domestically and internationally for the state of human rights in this province. As set out below, Canada is bound by international human rights instruments which have adopted the requirement for governments and those with rights obligations to “mainstream” human rights into a country’s social and economic fabric as the best method of enforcement and the best method of maximizing resources to ensure compliance.\(^8\)

As noted above, human rights obligations are also found in a variety of specialized, equality-promoting laws such as the Pay Equity Act and the Accessibility for Ontarians with Disabilities Act, 2005. Since 2008, AODA regulations have resulted in the enactment of various accessibility standards, which have different timelines for compliance. With these laws come further human rights institutions, namely the Pay Equity Commission and Hearings Tribunal and the Accessibility Directorate of Ontario. As well, since Tranchemontagne. Most administrative tribunals have a major role in human rights enforcement.

As well, embedded in other laws are equality promoting provisions such as the requirement in the Labour Relations Act that collective agreements must not discriminate on Code grounds and that arbitrators under collective agreements must interpret and apply the Code.\(^9\) Employers and accommodation and service providers also enforce human rights obligations through their own institutional policies and practices. In addition, one of Ontario’s largest "systems" enforcing human rights is the labour relations collective bargaining and grievance adjudication system.

Further, Ontario’s civil society organizations such as the AODA Alliance, the Colour of Poverty Coalition, and the Equal Pay Coalition also play a key human rights enforcement and empowerment role for claimants. All of these other institutions and organizations can and often do intersect with the “four pillars”. The question then becomes whether each of these institutions and systems is working in an effective and mutually re-enforcing way to reduce discrimination and inequality.

3. The Evolution of Pro-Active Human Rights Compliance and “Mainstreaming”

In order to consider the current effectiveness of Ontario’s human rights system, it is necessary to briefly review the lessons learned from the history of Canadian human rights systems, and the evolution of human rights understandings and legal standards, both on the national and international scene.\(^10\)

\(^9\) Labour Relations Act, c. 33, Sched. 20, s. 2.

The Commission as “gatekeeper” model found in the pre-Bill 107 reforms was developed in the 1960’s and became the main system used across Canada. Ontario’s 1962 Code, the first Code in Canada, used that model. This "gatekeeper" system was developed when discrimination was understood as primarily an individual problem, arising from isolated events with complaints mostly straightforward and involving overt discrimination. As human rights values have started to infuse our culture over the years, there is less overt discrimination, and yet the roots of discrimination remain embedded in the structures and practices of society. Justice Rosalie Abella in her ground-breaking report, popularized the term `systemic discrimination".

In its 1987 Canadian National Railway Co. landmark decision, the Supreme Court of Canada Court, citing Abella’s report, held that systemic discrimination “results from the simple operation of established procedures...none of which is necessarily designed to promote discrimination.” Such discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief “for example, that women ‘just can’t do the job.’” The Court found that human rights laws require that the remedy for such discrimination is pro-active measures which “break the continuing cycle of systemic discrimination.” The Supreme Court subsequently found in other cases interpreting human rights laws that the failure to change societal systems designed for male or able-bodied persons to accommodate the circumstances of women and the needs of those with disabilities constitutes unlawful systemic discrimination and results in social exclusion and poverty. “Transformation” is the goal and those with equality obligations must “build conceptions of equality” into society’s standards and practices.

In other words, general human rights laws have been interpreted to require employers to take pro-active equity measures to redress systemic inequalities.

In the case of employment, Canadian courts and adjudicators have identified wide-ranging employment equity obligations which bind employers and trade unions, whether or not they are covered by the federal Employment Equity Act. These employment

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11 This model has two enforcement institutions. (1) the Human Rights Commission, which accepts and investigates complaints, provides advice to claimants, acts as a mediator, and where cases are not settled, decides whether the claimant will get a hearing. It can also prosecute cases before the Tribunal and Courts. Public education and advocacy are also functions of the Commission. The second enforcement institution of this model is (2) the Board of Inquiry, an ad hoc body which decides whether complaints have merit, and whose decisions can be appealed to the courts if there is a legal error.


equity obligations flow from the inter-connecting and wide-ranging matrix of pro-active equity obligations that arise from federal and provincial human rights laws and policies, the Charter, labour relations and pay equity laws, and collective agreements. These obligations extend beyond the grounds covered by employment equity laws to grounds such as sexual orientation, religion, age and ethnicity. Powerful jurisprudence, mostly from the Supreme Court of Canada, requires employers – working with trade unions – to build a culture and reality of workplace equality by pro-actively designing workplace rules and practices to eliminate discrimination and promote the equality of disadvantaged groups.16

This pro-active compliance evolution in Canadian legal standards was informed by developments in international human rights standards. The 1948 Universal Declaration of Human Rights was followed in the late 70's and onwards with comprehensive international human rights instruments detailing extensive pro-active obligations to achieve equality of outcomes. This included wide-ranging public education measures and requirements for collaboration amongst those with equality obligations. The 1979 UN Convention on the Elimination of Discrimination against Women led to the 1995 UN Beijing Declaration and Platform for Action setting out required simultaneous actions in 12 critical areas to ensure an integrated and multi-layered approach to gender equality. The 2006 UN Convention on the Rights of Persons with Disabilities includes, amongst many ground-breaking obligations, the requirement for governments to take all appropriate measures to ensure persons with disabilities have equal access to the physical environment, transportation, information and communications and other public facilities.

Closing the gap on socio-economic inequalities faced by disadvantaged groups requires a combination of transformative and integrated interventions. Acknowledging the many different causes and roots of discrimination creates the understanding that there is no single path to closing discriminatory inequalities. What is required are pro-active planning and remedies that are “human rights-sensitive” and systemic in nature to be used by those with human rights responsibilities. Just as multi-dimensional planning is needed to achieve governmental, business and organizational objectives, so too is such planning needed to achieve and promote equality. This puts the onus on policy makers, legislators, employers, service and accommodation providers to incorporate equality-promoting measures into all of their actions and avoid measures that widen inequalities.

The best example of this new way of establishing equality is seen in the Accessibility for Ontarians with Disabilities Act, 2006 and the standards and compliance measures developed under that Act. Ontario’s Poverty Reduction Plan is also an example of such required planning, as are the provisions set out in the now repealed Ontario Employment Equity Act, 1993. Ontario’s Equal Pay Coalition has also proposed that Ontario develop a provincial “Closing the Gender Pay Gap” plan to address the 29%


4. **Assessing the Effectiveness of Human Rights Institutions -- The Paris Principles**

The global human rights community, through the UN’s 1993 “Paris Principles” acknowledged this multi-dimensional aspect of human rights systems. The Principles set out key benchmarks, roles and responsibilities for the effective functioning of human rights institutions. Seven “effectiveness factors” have been derived from these Principles:

1. Is the system capable of acting independently from government and other powerful interests?
2. Does the system have a defined, sufficient mandate to protect and promote human rights? This includes the responsibilities to adjudicate complaints, prepare reports, recommendations and opinions, review laws and administrative practices, highlight human rights violations and conduct public human rights education.
3. Is the system structured to establish and strengthen collaborative relationships with the full range of human rights stakeholders? This includes those with equality obligations, claimants, as well as community advocacy groups and other human rights organizations.
4. Is the system vested with sufficient power to accomplish its objectives while also structured to prevent abuse of respondents’ rights?
5. Is the system readily accessible and fairly administered so that rights and responsibilities can be enforced effectively? Do claimants have sufficient supports (legal and otherwise) to make their claims?
6. Is the system structured and funded so that it operates efficiently and effectively?
7. Is the system structured to be fully accountable to the government, to the public, and to its users?

As these international legal standards were developing, Canada’s human rights agencies were struggling to carry out their mandates. The “gatekeeper” complaint-

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based model was not designed to play a “transformative” role. Agencies were plagued by criticisms coming from all sides. Starting in the late 1980's, human rights reports across Canada found high levels of dissatisfaction.\textsuperscript{19}


   a. **Findings**

When the Government introduced Bill 107, it acknowledged that the 1992 Cornish Report "Achieving Equality" formed the starting point for the Government's reforms.\textsuperscript{20} As a result, it is useful to provide an overview of the findings of that report and its recommendations. This Report documented the concerns of stakeholders with the existing Code "gatekeeper" model which included lack of direct access; chronic under-funding and inadequate staffing lead to significant backlogs and delays with individual complaints and an inability to address systemic ones.

The Report, relying on the developing understandings about the nature of systemic discrimination, analyzed the issue of effective enforcement from a broad, systemic perspective. It concluded that "effective enforcement means that the persons and groups who are discriminated against are empowered and enabled to achieve their equality rights in the Code."\textsuperscript{21} The Report concluded that the success of an enforcement system can ultimately be measured by one test - did the system lead to a measurable and real reduction in the discrimination faced by its citizens who are protected by the Code?\textsuperscript{22} The Task Force concluded that the ‘gatekeeper’ model failed this test since individuals and groups who experience discrimination are denied proper justice in the human rights enforcement system.

The four cornerstones around which the “Achieving Equality” Report and recommendations were built are still relevant today when considering the effectiveness of Ontario’s systems. As seen below, having an effective and claim resolution process is only one of four cornerstones and is relevant only when compliance is not forthcoming. The focus is on promoting compliance and prevention of violations.

1. A consumer perspective which presents consumers of the system with options for how best to deal with a human rights claim – a system which empowers and those who experience discrimination in order that they may direct the methods used in

\textsuperscript{19} See also the 2000 federal review of the *Canadian Human Rights Act* which resulted in a report by former Supreme Court of Canada judge, Gerard LaForest which also recommended a “hybrid access model” which has not been implemented although there have been some internal reforms.


\textsuperscript{21} *Achieving Equality*, supra.

\textsuperscript{22} *Achieving Equality*, supra.
achieving equality including the right to direct access to a hearing through mediation or adjudication

2. A community-driven focus which empowers the regions of Ontario and their many communities to play a major role in ensuring a strong and responsive human rights system;

3. A proactive approach of building equality into Ontario's institutions by the adoption of pro-active measures and policies to ensure compliance without having to file Tribunal claims; and

4. An effective, accessible, expert and timely claim resolution process (including mediation or adjudication) where compliance is not forthcoming.23

b. Recommendations

The Achieving Equality Report called for a direct access Tribunal enforcement system, a Commission focusing on pro-active compliance, and a legal services centre for complainants. The “Achieving Equality” report also recommended a designated commissioner to work with those actors who have equality obligations, in order to assist them with compliance through training, education, and monitoring. It also called for mandatory human rights reporting and accountability measures for government and major public bodies, as well as the embedding of human rights education in all levels of the education system. The Achieving Equality Report made recommendations with respect to the following areas: a) Equality Services Board for Supporting Complainants; b) Human Rights Ontario Replacing Ontario Human Rights Commission; c) Equality Rights Tribunal; d) Role of Government; e) Pro-Active Role for Respondents; and f) Role of Education as Strategic Measure.


While providing for direct access, The Human Rights Code Amendment Act, 2006 fell significantly short of implementing fully the integrated human rights system proposed by Achieving Equality.

The Attorney General Michael Bryant called the Government’s reforms at that time a “direct-access-plus-public-support system.”24 They were designed to address the delays and inability of the Commission to address systemic issues and to give direct access, due process, and timely justice to those who appear before the Human Rights Tribunal.25 The Government promised that the reforms will “improve and strengthen the promotion, advancement and enforcement of human rights in Ontario,” 3 by the creation

23 Achieving Equality, supra.


25 Attorney General Michael Bryant, Hansard, 8 May, 2006, p.3651.
of a human rights system supported by the "three pillars". The OHRC was to address the underlying causes of discrimination with a strengthened capacity for public education, policy development, research and monitoring.

7. Enforcing the Government’s Obligations as the Guardian of Ontarian’s Human Rights

The Terms of Reference which the Government gave to the Pinto Review did not include a review of the effectiveness of the Government in carrying out its key role to safeguard human rights in Ontario. International instruments and the Paris Principles look to Governments to ensure the protection of the human rights of those who live in a country. The Charter and Code also require the Government to play this role. Disadvantaged groups depend on the state for protection and assistance and to ensure a system of human rights enforcement is in place by which they are able to access equitable employment, services and accommodation. Achieving Equality found that the Ontario Government was one of the most frequently complained against respondents over the years. Governments at all levels today remain a very frequent respondent at the Tribunal.

Governments have often acted as if the Code is an unwarranted constraint on their action rather than a vehicle for carrying out their role as the main defender of Ontarian’s equality rights. Ontarians have a right to expect that their governments at all levels would pro-actively implement the Code’s guarantees without wasting their tax money by marshalling teams of government lawyers to create a myriad of objections to such claims.

Achieving Equality made a number of recommendations about the role the Government should play in the human rights system which should continue to be considered. 1) The Government of Ontario and major public bodies should require positive action to be taken in all areas under its control in order to overcome present patterns of systemic discrimination and ensure that members of discriminated against groups benefit equally and fairly from government job opportunities and services at all levels; 2) The Premier should mandate the Cabinet Office in consultation with the community to establish a mechanism to develop a coordinated strategy to advance equality rights, to ensure the integration of that strategy throughout the Government’s decision-making (including the development of policies, practices and laws, the provision of services and/or employment practices), and to monitor the Government's performance in advancing

26 Attorney General Michael Bryant, Hansard, 26 April 2006; Ministry of the Attorney General, news release and backgrounder, 26 April 2006 and Attorney General Michael Bryant, Hansard, 8 May, 2006, p.3647-48, 3651-52

equality rights. 3) The Cabinet Office should receive and monitor equality reports from every ministry; 4) The Government should submit an annual Equality Rights Report to the Legislature. The Report together with the Commission’s Annual Report should be widely distributed and be submitted to the United Nations as part of Ontario’s reporting requirements under international human rights covenants. 5) An all-party Legislative Committee on Equality Rights should be established to provide a forum and to monitor and advance equality rights in Ontario. 6) The Legislative Committee should invite members of the community, including equality seeking groups, to appear before it to give their assessment of the Equality Report and the Government’s performance in equality rights, as well as their recommendations for improvements. 7) Each government ministry and major public body should be required to adopt and implement a clearly stated equity plan for services provided or overseen by the ministry or agency. 8) Deputy Ministers should receive training in the principles of effectively implementing equality and should be accountable for the resolution of the particular equality issues raised by their ministry’s mandate in all the areas covered by the Code. 9) Every ministry and major public body should provide equality rights training to their staff to ensure that an equality perspective is integrated within all levels of decision-making in the ministry. 10) Operational responsibility for implementing these service equity audits and plans should be with the Deputy Minister or head of the major public body. Success in effectively carrying out these reviews and implementing strategies for change would be a specific, significant factor in performance appraisal of the Deputy Minister or top official. 11) The Government and all major public bodies should conduct an immediate review of all rights claims made against them, seek a positive resolution wherever possible, and ensure that persons responsible for deciding to defend such claims and their lawyers are properly trained and informed on the Code’s proactive obligations and committed to a positive, constructive approach. 12) Public bodies should take a constructive approach to human rights claims made against them by focusing on the real, underlying issue of whether they have made sufficient positive efforts to achieve equality rights and whether improvement could be made.

8. Government Obligation to Fund System to meet Human Rights Guarantee

As the Pinto Report finds, the Government did significantly increase funding to the Human Rights Code system with the budget of $20.1 million in 2011-2012. However, the previous system had been previously grossly underfunded. While the Report acknowledges that the system is operating in a “challenging fiscal environment”, the Report notes that each Ontarian spends $1.57 per year on the human rights system and “viewed in this light it is fair to ask whether the paltry human rights budget should bear any of the responsibility of “reducing the budget” in harsh fiscal times.”

28 Human Rights Code p. 176

29 Human Rights Code p. 178
International standards call on government to use maximum available resources to enforce human rights. As noted above, the Paris Principles call for a system which provides the necessary supports to claimants and structured and funded so that it operates efficiently and effectively.

As stated at the outset of this paper, we know that there are widespread breaches of human rights in Ontario. Providing all Ontarians with workplaces, services and accommodation free of discrimination is supposed to be guaranteed. Instead of accepting that the new austerity environment means that there can be no new money, we need to consider what measures need to be taken to realize the human rights of Ontarians and how can that be achieved in the most cost-effective and timely manner. One way to do that is to provide the necessary resources not only to the "three pillars" so that they can provide a timely and effective complaint resolution process. But there are other monies that are needed as well. Ministries with the capacity to affect human rights compliance must also be given designated and protected funding to promote human rights compliance. As provincial and municipal governments are amongst the most frequent respondents at the Human Rights Tribunal and often the source of human rights violations, requiring them to spend money on pro-actively auditing their laws, policies and practices would help to limit the significant money they now spend on defending themselves at the Tribunal.

9. **The Ontario Human Rights Commission - the Key “Pillar”**

Next to the Ontario Government, the Ontario Human Rights Commission is the key “pillar” in Ontario’s Human Rights systems. Unlike the HRLSC and the HRTO which are focussed on complaints, the OHRC is focussed on systemic compliance.

While the OHRC has made great strides in its new role in its Annual Reports, the Pinto Report found that the OHRC is not fully carrying out its re-oriented mandate to focus pro-actively on ensuring human rights compliance and eliminating systemic discrimination. The Bill 107 reforms provided the OHRC with a broader range of tools and powers to leverage its ability to build an Ontario-wide culture of human rights compliance. The Pinto Report is critical of the Commission's failure to remain an active participant in litigation at the Tribunal and recommends that the Commission more frequently pursue the initiation of Applications and interventions at the Tribunal.

   a. **Facilitating Pro-Active Compliance by those with Rights Obligations**

In looking at the Human Rights Commission, the Pinto² Report did note the importance of facilitating those with human rights obligations to carry out those obligations. It recommended that the Commission should engage in more initiatives in the private employment sector and that it should establish and maintain a unit that would offer telephone and/or internet based summary advice and information to assist those with obligations to carry them out. While some have called for respondents to also receive some form of representation at the Tribunal, it is a much more productive use of public funds to provide compliance advice. Achieving Equality recommended that the Commission should have a Director of Compliance Services which would facilitate
compliance. Having a Director would ensure that such compliance services are given the priority they deserve in the Commission.

Achieving Equality also made other recommendations in this area 1) an enforcement regulation should be passed making clear that the "right to equal treatment" in the Code means that not only employers but also service and accommodation providers are required to take positive measures to overcome discrimination. Then the extent to which reasonable positive measures have been taken to overcome discrimination will be considered as part of the evidence in any claim. 2) requiring all those covered by the Code to post a notice that stating that they are bound to comply with the Code and provide employment, housing or accommodation without discrimination and that person with complaint about that can obtain assistance with that complaint. 3) the most senior official of an employer should be required to ensure that management at all levels is informed of and trained in carrying out human rights responsibilities which is similar to an obligation imposed in the context of occupational health and safety. 4) The Ontario Human Rights Commission, through a Director for Compliance Services and Director for Policy and Education, should also provide educational kits on human rights requirements to these obligation holders. These kits would be provided at a fee that could be waived where appropriate. They also could highlight the Commission's Guideline on establishing effective internal human rights systems developed in partnership with unions and employees as an important way to resolve human rights claims in the workplace.\footnote{Achieving Equality, supra, Recommendations 70-74}

b. Public Policy and Guidelines Powers

The Commission has the power to affect human rights compliance and litigation through its power to make policies to provide guidance on the Code’s application: s. 30. This allows the Commission to play a significant role in setting policy with respect to the interpretation of the Code’s provisions and seeking a consistent development of human rights law in the public interest. The Commission has issued a number of significant policies since 2008 but there is a need for it to work effectively to see those Guidelines mainstreamed into the operations of those with rights obligations.

c. Public Education

Education remains a key strategic enforcement strategy to ensure, advance and maintain a culture of equality. The Commission has a unique and important role to play in the area of education to oversee and initiate education activities which will advance its overall strategic plan for the enforcement of Ontarians' human rights.

While the Commission has produced a guide to the Code for workplaces and a number of educational videos, this is an area where it can make a real difference. To be effective, education must be innovative, reach all Ontarians and enter into strategic
partnerships in doing so. Educational initiatives should be focused on those which are most likely to concretely contribute to the reduction of systemic discrimination in the strategic areas the Commission identified. Education work of the various equality agencies within the Government should also be co-ordinated by the Commission to ensure consistency and effectiveness and reduce duplication. Effective human rights material should be developed and included in the regular school curriculum at every level from the earliest years. The Ontario Ministry of Education should review the human rights curriculum material that already exists, improve and supplement it as needed and require it to be taught throughout the Ontario school system. Teacher training courses should include training in human rights as a requirement for certification as a teacher.

d. Strategic Litigation and Inquiries

Freed from its role as the "gatekeeper", the Commission was to play a significant role in litigating "strategic" human rights complaints and issues and in guiding the development of consistent human rights jurisprudence. As well, the Commission should utilize its public inquiry powers to examine and revise any statute, regulation, or program or policy made under statute for compliance with human rights and make recommendations in respect of any inconsistency with the Code. This would allow the Commission to take a lead role in holding governments accountable for their laws and policies.

While noting that the Commission requires additional resources, the Pinto report found that the Commission has been focusing primarily on public sector compliance and has not made substantial use of its powers to engage in strategic litigation and public inquiries. 32

The Commission is empowered to file its own Tribunal applications where it is of the opinion that the application is in the public interest: s. 35(1). This allows the Commission to bring cases to the Tribunal as an extension of its investigative and educational work on issues of systemic discrimination. It is given the discretion to determine what issues should be litigated in the public interest and when it is appropriate for the Commission to use litigation as a tool to advance compliance with the Code. This permits the Commission to bring complaints which might otherwise fall through the cracks or remain unaddressed because there are no complainants willing and/or able to come forward with complaints. It also allows the Commission to incorporate litigation into the range of its other pro-active strategies.

Strategic litigation enhances human rights compliance since it relieves disadvantaged groups from having to initiate litigation themselves. The Commission also has investigative powers it can rely upon and the ability to retain experts. While the Commission has set out in its Annual Reports many important activities and its involvement in some strategic litigation before the Courts, it has focussed on

32 See Pinto Report pp. 126-130
collaboration activities with public sector employers and service providers. While these are important

The Commission’s new broad public inquiry power allows the Commission to examine and investigate systemic discrimination in a particular institution, throughout an economic sector, or within any area of community interaction. The Commission “may conduct an inquiry under this section for the purpose of carrying out its functions under this Act if the Commission believes it is in the public interest to do so.”: s.31. This includes the power “to make recommendations, and encourage and co-ordinate plans, programs and activities, to reduce or prevent such incidents or sources of tension or conflict”: s. 29(e).

The Commission’s public inquiry power can be leveraged to at least three different ends a) to pro-actively investigate an area of systemic discrimination, make recommendations for preventing and eliminating discrimination and to develop plans to eliminate discrimination. For example in the employment context, this could involve examining an economic sector where there is preponderance of vulnerable often non-unionized workers who are fearful of bringing individual complaints. b) to support either the complaints initiated by the Commission or in other complaints as the evidence that is secured through the inquiry may be lead in evidence before the Tribunal: s. 31.2 c) to focus and support the Commission’s reports to the Legislature and the public.

As the Pinto report noted, this power has yet to be fully utilized by the Commission. Where the Commission has used its public inquiry power and been unable to resolve a human rights issue with that process, it has the power to bring a complaint itself under s. 35 on the issue.

The Commission has the express right to intervene in any application before the Tribunal on such terms as the Tribunal may determine: s. 37(1). At the request of the Commission, the Tribunal is required to disclose to the Commission copies of applications and responses filed with the Tribunal and may disclose to the Commission other documents in its custody or in its control” s.38. As the Pinto report noted, there is needs to be more effective exchange of this information between the Commission and Tribunal. Access to this information enables the Commission to participate in Tribunal litigation, to be aware of developing issues before the Tribunal and informs the Commission’s broader pro-active mandate with respect to education, inquiries and policy development.

Just as the Commission can bring matters to the Tribunal, the Tribunal can now also refer public interest matters to the Commission arising out of its proceedings, which the Commission can decide whether to address: s.45.4. This provides another point at which the activities of the Commission and the Tribunal can work independently and yet reinforce or harmonize the development of human rights principles.
e. Anti-Racism and Disability Rights Secretariats

The Pinto Report has recommended the abolition of the Anti-Racism and Disability Rights Secretariats which were part of the reform package but which were never funded or appointed by the Ontario Government. There is very little analysis provided in the report for this recommendation other than an unspecific assertion that the Secretariats would be duplicative of the Commission's other work and that it would imply that there was a "hierarchy of rights". Achieving Equality Report called for the development of specialized expertise in a number of different areas, including anti-racism and disability rights. As the Commission was to be an important vehicle in the enforcement of the AODA, 2005, it is not appropriate to abolish the Disability Rights Secretariat with so little analysis. There must be effective and co-ordinated enforcement of the AODA, 2005 and Code disability rights. With disability issues the main area of complaints at the Tribunal, there is a need to prioritize enforcement in this area. The Anti-Racism secretariat was also established to address key problems in enforcement in the area of anti-racism.

f. Empowerment and Inclusion - Advisory Groups

The Commission has the power to establish advisory groups to advise the Commission about the elimination of discriminatory practices that infringe Code rights: s.31.5. These advisory groups provide an important opportunity to those with human rights duties such as employers and service providers to collaborate with human rights advocates to identify and work on key areas for pro-active and systemic action.