Annual Update on Human Rights:
Keeping on Top of Key Developments
Part I and Part II

Under the Microscope: Judicial Review of Human Rights Decisions

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1. Introduction

In 2008, legislative amendments to the Ontario Human Rights Code (“Code”) removed the right of parties to appeal decisions of the Human Rights Tribunal of Ontario (“HRTO” or “Tribunal”) to the courts. With the removal of appeal rights, decisions of the HRTO can now only be revisited by way of a judicial review before the Divisional Court of the Ontario Superior Court of Justice.

Although the 2008 legislative changes intended to narrow the circumstances in which HRTO decisions can be reviewed by the courts, decisions of the HRTO are often perceived as vulnerable to review, compared to other administrative decision-makers.

This paper provides an overview of HRTO cases that have come under review by the Divisional Court and the Ontario Court of Appeal since 2008. Key judicial review cases are surveyed in order to analyze and identify aspects of human rights decision-making that attract judicial intervention.

In addition to canvassing recent judicial review cases, this paper identifies the standard of review that applies to both interim and final decisions of the HRTO, and discusses whether recent commentary from the courts has imposed a greater burden on applicants seeking to establish a prima facie case of discrimination. In conclusion, it is suggested that the jurisprudence in this area is not sufficiently developed to support the conclusion that HRTO decisions are highly vulnerable to review. Nevertheless, as judicial review of HRTO decisions is typically conducted using the reasonableness standard of review, this necessitates some evaluation by the Court of the Tribunal’s reasoning process to determine if it is intelligible,
transparent and justifiable and to determine whether the adjudicator’s conclusions fall within the acceptable range of outcomes, based on the facts and the law.

2. The Legislative Framework

Prior to the 2008 changes that led to a direct access human rights system in Ontario, any party to a proceeding before the Tribunal had a right of appeal to the Divisional Court. The statute contained an expansive appeal provision, which authorized appeals based on questions of fact, law, or mixed law and fact. The Divisional Court, acting as an appellate court, was authorized to make any order or decision that the Tribunal could make, and was entitled to substitute its opinion for that of the Tribunal.¹

As a result of the 2008 changes to the Code, this statutory right of appeal has been removed. The Code now contains a strong privative clause, found at s. 45.8 of the Code, that is intended to preserve the finality of HRTO decisions and insulate them from review.

Section 45.8 of the Code provides that “a decision of the Tribunal is final and not subject to appeal.” The statute goes on to state that decisions of the HRTO “shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.”²

The Code also aims to prohibit judicial review of interim rulings of the HRTO, especially those pertaining to procedural issues. Section 43(8) of the Code provides that the Tribunal’s failure to comply with its own rules of practice and procedure, as well as the Tribunal’s exercise of discretion in relation to its own rules of procedure, “is not a ground for setting aside a decision of the Tribunal on an application for judicial review...unless the failure or the exercise of a discretion caused a substantial wrong which affected the final disposition of the matter.”³ This statutory provision flows from the well-established principle that courts will allow a Tribunal’s adjudicative process to “run to completion before entertaining an application for judicial review,” and that courts should avoid fragmenting or protracting adjudicative proceedings that have not yet concluded.⁴

The Code also allows the Ontario Human Rights Commission (“OHRC”) to apply to seek the opinion of the Divisional Court on a question of law, where the OHRC believes that a decision of the HRTO is not consistent with adopted OHRC policies.⁵ To date, it appears that the OHRC has not sought to review a decision of the HRTO under this Code provision, although the OHRC has intervened in several judicial review cases, as well as HRTO proceedings, in order to provide submissions on questions of law.

¹ Human Rights Code, RSO 1990, C H.19, s. 42 [Code].
² Ibid. s. 45.8. But see the reconsideration provisions contained at s. 45.7 of the Code, as well as s. 21.1 of the Statutory Powers Procedure Act, RSO 1990, c S.22, authorizing the HRTO to correct clerical errors contained in final decisions.
³ Ibid. s. 43(8).
⁴ College of Nurses of Ontario v Trozzi, 2011 ONSC 4614 (Div Crt) at para. 20 [Trozzi].
⁵ Supra note 1 at s. 45.6.
3. Leading Judicial Review Cases

The *Code* provides that judicial review is only available where decisions of the HRTO are patently unreasonable. Despite this strict legislated standard, the courts have relied on the common law, alongside this legislated standard, to determine the level of deference that will be afforded to decisions of the HRTO.

The degree of deference afforded to the HRTO decision under review is determined by the nature of or the grounds for the judicial review. First, where the judicial review is brought on procedural fairness or natural justice grounds, the standard of review analysis is not engaged, and the court will determine whether the fairness afforded to the parties was correct and in accordance with the Tribunal's legal requirements. The reviewing court will look to the common law factors outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*, the Tribunal’s own rules and procedures, and the *Statutory Powers Procedure Act*, to determine whether the Tribunal conducted a fair hearing that provided the affected parties with the correct degree of procedural fairness. If the hearing conducted by the HRTO was procedurally unfair or violated the requirements of natural justice, there will be no deference to the decision-maker and the proceeding will typically be set aside.

Conversely, where the substantive outcome or findings of the HRTO are under review, the decision of the HRTO will be given deference by the reviewing court. Despite the legislated patently unreasonable standard contained in the *Code*, the Ontario Court of Appeal and the Divisional Court have relied on the Supreme Court’s analysis in *Dunsmuir v New Brunswick* to conclude that the applicable standard of review for decisions of the HRTO is reasonableness.

As the standard of review for HRTO decisions has now largely been resolved by precedent, the predominant focus of the leading judicial review cases on substantive review is the application of the reasonableness standard, in particular, the quality of the adjudicator’s decision-making and reasoning process, and whether the decision falls within the range of possible acceptable outcomes, defensible in respect of the facts and law. An exception to this, which is discussed below, is when the HRTO is required to engage with questions of law that are of general importance to the legal system and which fall outside of the HRTO’s statutory mandate and expertise. In this narrow circumstance, a correctness standard may apply.

a) *Shaw v Phipps, 2012 ONCA 155*

The Ontario Court of Appeal’s decision in *Shaw v Phipps* is the latest statement from the courts on the standard of review to be applied to decisions of the HRTO. The decision also provides guidance on the applicable legal test for establishing a *prima facie* case of discrimination under the *Code*.

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7. [1999] 2 SCR 817 [*Baker*].
8. RSO 1990, c S.22.
9. 2008 SCC 9 [*Dunsmuir*].
The HRTO Decision:

The underlying HRTO decision was in respect of a human rights application brought by Ronald Phipps, a Canada Post letter carrier, who was stopped and questioned by police officer Michael Shaw while Mr. Phipps was delivering mail in an affluent Toronto neighborhood.

In its decision, the HRTO adjudicator found that Mr. Phipps, who is African-Canadian, was subject to racial discrimination, contrary to the Code. The underlying facts of the case were largely undisputed. Mr. Phipps was acting as a substitute letter carrier in the Bridle Path area of Toronto. Constable Shaw and a police trainee were on patrol in the neighbourhood under orders to watch out for white Eastern European men with a vehicle, who were suspected of cutting telephone lines in the area.

Mr. Phipps, who was on foot, was delivering mail and aroused Constable Shaw’s suspicions because he was not the usual mail carrier. Constable Shaw’s suspicions increased when he saw Mr. Phipps approach one of the houses where he was delivering mail and speak to the householder. Constable Shaw sent the trainee to inquire about Mr. Phipps’ conversation, and it was explained that Mr. Phipps had been inquiring about misdirected mail. Still not satisfied, Constable Shaw went on to detain Mr. Phipps, identify him, and run his name through a criminal records database. After nothing was revealed by the criminal records check, Mr. Phipps was allowed to continue his route. However, Constable Shaw followed up by making additional inquiries about Mr. Phipps with a white postal worker in the area, who confirmed that Mr. Phipps was indeed acting as a substitute carrier that week.

Based on the evidence presented at the Tribunal hearing, the HRTO adjudicator determined that Mr. Phipps had established discrimination, and that on a balance of probabilities, the fact that Mr. Phipps was an African Canadian in an affluent neighbourhood was “a factor, a significant factor, and probably the predominant factor, whether consciously or unconsciously, in Constable Shaw’s actions.”

The Divisional Court Decision:

The Respondents Constable Shaw, Police Chief Blair, and the Toronto Police Services Board (“TPSB”) challenged the decision at the Divisional Court, arguing that the adjudicator made several reviewable errors, which included improperly imposing a burden on Constable Shaw to disprove discrimination in order to bolster the applicant’s prima facie case, inappropriately relying on the “unrebuttable” concept of “unconscious discrimination,” and failing to consider the unique legal duties of police officers. The majority of the Divisional Court held that the Tribunal’s conclusions and findings were reasonable ones that could be reached on the evidence before it. Justice Nordheimer, in dissent, conducted a detailed review of the evidence

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11 Toronto (City) Police Services v Phipps, 2010 ONSC 3884 (Div Crt) at para. 26.
before the HRTO and found that the conclusions reached by the HRTO were “fatally flawed” and unsupported by the evidence.\(^\text{12}\)

With respect to the applicable standard of review, the majority of the Divisional Court confirmed that the Tribunal's conclusions on Code liability and discrimination were to be reviewed on a reasonableness basis. The TPSB and other respondents also challenged the adjudicator’s finding that the TPSB was liable under the Code for Constable Shaw’s discriminatory conduct. In finding that the TPSB was liable for Constable Shaw, the HRTO adjudicator was required to interpret both the Code’s employer liability provisions contained at s. 46.3\(^\text{13}\) and the Police Services Act.\(^\text{14}\) The Divisional Court noted that while the HRTO’s interpretation of the Code, its “home statute,” was entitled to deference, a correctness standard was to be applied to the adjudicator’s decision on the interpretation of the PSA. Consistent with a correctness review, the Divisional Court conducted its own analysis of the applicable PSA provisions, and held that the adjudicator’s conclusions on the TPSB’s vicarious liability were correct.

Although the Divisional Court acknowledged that the HRTO’s interpretation of the Code is subject to deference, the Divisional Court conducted its own analysis of s. 46.3, without explicit reference to the adjudicator’s legal analysis of s. 46.3, in a manner that is consistent with a correctness review. Notably, this aspect of the Divisional Court decision, which was not commented on by the Court of Appeal in its analysis, is arguably inconsistent with Dunsmuir, and other decisions of the Divisional Court confirming that a reasonableness standard will generally apply to the factual and legal components of HRTO decision-making. Although the Court of Appeal did not explicitly reverse the Divisional Court’s findings on this specific issue, it has been confirmed on numerous occasions that a correctness standard will only be applied to question of law that are outside of the expertise of the decision maker and that are of general importance to the legal system.\(^\text{15}\) Courts recognize that administrative decision-makers are routinely called on to interpret other statutes in the course of their decision-making, and will typically be afforded deference when doing so.\(^\text{16}\)

*The Court of Appeal Decision:*

Shortly thereafter, Police Chief Bill Blair and Constable Shaw (“the appellants”) appealed the Divisional Court decision to the Ontario Court of Appeal. The appellants argued that the Divisional Court and the Tribunal had erred in 1) identifying and applying the test for prima facie discrimination; 2) placing the onus on Constable Shaw to disprove discrimination; and 3) in failing to give proper weight to Constable Shaw’s evidence and role as a police officer. The TPSB also argued that the adjudicator’s use of the concept of “unconscious discrimination” created an improper presumption of discrimination that was impossible to rebut.


\(^{13}\) *Code*, *supra* note 1, s. 46.3.

\(^{14}\) RSO 1990, c P.15 [PSA].

\(^{15}\) *Dunsmuir*, *supra* note 10 at para. 60.

\(^{16}\) See for e.g. *First Ontario Realty Corp. v Deng*, 2011 ONCA 54 at para. 17.
In its decision, the Court of Appeal affirmed that the majority of the Divisional Court was correct in finding that the HRTO decision was reasonable. The Court of Appeal also held that the Divisional Court dissent had erred by not giving the required degree of deference to the adjudicator’s findings and conclusions. The Court of Appeal agreed that, following Dunsmuir, the standard of review applicable to the Tribunal’s decision was reasonableness. Because of its “specialized expertise,” the HRTO was to be afforded the highest available degree of deference with respect to both “determinations of fact and the interpretation and application of human rights law.”\textsuperscript{17} The Court of Appeal also reiterated that the ultimate question for the reviewing court is to determine whether the Tribunal decision under review falls within the “range of possible, acceptable outcomes which are defensible in respect of the facts and the law.”\textsuperscript{18}

The Court of Appeal decision further clarifies the applicable test for establishing a \textit{prima facie} case of Code-prohibited discrimination, and affirms that the adjudicator applied the correct legal test for discrimination in Mr. Phipps’ case.\textsuperscript{19} A \textit{prima facie} case is one where the following elements are proven:

1) The applicant is a member of a group protected by the Code;
2) The applicant was subjected to adverse treatment; and
3) The applicant’s gender, race, colour or ancestry was a factor in the alleged adverse treatment.\textsuperscript{20}

Not surprisingly, the bulk of the analysis is engaged by the third element. An applicant must show a “nexus” or “connection” between his or her race or other Code ground and the adverse treatment experienced. A nexus or connection between the Code ground and the adverse treatment is established even where the applicant’s race or other characteristic is only one factor in the adverse treatment. In its decision, the Court of Appeal confirms that the adjudicator’s reference to this “factor” was evidence that she was very cognizant of the need for a connection or link between Mr. Phipps’ race and Constable Shaw’s actions.\textsuperscript{21} The Court also confirmed that the adjudicator conducted a careful analysis and review of the evidence, which led her to reasonably conclude, on a solid evidentiary foundation, that Mr. Phipps’ race was a factor in Constable Shaw’s actions.\textsuperscript{22}

In addition, the Court of Appeal determined that the adjudicator got it right with respect to the placement of the onus, namely, that it was only after Mr. Phipps had established a \textit{prima facie} case of discrimination, did the onus then lie on Constable Shaw to provide a rational and credible non-discriminatory explanation for his actions. With respect to the appellant’s arguments on unconscious discrimination, the Court of Appeal found that there was ample evidence to support a finding of discrimination, and that the adjudicator made a finding of

\textsuperscript{17} Shaw \textit{v} Phipps, 2012 ONCA 155 at para. 10.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid. at paras. 12-13.
\textsuperscript{20} Ibid. at para. 14.
\textsuperscript{21} Ibid. at para. 20.
\textsuperscript{22} Ibid. at para. 21.
discrimination, conscious or unconscious, that was grounded in the evidence and Constable Shaw’s actions, and not on an improper “assumption of discrimination.” The court also confirmed that the adjudicator’s discussion of unconscious discrimination was appropriate and relevant to her correct statements on the law, which is that a subjective intention to discriminate is not a necessary element of the prima facie test. Finally, the Court of Appeal rejected the appellants’ argument that special consideration should be given to Constable Shaw’s evidence or to the legal obligation of police officers to investigate crime.

b) *Peel Law Association v Pieters, 2012 ONSC 1048*

In *Peel Law Association v Pieters*, the Divisional Court was asked to review a decision of the HRTO which found that lawyers Selwyn Pieters and Brian Noble, who are Black, were subject to racial discrimination when they were asked to produce identification in the Peel Law Association’s lawyer-only facilities at the Brampton Courthouse.

The underlying facts in the case are that Mr. Pieters and Mr. Noble were present in the Peel Law Association’s (“PLA”) lawyer’s lounge, along with law student Paul Waldron, who is also Black, when the PLA’s librarian approached them to request their identification. The librarian’s evidence was that she had requested identification from Mr. Noble and Mr. Waldron as it was part of her regular job duties and usual practice to identify individuals, to ensure that they were entitled to use the PLA’s facilities. The PLA’s lounge and library are reserved for lawyers, articling and law students, and paralegals and others are prohibited from accessing them.

**The HRTO Decision:**

The HRTO adjudicator’s findings about this brief interaction were that the librarian questioned and interacted with Mr. Noble and Mr. Pieters in an aggressive and demanding fashion, abruptly requesting their identification in a manner that the applicants found demeaning. The adjudicator found that a prima facie case of discrimination was established based on his finding that the librarian specifically requested identification from the applicants, even though there were others in the lounge who were unknown to her. The adjudicator also found that the librarian interrupted her planned trip to a robing room located off the lounge in order to question the applicants. Finally, the fact that no one else in the lounge was questioned, including two white women and another racialized person who the librarian did not know, gave rise to a prima facie case, which was sufficient to require the personal respondent to provide a credible and non-discriminatory explanation for her actions. The adjudicator rejected the librarian’s explanations for stopping and questioning the applicants, and found that the decision to stop them was, in some measure, because of their race and colour.

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24 *Ibid.* at para. 34.
25 *Pieters v Peel Law Association*, 2010 HRTO 2411 at para. 84 [*Pieters*].
26 *Ibid.* at paras. 84, 90.
The Divisional Court Decision:

At the Divisional Court, citing Dunsmuir, the court agreed that the standard of review to be applied to the HRTO’s decision was reasonableness, which required that the HRTO decision be “rationally supported” and “fall within a range of possible, acceptable outcomes that are defensible in fact in law.”

In addition to identifying the standard of review as reasonableness, the Divisional Court also outlined the test for establishing a prima facie case of discrimination. It is notable that the Divisional Court articulated the test for prima facie discrimination in a slightly different manner than the Ontario Court of Appeal subsequently did in Shaw v Phipps, by identifying an additional requirement of arbitrariness. According to the Divisional Court, a human rights applicant must establish a causal nexus between the disadvantage experienced by the applicant and an arbitrary distinction based on a prohibited ground of discrimination. The Divisional Court also confirmed that discrimination can be established in the absence of an intent or motive to discriminate, however, more is required than “mere speculation” as to the existence of a discriminatory bias on the part of the respondent.

The additional factor of “arbitrariness based on a prohibited ground” was not later identified as an element of the test for prima facie discrimination in Shaw v Phipps. The Divisional Court’s inclusion of the additional arbitrariness element can be explained by its reliance on the legal test for prima facie discrimination that was enunciated by the Court of Appeal in Ontario v Tranchemontagne. Tranchemontagne was a human rights challenge to the government’s exclusion of those disabled by substance abuse from Ontario Disability Support Program social assistance benefits. The Code challenge in Tranchemontagne was to a government program, and it is therefore not surprising that the Court of Appeal would articulate a test for prima facie discrimination which required that the applicant show that the government’s legislative or policy choice was an arbitrary distinction that “created a disadvantage by perpetuating prejudice or stereotyping.” Query whether this arbitrariness element would be required in a human rights application involving a complaint of discrimination between private actors and which was unrelated to a distinction contained in a policy or program.

In the Pieters decision, the Divisional Court found that the decision was unreasonable, as the first and final elements of the prima facie test had not been made out. First, the evidence did not establish that Mr. Pieters and Mr. Noble were subject to differential treatment. Second, the evidence did not establish that the applicants’ race or colour were factors in the alleged differential treatment.

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28 Ibid. at para. 16.
29 Ontario (Director, Disability Support Program) v. Tranchemontagne, 2010 ONCA 593 [Tranchemontagne].
30 Ibid. at para. 103.
31 Ibid.
In determining that there was no evidence of differential treatment, the Divisional Court observed that the adjudicator had disregarded his own findings on a number of points. First, the adjudicator had found that the applicants were the first persons that the librarian had encountered upon entering the lounge. Further, the librarian’s evidence, which the adjudicator accepted, was that her regular practice was to check identification and indeed she was mandated to do so under the PLA policy. The Court concluded that by disregarding this evidence, which it had accepted, the adjudicator’s conclusion that the appellants’ had been subject to differential treatment was unreasonable. The Court also observed that the adjudicator’s findings were inconsistent in some areas. For example, the adjudicator accepted that the librarian approached Mr. Pieters and Mr. Noble in an “aggressive” and “demanding” manner, but by the same token found that she was embarrassed, quiet and red-faced in response to the applicants identifying the interaction as one of racial profiling.\(^\text{32}\)

In addition, the Court observed that even if differential treatment was established, there was no evidence that Mr. Pieters and Mr. Noble’s race or colour were a factor in the treatment they experienced. As a prima facie case was not established on the evidence, the personal respondent should not have been required to provide a credible non-discriminatory explanation for her conduct. In the absence of a prima facie case, the adjudicator had unreasonably reversed the onus and put the personal respondent librarian in a position of having to disprove discrimination. Finally, the Court observed that it was inappropriate for the adjudicator to rely on police racial profiling cases to infer a causal nexus between the applicants’ race and the treatment they experienced, and that the adjudicator’s use of racial profiling cases was out of context.\(^\text{33}\)

A second ground of review was raised before the Court, with the PLA challenging the manner in which the adjudicator had assessed the credibility of the librarian as compared to that of Mr. Pieters’. The Court noted that findings of credibility and fact are not an “exact science” and that an adjudicator is usually entitled to deference in this regard. However, in this case, because the adjudicator’s ultimate findings were based on a rejection of portions of the librarian’s evidence and an acceptance of Mr. Pieters’ evidence, it was necessary for the adjudicator to provide a more detailed explanation for his credibility findings. In conclusion, the Divisional Court held that the decision was not rationally supported and did not fall within the range of possible acceptable outcomes defensible in fact and law because the adjudicator’s own findings did not establish a finding of differential treatment, and because there was insufficient evidence that the applicants’ race was a factor in the treatment they experienced.\(^\text{34}\)

\(^{32}\) Supra note 27 at para. 31.
\(^{33}\) Ibid. at para. 43.
\(^{34}\) Ibid. at para. 55.
c) **Audmax Inc. v Ontario (Human Rights Tribunal), 2011 ONSC 315**

*Audmax Inc. v Ontario (Human Rights Tribunal)* was a judicial review of a HRTO decision brought on both substantive and procedural fairness grounds. This case illustrates that deficiencies in a Tribunal’s written reasons can lead to a finding that the decision itself was unreasonable, as well as a finding that the procedure afforded to the parties was unfair.

*Audmax* is also an important case as it was one of the early Divisional Court decisions to grapple with the *Code*’s legislated “patently unreasonable” standard for judicial review, and to interpret this provision in light of the Supreme Court’s decision in *Dunsmuir* which eliminated the common law patently unreasonable standard of review. Ultimately, in *Audmax*, the court confirmed that a reasonableness standard of review applied to HRTO decisions, despite s. 45.8 of the *Code* which states that HRTO decisions may only be altered or set aside where they are “patently unreasonable.” Justice Molloy’s finding in *Audmax* that a reasonableness standard applies to substantive review of HRTO decisions has been upheld by the Court of Appeal in *Shaw v Phipps*, and relied upon in subsequent decisions of the Divisional Court.

**The HRTO Decision:**

The applicant, Seema Saadi, a former immigration settlement intake worker at Audmax Inc. who identifies as a legally blind Bengali-Canadian Muslim, brought an application to the HRTO alleging that she was discriminated against and harassed in her employment and dismissed in a discriminatory manner.

Ms. Saadi’s application alleged discrimination on a number of grounds, arising from several incidents. Ultimately, the HRTO found that Audmax had discriminated against Ms. Saadi on the basis of ancestry, ethnic origin, creed and sex through its workplace policies regarding office attire and use of the staff microwave. Audmax’s staff microwave policy was vague on what foods were permitted, and which ones were not, and, according to the Tribunal, constituted a “moving target” that was impossible to comply with. The adjudicator found that the employer’s microwave policy effectively operated as a ban on heating foods with an ethnically identifiable odour, and that Ms. Saadi had been disciplined for her violations of the microwave policy, and that these violations were a factor in her termination.35

The Tribunal also found that Audmax had discriminated against Ms. Saadi when conducting a meeting regarding her workplace attire, and by seeking to dictate the style of *hijab* worn by Ms. Saadi. According to the adjudicator, the employer violated the *Code* when it singled out Ms. Saadi “for corrective action on the basis of her chosen form of *hijab*, which was clearly worn for religious reasons.”36 As these disciplinary incidents were at least factors in Audmax’s decision to terminate Ms. Saadi, her termination was discriminatory and in contravention of the *Code*.37

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The Divisional Court Decision:

The Divisional Court set aside the adjudicator’s finding that Ms. Saadi was discriminated against, and remitted the matter back to the Tribunal for a new hearing. Describing the Tribunal decision as “fatally flawed,” the court expressed a number of concerns related to the Tribunal’s reasons for decision and choice of procedure.

From the perspective of substantive review, the Divisional Court found that the Tribunal’s reasons for decision were unreasonable as they did not disclose a rational basis for the conclusions reached by the Tribunal. According to the court, the adjudicator drew conclusions regarding discrimination that did not follow logically from the adjudicator’s findings of fact. Moreover, the adjudicator made findings of fact that were unreasonable based on the evidence before him. The Tribunal’s findings did not fall within the range of possible acceptable outcomes defensible in respect of the facts and the law, and, more importantly, the reasons were neither transparent nor intelligible within the meaning of Dunsmuir.

For example, with respect to the Tribunal’s reasons and findings on the microwave policy, the court appeared to take issue with the Adjudicator’s failure to identify the elements of a prima facie case. The adjudicator had found that other staff members at Audmax had stopped using the microwave altogether, as it was impossible to comply with the policy, while Ms. Saadi, in contrast, continued to use the microwave. There was little discussion by the adjudicator as to how Ms. Saadi’s ancestry or ethnic origin were factors in her difficulties with and discipline pursuant to the microwave policy. The court pointed out that in her original application, Ms. Saadi had alleged that she was disciplined for heating up food given to her by a co-worker originally from Tunisia. The court observed that the decision did not explain how the ethnicity and ancestral rights of a Bengali-Canadian Muslim woman were adversely affected by being prevented from re-heating another person’s Tunisian food. Without more, the court questioned how a finding that the microwave policy was arbitrarily applied and resulted in Ms. Saadi being disciplined, could lead to a conclusion that Ms. Saadi’s ancestry and ethnic origin were factors in the discipline she experienced. In short, the adjudicator did not identify a nexus between Ms. Saadi’s ethnic origin and the adverse treatment she alleged. With respect to the adjudicator’s findings on Ms. Saadi’s style of dress and preferred style of hijab, the court criticized the Tribunal for making conflicting and vague factual findings, for not clearly delineating the factual findings and underpinnings that resulted in his finding of discrimination, and for failing to engage in an analysis as to whether Audmax’s dress code actually conflicted with Ms. Saadi’s religious requirements.

Notably, the Divisional Court found that the adjudicator’s conclusions were unreasonable from the perspective of substantive review, but also failed to meet the procedural fairness requirement to provide adequate reasons for decision. According to the court, the reasons breached the principles of natural justice and procedural fairness as they were not adequate to

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38 Audmax Inc. v. Ontario (Human Rights Tribunal), 2011 ONSC 315 (Div Crt) at para. 53.
39 Ibid. at paras. 80, 86-88.
explain the basis for the decision or to permit meaningful appellate review.\textsuperscript{40} From a procedural fairness perspective, the Divisional Court also took issue with the fact that the adjudicator did not advise Audmax, which was unrepresented, of its options for securing the evidence of an absent witness and with the adjudicator’s refusal to review or consider late evidence tendered by Audmax.

In its decision, the Divisional Court engaged in an extensive discussion as to why a reasonableness standard of review should be applied, despite the “patently unreasonable” standard contained at s. 45.8 of the Code. Justice Molloy explained that the legislated patently unreasonable standard had to be interpreted in light of the general principles of administrative law as enunciated in \textit{Dunsmuir} and \textit{Khosa}.\textsuperscript{41} The general principles of administrative law now state that there are only two standards of review: reasonableness and correctness, and that any distinction between reasonableness and patent unreasonableness is illusionary. Accordingly, section 45.8 is to be viewed as a signal from the legislature that decisions of the HRTO must be afforded the highest degree of deference available in administrative law.\textsuperscript{42}

The court also explained that there is no “spectrum” or “continuum of deference” within the reasonableness standard, and that any difference between a “reasonableness” and a “patently unreasonable” standard was a matter of semantics.\textsuperscript{43} Although the court held that HRTO decisions are reviewed on a reasonableness basis, the court in \textit{Audmax} proceeded to refer to the adjudicator’s decision as patently unreasonable on a number of occasions, a surprising choice in light of the court’s determination that a reasonableness standard applies. Subsequent decisions of the Divisional Court have not referred to patent unreasonableness, but have opted instead to describe the HRTO decision under review as either reasonable or unreasonable.

d) \textit{College of Nurses of Ontario v Trozzi, 2011 ONSC 4614}

In \textit{College of Nurses of Ontario v Trozzi}, the Divisional Court was asked to review an interim decision of the HRTO addressing the question of whether Ms. Trozzi’s application to the HRTO should be dismissed on the ground that it had been appropriately dealt with in another proceeding.

\textit{The HRTO Decision:}

Ms. Trozzi was a nurse who sought registration with the College of Nurses. In considering her application for registration as a registered nurse (“RN”) and a registered practical nurse (“RPN”), the College’s Registration Committee had imposed terms on her registration because of Ms. Trozzi’s medical conditions of depression and fibromyalgia. The College committee was entitled

\textsuperscript{40} For a discussion of an administrative decision-maker’s duty to provide reasons as an aspect of procedural fairness see \textit{Clifford v Ontario Municipal Employees Retirement System}, 2009 ONCA 670 at paras. 20-24 and \textit{Baker}, supra note 7.

\textsuperscript{41} \textit{Canada (Citizenship and Immigration) v Khosa}, 2009 SCC 12.

\textsuperscript{42} \textit{Supra} note 38 at para. 22.

\textsuperscript{43} \textit{Ibid.} at paras. 31-32.
to impose conditions on Ms. Trozzi’s registration as an RN and RPN if it determined that such terms were in the public interest. In Ms. Trozzi’s case, the registration committee imposed a requirement that Ms. Trozzi comply with ongoing medical treatment, and also that she inform all prospective employers of the fact that her registration with the College was subject to conditions and what those conditions were.

Ms. Trozzi appealed the Registration Committee’s restrictions to the Health Professions Appeal Review Board ("HPARB"). In her appeal, Ms. Trozzi specifically raised a human rights argument, and provided written submissions as to why the practice restrictions imposed by the College constituted a violation of the Code. In addition to her written submissions, she provided the HPARB with a copy of the Human Rights Commission’s complete Policy and Guidelines on Disability and the Duty to Accommodate. The HPARB dismissed Ms. Trozzi’s appeal and found that the practice restrictions were reasonable and within the proper mandate and responsibility of the College. The HPARB also specifically found that the College had discharged its duty to accommodate Ms. Trozzi’s disabilities.

At the same time that the HPARB appeal was underway, Ms. Trozzi filed an application to the Ontario Human Rights Commission, alleging discrimination with respect to membership in her profession. The Application was referred by the OHRC for adjudication by the HRTO. By the time the matter reached the HRTO, the Code had been amended to include s. 45.1 which provides that the Tribunal may dismiss an application where it is of the view that the substance of the application, in whole or in part, has been appropriately dealt with in another proceeding.

The HRTO then issued an interim decision on whether the HPARB proceeding had appropriately dealt with the human rights issues raised in Ms. Trozzi’s application to the HRTO. The adjudicator determined that the matter had not been appropriately dealt with because the HPARB did not apply the well established human rights principles of undue hardship and adverse impact. The HRTO also concluded that Ms. Trozzi’s human rights application did not amount to a collateral attack on the HPARB proceeding, and ordered a full hearing on the merits. The HRTO’s interim decision on these issues was then challenged on a judicial review to the Divisional Court.

The Divisional Court Decision:

In its decision, as a preliminary issue, the Divisional Court held that the College’s application for judicial review of the interim HRTO decision was not premature and that s. 43(8) of the Code, the legislative provision which is intended to insulate discretionary and interim decisions from judicial review, was not a bar to the judicial review application in this case. There was no issue with fragmented proceedings in this case, because the issues before the Divisional Court related to statutory interpretation and jurisdiction, and were not dependent upon the evidence that would be adduced at a full hearing on the merits.\textsuperscript{44}

\textsuperscript{44} Supra note 4 at para. 21.
Unlike the judicial review cases outlined above, in Trozzi, the Divisional Court found that its review of the HRTO decision should be conducted on a correctness basis, and that it was required to conduct its own legal analysis, without reference to the reasons of the adjudicator. The court held that a correctness standard was applicable in this case because the legal issue was one of the competing jurisdiction between the HPARB and the HRTO. The court cited a passage from Dunsmuir in which the Supreme Court suggested that questions of the jurisdictional lines between two or more competing specialized tribunals have traditionally been subject to review on a correctness standard.\(^{45}\) The Divisional Court acknowledged that the HRTO was interpreting the Code, its home statute, but ultimately found that a correctness standard applied in this case, because the HRTO had been required to interpret the Regulated Health Professions Act, address issues of competing jurisdiction, and grapple with legal principles and doctrines of general importance to the legal system, such as abuse of process, collateral attack, and adjudicative immunity.\(^{46}\)

With respect to the ultimate issue, the Divisional Court held that the HRTO had erred in concluding that the substance of Ms. Trozzi’s application was not appropriately dealt with by the HPARB. The Divisional Court explained that s. 45.1 of the Code did not give the HRTO “supervisory jurisdiction” over other administrative tribunals. According to the court, the HRTO was required to ask itself whether Ms. Trozzi’s application was “appropriately dealt with” by taking into consideration the HPARB’s specialized expertise and public protection mandate. It was inappropriate, in this case, for the HRTO to use its own legal yardstick of “accommodation to the point of undue hardship” and substitute its own view of public health protection concerns for those of the HPARB.\(^{47}\)

The Divisional Court observed that as a result of the Supreme Court’s decision in Tranchemontagne, all administrative tribunals are entitled and required to apply human rights legislation, unless expressly prohibited from doing so by their enabling statute.\(^{48}\) Had the HPARB failed to address Ms. Trozzi’s human rights arguments, as required, her application would not have been “appropriately dealt with.” However, in this case, the HPARB had weighed Ms. Trozzi’s human rights concerns in light of its own public interest mandate, and had explicitly considered the Code’s requirements and human rights principles. The HPARB had the benefit of Ms. Trozzi’s written submissions on the human rights issues, and the OHRC’s policy on disability and the duty to accommodate. In these circumstances, the matter had been appropriately dealt with within the meaning of s. 45.1 of the Code, and the HRTO was not entitled to assume supervisory jurisdiction and substitute its own views and statutory mandate for that of the HPARB, which possesses a different mandate and expertise in that area.\(^{49}\)

\(^{45}\)  *Supra* note 9 at para. 61.
\(^{47}\)  *Supra* note 4 at para. 30.
\(^{48}\)  *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14.
\(^{49}\)  *Supra* note 4 at paras. 28-33.
It is notable that the Divisional Court’s decision in Trozzi was released just one week before the Supreme Court’s decision British Columbia (Workers’ Compensation Board) v Figliola, which was a decision interpreting a parallel “appropriately dealt with” provision contained in British Columbia’s Human Rights Code. The Divisional Court’s reasoning in Trozzi is very much in line with the Supreme Court’s reasoning in Figliola, wherein the Supreme Court confirmed that human rights tribunals are not entitled to sit as an “appeal body” over other administrative tribunals. In a nutshell, in Figliola the Supreme Court determined that human rights tribunals must find that the substance of a human rights application has been appropriately dealt with when the other tribunal had concurrent jurisdiction to consider Code arguments, when the issues raised are essentially the same, and when the parties all had notice of the human rights arguments and an opportunity to respond.

4. Conclusion

It remains to be seen whether reviewing courts will provide HRTO decision-makers with the level of deference mandated by the Court of Appeal in Phipps. Although the cases reviewed above are highly fact specific, the Court of Appeal’s decision in Phipps suggests that decisions of the HRTO are to receive a high level of deference with respect to their factual and legal findings. And as noted above, except in limited circumstances, a reasonableness standard applies to substantive review of HRTO decisions. This reasonableness standard entitles a reviewing court to engage in a respectful evaluation of the HRTO’s reasoning process to determine whether the decision is intelligible, transparent and justifiable, and whether the conclusions of the tribunal fall within the range of possible acceptable outcomes, defensible in respect of the facts and the law. Conversely, Pieters and Audmax suggest that courts will not hesitate to interfere when an adjudicator’s reasons and factual findings fail to establish the elements of a prima facie case, or when the reasons are inadequate or internally inconsistent.

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50 British Columbia (Workers’ Compensation Board) v Figliola, 2011 SCC 52.