Overlapping Jurisdiction and Ontario’s New Human Rights Code

Beyond the Horizon: The Expanding and Overlapping Jurisdiction of Arbitrators and Tribunals

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I. Introduction

Significant amendments to Ontario’s Human Rights Code\(^1\) took effect on June 30, 2008. Applications alleging Code violations are now made to the Human Rights Tribunal of Ontario rather than to the Ontario Human Rights Commission. The Human Rights Legal Support Centre has been established to provide legal support and assistance to applicants. The Commission has a continuing role including the power to initiate applications and to intervene in proceedings at the Tribunal.

The new Code also makes considerable changes to how the human rights system addresses situations in which an applicant could or has participated in another proceeding. Under the old Code, the Commission had the discretion, under s. 34, to dismiss a complaint where “the complaint is one that could or should be more appropriately dealt with under an Act other than this Act”. Section 45 of the new Code provides that the Tribunal “may defer an application in accordance with the Tribunal rules” and s. 45.1 provides that it may “dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application”. Further, where the other proceeding is a court action in which an order is sought under s. 46.1 of the Code, s. 34 (11) sets out circumstances in which the Tribunal does not have jurisdiction.

This paper will address the emerging jurisprudence on overlapping proceedings. The amount of case law these issues have generated in less than four months since the new provisions came into effect is an indication of how significant they will be in Ontario’s new human rights system.

\(^{1}\) R.S.O. 1990, c. H.19, as amended.
II. Issue Estoppel and Abuse of Process: Snow and Campbell

Under the old legislation, even if the Commission did not dismiss a matter under s. 34 and referred it to the Tribunal under s. 36, the common law principles of abuse of process and issue estoppel could apply to prevent relitigation of issues addressed in another proceeding.\(^2\) The Tribunal’s s. 45.1 jurisprudence has applied and built upon these legal concepts.

In *Snow v. Honda*,\(^3\) the employer sought dismissal of the Commission-referred complaint, which alleged that the respondent had violated the *Code* by failing to accommodate the complainant’s disability, for the following reasons, among others:

- The Human Rights Tribunal of Ontario (the “Tribunal”) does not have the jurisdiction to hear Ms. Snow’s complaint because the Workplace Safety and Insurance Board (“WSIB”) has exclusive jurisdiction over the issues raised in his complaint (return to work and accommodation);
- The Tribunal does not have the jurisdiction to review a decision of the WSIB;
- Mr. Snow is barred by the provisions of the *WSIA* from initiating this action;
- The Tribunal is barred from considering this matter by virtue of the application of issue estoppel or, alternatively, abuse of process\(^4\)

Vice-Chair Joachim rejected these arguments and ruled that the complaint would proceed. On the issue of whether the *Workplace Safety and Insurance Act, 1997*\(^5\) ousted the Tribunal’s jurisdiction, she reasoned as follows:

[In this case, it appears that both the WSIB and the Tribunal may have the authority to make a determination under their constituent statutes as to whether Honda has appropriately fulfilled a duty to accommodate the

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\(^2\) *Snow v. Honda*, 2007 HRTO 45 at paras. 35-37.
\(^3\) 2007 HRTO 45.
\(^5\) S.O. 1997, c. 16.
disability-related needs of Mr. Snow. The question before me is whether the Tribunal’s jurisdiction is ousted because of Section 118 of the WSIA.

The implication of Honda’s argument is this. If Honda is correct, then a worker entitled to benefits under the WSIA would not be able to file a human rights complaint alleging that the employer failed to accommodate a return to work because the WSIB (and on appeal the WSIAT) would have exclusive jurisdiction to adjudicate those issues. Taken to its logical conclusion, Honda’s argument would mean that Honda does not need to demonstrate that the WSIB has even made a determination on the issues of return to work or accommodation. In fact, in the present case, there has been no WSIB decision making a determination on these issues. The mere fact that the worker is entitled to benefits would give the WSIB exclusive jurisdiction to determine those issues.

It is useful to review briefly the purposes of the WSIA and the Code before addressing Honda’s argument.

One of the purposes of the WSIA is “to facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment…” (Section 1). Employers have an obligation to co-operate in the early and safe return to work of the worker by, among other things, “attempting to provide suitable employment that is available and consistent with the worker’s functional abilities and that, when possible, restores the worker’s pre-injury earnings.” (section 40(1)). The employer is obliged to re-employ injured workers (section 41) in their pre-injury employment, or if the worker is not able to perform the essential duties of the pre-injury employment, in alternative available suitable employment (section 41(4) & (5)). In determining whether the worker is medically able to perform pre-injury or suitable employment, the employer “shall accommodate the work or the workplace for the worker to the extent that the accommodation does not cause the employer undue hardship.” (section 41(6)). Upon the request of either the worker or the employer, the board shall determine whether the employer has fulfilled its obligations under section 41 (section 41(11)). Alternatively, if a worker is unable to return to the pre-injury employment or to suitable alternative employment because of the injury, the Board shall develop a labour market re-entry plan, in consultation with the worker, the employer and the worker’s health practitioners, if necessary (section 42).


10302 When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly
indicated that they consider that law, and the values it endeavours
to buttress and protect, are, save their constitutional laws, more
important than all others. Therefore, short of that legislature
speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code
supersede all other laws when conflict arises.

The primacy of the Code is also enshrined in the legislation itself in
s.47(2). The Supreme Court of Canada recently confirmed the
importance of this provision in finding that two provincial adjudicative
bodies, the Human Rights Commission and the Social Benefits Tribunal,
had concurrent jurisdiction to make a determination on a human rights
issue. In Tranchemontagne v. Ontario (Director, Disability Support
Program) 2006 SCC 14 (CanLII), [2006] 1 S.C.R. 513 at para. 38, Mr.
Justice Bastarache, for the majority, wrote with reference to s.47(2):

This section [s.47(2)] provides not simply that the Code takes
primacy over other legislative enactments, but that this primacy
applies “unless the [other] Act or regulation specifically provides
that it is to apply despite this Act [the Code]”. Thus the legislature
put its mind to conflicts between the Code and other enactments,
declared that the Code will prevail as a general rule, and also
developed instructions for how it is to avoid application of Code
primacy.

The Code prohibits discrimination in employment against persons with
disabilities. “Disability” is defined in section 10(1)(e) of the Code to
include “an injury or disability for which benefits were claimed or received
under the insurance plan established under the WSIA, 1997.” Thus, the
legislature specifically intended that injured workers who are entitled to
benefits under WSIA (“injured workers”) may also bring complaints of
discrimination under the Code. In complaints under the Code, injured
workers may allege harassment or discrimination or reprisal, which are
issues not contemplated by the WSIA. In addition, an injured worker may
allege that an employer failed to permit him or her to return to work or
failed to make suitable efforts to accommodate. Accordingly, the Code
clearly contemplates that the Tribunal (and the Commission) has
jurisdiction to hear and consider issues relating to the accommodation of
injured workers. Section 17 of the Code specifically addresses the test to
be applied in assessing whether an employer made sufficient efforts to
accommodate a person with a disability (and an injured worker falls into
that group).

The remedies available under the Code are different from and
considerably more extensive than those available under the WSIA.
Remedies for discrimination include reinstatement, damages for all lost
wages and benefits, general damages for injury to dignity and breach of
the Code, and damages for mental anguish, as well as pre and post
judgement interest. Since the Code has specifically included injured
workers with claims under the WSIA as a group falling under the definition
of disability in the Code, I do not accept that the legislature intended to deny the remedial provisions of the Code to this subset of persons with disabilities. Moreover, pursuant to s.47(2) of the Code, if the legislature had intended, by enacting s.118 of the WSIA, to remove the right of injured workers to claim their rights under the Code, and to restrict them to the remedies under the WSIA, the legislature would have had to include a specific provision to that effect: Tranche montagne, supra at para.38.

I find that, considering the nature and purpose of the Code and the WSIA, the Tribunal’s jurisdiction to hear Mr. Snow’s complaint is not ousted simply because the WSIB also has jurisdiction to determine whether Honda properly accommodated Mr. Snow within the meaning of the WSIA. I accept that the WSIB (and on appeal, WSIAT) has exclusive jurisdiction to interpret and apply the WSIA. In interpreting and applying the WSIA, an issue may arise as to whether a worker can be accommodated at the employer’s workplace. The WSIB or WSIAT may make a determination as to whether an employer is able to accommodate an injured worker without causing the employer undue hardship. In so doing, they are not interpreting and applying the Code, but rather, their own constituent statute. Whether the WSIB determination of that issue should give rise to an issue estoppel or foreclose re-litigation of that issue as an abuse of process is a legitimate question, which is discussed below.6

For similar reasons, the Tribunal determined that the hearing of the complaint was not barred because of various other sections of the legislation.7

The Tribunal declined to apply the doctrine of issue estoppel on the basis that the parties to the Tribunal proceeding were not the same as those in the WSIB proceeding:

The doctrine of res judicata (of which issue estoppel is one part) has two common rationales: the first is the need for finality; the second is that a party should not be "vexed" twice by the same cause: Cremasco v. Canada Post Corp. (2002), 45 C.H.R.R. D/410 at para. 50, ("Cremasco, Tribunal") aff’d (2004), 49 C.H.R.R. D/172 (FCTD) ("Cremasco FCTD") and 2004 FCA 363 (CanLII), 2004 FCA 363 ("Cremasco FCA”).

The prompt, final and binding resolution of workplace disputes is of fundamental importance, both to the parties and to society as a whole: Parry Sound (District) Social Services Administration Board v.

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6 Snow, supra note 3 at paras. 15-23.
7 Ibid. at paras. 27-32.
However, there has also been some reluctance to apply the doctrine of issue estoppel to the determination of human rights complaints by tribunals such as this one. One of the primary concerns is that the dismissal of a complaint deprives the parties of the opportunity to have the merits of the case determined by a tribunal that specializes in the adjudication of human rights disputes. Therefore, it is appropriate to use caution and restraint in the application of the doctrine of res judicata to the adjudication of human rights complaints: O'Connor, supra at para. 22.

The application of the doctrine is to be determined on a case-by-case basis, paying close attention to the particular facts of the case, and adjudicators have the discretion to refuse to apply the doctrine if doing so would work an injustice.

There are two principal branches of the doctrine of res judicata. The first branch is known as issue estoppel. Issue estoppel applies where there are common issues in the two proceedings. The issues in question in the second proceeding must have been necessary to the decision in the first proceeding. Depending on the nature of the issue in respect of which the estoppel is being raised, issue estoppel may bar relitigation of only a discrete issue or it may bar the second action in its entirety. (O'Connor, supra at para 24). The second branch of res judicata, known as "cause of action" estoppel, is not raised in this case.

The criteria to be met for the application of issue estoppel are as follows:

- the same questions are being decided in both proceedings
- the judicial decision which is said to create the estoppel is a final decision
- the parties, or their privies, are the same.

i) Same Question

For this requirement to be met, the determination of the issue in the first litigation must have been necessary to the result. In other words, issue estoppel covers fundamental issues determined in the first proceeding, issues that were essential to the decision. (O'Connor, supra at para. 27).

As the Ontario Court of Appeal stated in Rasanen v. Rosemount Instruments Ltd. 1994 CanLII 608 (ON C.A.), (1994), 112 D.L.R. (4th) 683
at p. 703, a different characterization of the issues and process for analyzing them does not necessarily mean different questions.

**ii) Final Decision**

Although originally developed in the context of the civil courts, over time the doctrine of issue estoppel has been extended to decisions by administrative bodies (*Danyluk v. Ainsworth Technologies Inc.* [2001] S.C.R. 460 at para. 21). Where there is a process of appeal or reconsideration that the party does not utilize, the decision at first instance is considered final: *O'Connor, supra* at para. 46. There would seem to be no reason why a decision by the WSIB or WSIAT should not equally be considered a “judicial” decision.

**iii) Same Party or Privy**

When the parties to the proceedings are not the same, this aspect of the test may still be met if one party was the privy of another in the previous proceedings.

In order to be a privy, there must be a sufficient degree of common interest between the party and the privy to make it fair to bind the party to the determinations made in the previous proceedings: *Danyluk, supra*, at para. 60. Decisions about whether there is a sufficient degree of mutual or common interest to say that one party was the privy of another must be made on a case-by-case basis.

It would not be appropriate to reverse or relax the long-standing application of the privity/mutuality requirement: *Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77 (“CUPE”).*

**Does Issue Estoppel apply in this case?**

In this case, I am not satisfied that *any* of the criteria of issue estoppel have been met. Honda has not provided me with a “decision” of the WSIB determining that Honda was unable to accommodate Mr. Snow at its workplace in March 2003. Honda asserts that it is implicit in the referral of Mr. Snow to the LMR program that the WSIB must have determined that Honda could not accommodate Mr. Snow. However, there is no “decision” that I can assess to determine whether the issues decided by the WSIB are the same ones before me. Therefore, I am not satisfied that there is a final decision by the WSIB on issues which are substantially the same as those raised by Mr. Snow’s complaint.

The parties in the WSIB matter are Mr. Snow, Honda and the WSIB. The parties before this Tribunal are Mr. Snow, Honda, the Commission and
the Personal Respondents. The Commission did not participate in the WSIB proceedings. The Respondents submit that the Commission should be considered a privy to Mr. Snow. They rely on the cases of Axton v. B. C. Transit, [1996] B.C.C.H.R. No 25 and Cote v. Canadian Forest Products Ltd., [2001] B.C.H.R.T.D. No. 13. In those cases, workers first filed grievances and subsequently filed human rights complaints. The employers sought to apply issue estoppel against the complainants for those issues that had been determined by the prior arbitration decisions. The parties in the arbitrations were the unions and the employers. The parties in the human rights proceeding were the workers and the employers. In both cases, the Tribunal found that the unions were privies to the individual workers, and concluded that the parties in the two proceedings were the same. At that time, the Commission was no longer a party to human rights proceedings in British Columbia. These cases support an argument that a union may be found to be a privy of a worker/complainant. They do not support an argument that the Commission is a privy to the Complainant.

The Commission and the Complainant are distinct parties to the proceedings under the Code, each having a specific role, the role of the Commission being that of representing the public interest. I find that the Commission is not a privy of Mr. Snow: Tweten v. RTL Robinson Enterprises Ltd. (No. 1) 2004 CHRT 8 (CanLII), 2004 CHRT 8 and cases cited therein.

Accordingly I decline to apply the doctrine of issue estoppel to any issues arising from Mr. Snow's complaint.  

Finally, the Tribunal considered whether to apply the doctrine of abuse of process:

What is an Abuse of Process?

Tribunals have the jurisdiction to stay or dismiss complaints if to proceed would amount to an abuse of process. In Ontario, this discretionary power is confirmed by section 23(1) of the Statutory Powers Procedures Act, R.S.O. 1990, c. S. 22, which provides that "a tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes."

The Supreme Court of Canada confirmed in Blencoe v. British Columbia (Human Rights Commission), [2000] S.C.J. No. 43, that remedies available to remedy an abuse of process include a stay of proceedings, orders for an expedited hearing, and costs.

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8 Ibid. at paras. 52-60
The circumstances that might ground a successful abuse of process motion are not closed. To date, some of the circumstances which have been identified as potentially giving rise to an abuse of process include:

1. Delay between the date of the occurrence and the Tribunal proceedings which causes such prejudice and unfairness that it would be an abuse to continue the proceedings: (Ontario (Human Rights Comm.) v. Dofasco Inc. (No. 4) (2004), 49 C.H.R.R. D/277, 2004 HRTO 5 (CanLII), 2004 HRTO 5; Anonuevo v. General Motors of Canada Ltd. (No. 3) (1998), 32 C.H.R.R. D/322 (Ont. Bd. Inq.)

2. The fact that the Complainant has settled with the Respondent and signed a release agreeing not to pursue a complaint in circumstances that would make it an abuse of process to pursue the complaint: Pritchard v. Ontario (Human Rights Comm.) (No. 1) (1999), 35 C.H.R.R. D/39 (Ont. Ct. (Gen. Div.) at para. 17; Chow (Re) (1999), 37 C.H.R.R. D/442 (Alta. Q.B.); Brine v. Canada (Human Rights Comm.) 2003 CHRT 17 (CanLII), 2003 CHRT 17)

3. When the Complainant’s behaviour has caused such prejudice and unfairness that it would an abuse to continue the proceedings: Patel v. Minto Developments Inc. (No. 2) (1996), 26 C.H.R.R. D/444 (Ont. Bd. Inq.); Johnson v. East York Board of Education (No. 2))

4. When the allegations of discrimination have been heard and determined appropriately in another forum: O’Connor; supra, Cremasco, Tribunal, supra; Sewak v KCL Holdings Inc. (No. 2) 2004 BCHRT 16; Tweten supra; Jeffrey v. Dofasco Inc. (No. 3) supra.; Chan v. Ontario Power General Inc. (2000), 37 C.H.R.R. D/351; British Columbia v. Tozer (1998), 33 CH.R.R. D/327.

Abuse of process because the issues have already been determined in another forum

The Supreme Court of Canada has stated that the doctrine of abuse of process is appropriately used to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) have not been met, but where allowing the litigation to proceed would nonetheless violate principles such as judicial economy, consistency, finality, and the integrity of the administration of justice: CUPE, supra at para. 37. In the CUPE case, the issue was the relitigation of a criminal conviction in an arbitration proceeding. The Supreme Court’s reasoning has since been applied in the human rights context: see cases listed in para. 54.

In Cremasco, Tribunal, supra the Tribunal asked itself the question: "Would it be fair to proceed?” The Tribunal also stated that the public perceives the human rights process as an integral part of the justice
system. Therefore, if the reputation of the larger system is to be preserved, one must consider whether, in the view of reasonable and informed but ordinary people, it would be fair to proceed with the complaint, where the issues before the Tribunal have already been heard and determined in a different forum. This decision was upheld by the Federal Court Trial Division: Cremasco, FCTD, supra and the Federal Court of Appeal: Cremasco, FCA, supra.

Having reviewed the cases, it appears that the some of the factors that human rights adjudicators have considered in deciding whether it would be an abuse of process to determine issues which have been decided by another decision-maker in another forum include:

- the wording of the other statute
- the purpose of the other legislation
- the availability of an appeal in the other proceedings
- the safeguards available to the parties in the other administrative procedure
- the expertise of the decision-maker in the other proceeding
- the circumstances giving rise to prior administrative proceedings
- the issues decided in the other proceedings
- the human rights principles applied in the other proceeding
- whether fresh evidence is available which was not available in the earlier proceeding
- whether the earlier action was tainted by fraud, dishonesty or unfairness of any kind
- any potential injustice.

Would it be an abuse of the Tribunal’s process to hear some or all of Mr. Snow’s complaint?

I find that there is merit to the Respondents’ assertion that the Legislature did not intend the Tribunal to relitigate issues that have been fully canvassed under the WSIA. Indeed, given the large number of WSIA claims, the Tribunal would be swamped if injured workers were to routinely relitigate the issue of accommodation at the Tribunal.
In an appropriate case, it may be that a WSIB decision that a worker cannot be accommodated without undue hardship to the employer should prevent the employee from relitigating that same issue before the Tribunal. The WSIB applies a standard of undue hardship to the accommodation of injured workers and has expertise in that area. There is a full right of appeal to the WSIAT, which also has significant expertise in that area.

However, at this stage, I am not prepared to find that it would be an abuse of process to hear and determine Mr. Snow's complaint of discrimination. The following factors militate against the exercise of my discretion to dismiss Mr. Snow's complaint:

- The issues before me in this proceeding include whether Honda appropriately accommodated Mr. Snow after March 2003 and whether his dismissal in 2004 was discriminatory. There are also allegations of harassment by individual managers, which are discussed below.

- I have no formal "decision" of the WSIB before me stating that Honda could not have accommodated Mr. Snow in March 2003 without undue hardship. Rather, it appears that following a mediation between Honda, WSIB and Mr. Snow, Mr. Snow was referred to a LMR program. I have no information about what process of reasoning or evidence led to that referral. I cannot assess whether the WSIB applied appropriate human rights principles to that determination.

- The WSIB, in a letter dated April 1, 2004, advised Mr. Snow that the LMR program was terminated because of non-co-operation. Honda dismissed Mr. Snow as a result of this decision. The issue before me is not whether Mr. Snow co-operated with the LMR program, or whether Honda was entitled to dismiss Mr. Snow for non-co-operation in the LMR, but whether Mr. Snow's termination was tainted by discrimination.\(^9\)

The next case to address the issue of overlapping proceedings was the decision of Vice-Chair Sherry Liang in Campbell v. Toronto District School Board,\(^10\) which dealt with a request by the respondents to strike certain allegations that they alleged had been previously determined in a decision of Ontario's Special Education Tribunal ("SET"). The decision determined that

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\(^9\) Ibid. at paras.

\(^10\) 2008 HRTO 62
certain allegations would not be heard on the basis of both abuse of process and s. 45.1. On abuse of process, the Tribunal found as follows:

**Abuse of Process**

The term “abuse of process” has been applied to a variety of circumstances in which a court or a tribunal has found it unfair to permit proceedings to continue. It may bring proceedings to an end where there has been inordinate delay (see *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), 2000 SCC 44 (CanLII)), where in a criminal context there has been unfair or oppressive treatment of an accused (*R. v. Conway*, 1989 CanLII 66 (S.C.C.), 1989 CanLII 66 (S.C.C.)), or based on the cumulative effect of breaches of fairness and delay (*Anonuevo v. General Motors of Canada Ltd. (No. 3)* (1998), 32 C.H.R.R. D/322 (Ont.Bd.Inq.)).

It can also apply to an attempt to re-litigate a claim, as described by the Supreme Court of Canada in *CUPE*:

> ... Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (para.37).

The Court went on to state that the “policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel”, referring to the following excerpt from a legal text:

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts’ and the litigants’ resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice. [Donald J. Lange, *The Doctrine of Res Judicata in Canada*, Markham, Ontario: Butterworths, 2000 (at pp. 347-48), cited in *CUPE* at para.38].

The Supreme Court emphasized that the focus of the abuse of process doctrine is less on the private interests of the parties, and more on the integrity of the adjudicative process. Therefore, the motive of the party seeking to re-litigate an issue is not a decisive factor in the application of the doctrine (see *CUPE*, paras. 43-46). This point is worth noting here. There may be various reasons why an individual may seek to conduct
litigation of the same or similar issues in different forums, or to challenge a prior adjudicative finding through another proceeding. In the case before me, it is apparent that the complainant’s mother is deeply concerned for her son’s education and life opportunities. Presented with the challenges of her son’s disability, it is perhaps no surprise that she would seek relief wherever she may find an opportunity. To call her endeavour an “abuse of process” is not to conclude that she has acted oppressively or abusively, or that she is driven by malice or bad faith. As I have indicated, abuse of process is a legal doctrine whose focus is the integrity and coherence of the adjudicative process.

In *Snow*, the Tribunal canvassed cases in which the Supreme Court’s reasoning in the *CUPE* decision was applied, referring in particular to the decision in *Cremasco*, and stating:

In *Cremasco*, Tribunal, *supra* the Tribunal asked itself the question: "Would it be fair to proceed?" The Tribunal also stated that the public perceives the human rights process as an integral part of the justice system. Therefore, if the reputation of the larger system is to be preserved, one must consider whether, in the view of reasonable and informed but ordinary people, it would be fair to proceed with the complaint, where the issues before the Tribunal have already been heard and determined in a different forum. This decision was upheld by the Federal Court Trial Division: *Cremasco, FCTD, supra* and the Federal Court of Appeal: *Cremasco, FCA, supra*. (para.56).

The Tribunal in *Snow* identified the following as some of the factors that human rights adjudicators have considered in deciding whether it would be an abuse of process to determine issues which have been decided by another decision-maker in another forum:…

Not all of these factors are significant to the case at hand but on balance, I am satisfied that the circumstances before me justify the application of the abuse of process doctrine to preclude the re-litigation of issues and facts already dealt with by the SET. In arriving at this conclusion, I find the following considerations most relevant.

**The Purpose Of The Statutory Scheme For Special Education**

I find that the statutory scheme for special education has as its central purpose the accommodation of children with special needs, including those with disabilities, so that they are able to receive the benefits of education available to others (see *Eaton*, para. 68). With respect to the provision of education services to children with disabilities, therefore, it has the same goal as the *Code*. In the words of the Board, “special education is all about finding the appropriate accommodation for students with disabilities.”

The statutory scheme for special education begins with the definition of “exceptional pupil” in the *Education Act* as one whose “behavioural,
communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program by a committee...of the board...” [sec.1(1)]. The Education Act then establishes an obligation on the Minister to ensure that all exceptional children in Ontario have available to them, “appropriate special education programs and special education services”. [s.8(3)]. As described in Sigrist and Carson v. London District Catholic School Board et al, 2008 HRTO 14 (CanLII), 2008 HRTO 14 (CanLII), the Minister's responsibility in this regard is to provide the regulatory framework within which school boards provide those programs and services (para.15). Following on this, regulations under the Education Act flesh out the obligations of school boards in the provision of special education programs and services and establish the process for the identification and placement of exceptional students, including the process by which parents may appeal a decision of an Identification Placement and Review Committee [O.Reg. 181/98 (Identification and Placement of Exceptional Pupils); Reg.306 (Special Education Programs and Services)].

The appeal process culminates in an appeal to the SET, a specialized tribunal established under the Education Act. In its decisions, the SET has stated that the applicable test in determining the appropriate placement of an exceptional pupil is whether it is in the “best interests of the child”. The decision of the Supreme Court in Eaton confirmed that this standard is the appropriate one in seeking to achieve equality in education for an exceptional child:

In its thorough and careful consideration of this matter, the Tribunal sought to determine the placement that would be in the best interests of Emily from the standpoint of receiving the benefits that an education provides. In arriving at the conclusion, the Tribunal considered Emily's special needs and strove to fashion a placement that would accommodate those special needs and enable her to benefit from the services that an educational program offers. (para.72)

The approach that the Tribunal took is one that is authorized by the general language of s. 8(3) of the Act. I have concluded that the approach conforms with s. 15(1) of the Charter. (para.80)

**Whether The Same Question Has Been Decided; Whether Human Rights Principles Were Applied**

Nowhere in either the oral or written submissions have the Commission and the complainant disputed that the complaint raises facts or issues that were the subject of findings by the SET. They do not take issue with the Board's comparison of the facts and issues raised in the Commission's pleadings, and determinations made by the SET. They do not dispute that the complaint before the Tribunal and the hearing before the SET arises out of the same set of facts. As I have set out above, the appeal to the SET and the complaint to the Commission were made
following a May 2004 placement decision and proceeded roughly concurrently. It is clear that the central issue in both processes is the appropriateness of the placement. Indeed, in the Commission’s pleadings, the central non-monetary remedy sought respecting the complainant is “an order directing that the TDSB provide comprehensive assessment of the complainant by an independent expert to assess the complainant’s needs and develop a complete accommodation program for the complainant.”

The position of the Commission on the question of whether the SET addressed the same issues as those before this Tribunal is essentially two-fold: (1) that to the extent the SET made findings on certain of those issues, they were non-binding and cannot therefore be taken to prevent the Tribunal from considering those same matters and (2) that in deciding those issues the SET did not apply a “Code” analysis, requiring a consideration of undue hardship.

The position of the Commission on (1) above is grounded in its view that a decision about “placement” is restricted to deciding whether an exceptional pupil should be placed in a regular class, or in a special education class. In its submission, the SET is unable to consider the full range of accommodations that may be required. It must pick from the placements as defined by the Board. In contrast, this Tribunal is empowered to consider the full range of a child’s needs. Although the Commission does not disagree that the goal of special education is accommodation, it submits that the SET is confined by the terms of the Education Act.

I am satisfied that the general question before the SET is the same as that before this Tribunal: what accommodations are required in order for the complainant to have access to education services. Further, I am satisfied that the mandate of the SET is not limited to a decision about whether to place a student in a regular class or special education class, but includes a consideration of the programs and services required to achieve appropriate accommodation. In fulfilling this mandate, the SET is making decisions about matters addressed by the Code. Further, on my review of the statutory scheme of special education and decisions of the SET, I see no reason to view its directions as non-binding, insofar as it makes directions about specific programs and services.

It is true that the Education Act and regulations describe special education appeals in terms of issues of “identification or placement” (see section 57(3) of that Act). It appears that some years ago, in the relatively early days of this scheme for special education, the SET construed its mandate more restrictively than it does currently. An appeal about “placement” was confined more or less to the issue of whether an exceptional pupil should be placed in a regular class, or in a special education class. Over time, however, decisions of the SET began to examine the services and programs available to an exceptional pupil, and
to make orders with respect to the provision of specific services or programs. The SET has stated that:

It is the view of the Tribunal that appropriate programs and services are interconnected with the issue of placement. Inclusion of students who have special needs into the regular classroom requires that appropriate programming and services be put in place to ensure those needs are met. This is contrasted with a special education placement where the services and programs are built into the placement itself. A regular class placement can only be considered appropriate when the services and the program are identified. (Ms. I. v. The Toronto District School Board, unreported decision of the SET, November 17, 2005, p.22).

Whether through a consideration of the special education options, accompanied by specific services and programs, or through a consideration of what services and programs are required in order for a child to be accommodated in a regular class, the SET is engaged in making decisions about appropriate accommodation. Further, its analysis is undertaken applying the standard of the “best interest of the child”, which has been found by the Supreme Court to be consistent with the equality rights of special education students under section 15(1) of the Charter of Rights and Freedoms.

In the case of this complainant, the hearing before the SET included evidence about many aspects of the complaint now before the Tribunal. A number of the allegations made by the parent at the SET hearing about the Board’s failure to provide appropriate services to the complainant are echoed in the complaint before me. The position taken by the parent at the SET hearing was that her child should be placed in a regular classroom with appropriate supports. The Tribunal found that the complainant was non-verbal, with a combined exceptionality of autism and developmental disability which requires some very specific teaching. The Tribunal heard evidence about services and programming available in special education programs and in a regular class. Ultimately, the SET found that, based on the standard of “the best interests of the child”, the appropriate placement for the complainant was in a special education class, combined with specific supports.

In view of the above, I do not agree that the inquiry undertaken by the SET cannot be compared to the type of inquiry the Tribunal will undertake in considering whether the Board has properly accommodated the complainant. I find that the mandate of the SET must be understood as part of the special education scheme in its entirety, whose goal is to provide accommodations to students with special needs to allow them to benefit from education services to the same degree as other students. As part of that scheme, the SET makes determinations of the accommodations required by a student with a disability in order to obtain equal treatment in the provision of education services, consistent with established human rights principles.
Of what significance is it that the SET did not explicitly address the issue of “undue hardship” in its decision? One answer is that in the circumstances of this case it was simply not relevant. The issue of undue hardship arises as a defence where a respondent submits that it cannot accommodate the needs of an individual. In the circumstances of this case, the parent took the position before the SET that her child should be placed in a regular class, with supporting services or programs. The Board did not take the position that those supports would cause it undue hardship. In considering the appropriate placement for the complainant that would be in his best interests, it was not necessary for the SET to consider the issue of undue hardship.

The Safeguards Available To The Parties In The Other Administrative Procedure; The Characteristics Of The SET

Decisions of the SET are final and binding on the parents and on the school board (section 57(4) of the Education Act). However, they can be reviewed by the courts. SET processes are covered by the provisions of the Statutory Powers Procedure Act as well as principles of procedural fairness. In the Eaton case, the Divisional Court found that the SET was a specialized tribunal worthy of curial deference given the structure of the legislation, the subject matter and the composition of the tribunal. Although the Court of Appeal came to a different result on the merits, it did not disagree with this characterization of the SET and neither did the Supreme Court of Canada. Decisions of the SET on the “best interests of the child” are therefore made by a specialized tribunal with expertise in the matters before it.

It is also worth noting that under the regulations for special education, a placement decision must be reviewed at least once annually. Each review leads to a decision either confirming or changing a placement, which may be appealed.

There is nothing to suggest that the SET in this case failed to deal fully and fairly with the issues raised and positions taken by the parent, or that its processes were in any way procedurally unfair.

All of the above weighs in favour of giving full effect to the determinations of the SET on the matters now sought to be raised in this complaint.

Conclusion On Abuse Of Process

In my view, having regard to the above, it would not be fair to permit the re-litigation of issues that have been determined by the SET. To apply the words used by the Supreme Court of Canada, allowing the litigation to proceed on those matters would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice. It would improperly place the Tribunal in the position of an appellate court with respect to the decision of an expert tribunal, acting within its
jurisdiction as part of a comprehensive scheme for the accommodation of special education students.\textsuperscript{11}

III. The New Code: Court Proceedings: s. 34 (11) and (12)

The new Code, in s. 46.1, provides the courts with jurisdiction to interpret and apply the Code in certain circumstances. It reads as follows:

**Civil remedy**

46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

**Same**

(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I.

There are provisions governing how a claim under s. 46.1 affects the Tribunal’s jurisdiction in s. 34 (11) and (12), which read as follows:

**Where application barred**

(11) A person who believes that one of his or her rights under Part I has been infringed may not make an application under subsection (1) with respect to that right if,

(a) a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or

(b) a court has finally determined the issue of whether the right has been infringed or the matter has been settled.

\textsuperscript{11} Campbell, supra note 10 at paras. 35-58.
Final determination

(12) For the purpose of subsection (11), a proceeding or issue has not been finally determined if a right of appeal exists and the time for appealing has not expired.

As of the writing of this paper, the Tribunal has not yet considered the application of these provisions.

IV. Ongoing Proceedings: Deferral

Section 45 of the Code provides: “The Tribunal may defer an application in accordance with the Tribunal rules”. Under the Tribunal’s rules, deferral means that the Tribunal’s process is suspended pending the completion of the other proceeding.

Deferral may be requested by the applicant, may be initiated by the Tribunal, or may be requested by the respondent. Rule 7 provides for the filing of an application with a request for deferral. It reads as follows:

RULE 7 APPLICATION WITH REQUEST TO DEFER CONSIDERATION

7.1. An Applicant may file an Application under Rule 6.1 and, at the same time, ask the Tribunal to defer consideration of the Application in accordance with Rule 14 if there are other legal proceedings dealing with the subject-matter of the Application.

7.2. A request for deferral will only be considered by the Tribunal where the other legal proceeding does not fall within the scope of s.34(11) of the Code.

7.3. Where an Application is filed with a request for a deferral, the Applicant must include the following additional information with the Form 1 or Form 4:

identifying information about the other legal proceeding dealing with the subject matter of the Application; and a copy of the document that commenced the other legal proceeding.

7.4. The Tribunal will not defer consideration of an Application without first giving all the parties, and any affected persons or organizations identified
in the Application or Response, an opportunity to make submissions on
the request for deferral.

7.5. Where an Applicant wants the Tribunal to proceed with an
Application that was deferred pending completion of another legal
proceeding, the Applicant must make a request, in accordance with Rules
14.3 and 14.4, no later than (sixty) 60 days after completion of the other
proceeding.

Deferral initiated by the Tribunal or a respondent is addressed in Rule 14
as follows:

**RULE 14 DEFERRAL OF AN APPLICATION BY THE TRIBUNAL**

14.1 The Tribunal may defer consideration of an Application, on such
terms as it may determine, on its own initiative, at the request of an
Applicant under Rule 7, or at the request of any party.

14.2 Where the Tribunal intends to defer consideration of an Application
under Rule 14.1, it will first give the parties, any identified trade union or
occupational or professional organization and any identified affected
persons, notice of its intention to consider deferral of the Application and
an opportunity to make submissions.

14.3 Where a party wishes the Tribunal to proceed with an Application
which has been deferred the request must be made in accordance with
Rule 19.

14.4 Where an Application was deferred pending the outcome of another
legal proceeding, a request to proceed under Rule 14.3 must be filed no
later than (sixty) 60 days after the conclusion of the other proceeding,
must set out the date the other legal proceeding concluded and include a
copy of the decision or order in the other proceeding, if any.

14.5 The Tribunal may, on its own motion, require a deferred Application
to proceed in appropriate circumstances.

With regard to ongoing grievances, the Tribunal's approach has been
articulated as follows:

The Tribunal will generally defer an application where there is an ongoing
grievance under a collective agreement based on the same facts and
issues. However, the Tribunal must also consider, in light of particular
circumstances of each case, whether deferral is the most fair, just and
expeditious way of proceeding with the application.\(^\text{12}\)

\(^{12}\) Aubin v. Waterloo (Regional Municipality), 2008 HRTO 214 at para. 4. See also Cray v. Rouge
Valley Health System, 2008 HRTO 120; Kench v. Automodular Assemblies, 2008 HRTO 188.
However, the Tribunal refused to defer where the employer requesting the deferral was contesting the arbitrator’s jurisdiction to hear the grievance through a preliminary objection.\textsuperscript{13}

The Tribunal has thus far not made many decisions on deferral in other circumstances. In \textit{Klein v. Toronto Zionist Council},\textsuperscript{14} the Tribunal deferred where a civil proceeding, that did not deal with the human rights issues, was near completion. It held as follows:

Deferral of an application ensures that proceedings dealing with the same issues do not run concurrently, thereby raising the possibility of inconsistent decisions on facts or law. Deferral is not automatically invoked simply because the parties are involved in other legal proceedings.

Some of the factors that may be relevant in deciding whether to defer consideration of an application before the Tribunal are the subject matter of the other proceeding, the nature of the other proceeding, the type of remedies available in the other proceeding, and whether it would be fair overall to the parties to defer, having regard to the status of each proceeding and the steps that have been taken to pursue them.

In this case, the most significant factor is the overall fairness to the parties, given the stage of the other proceeding.

Although the civil action does not raise human rights issues or include a claim for human rights remedies, the underlying events giving rise to both the civil action and the Application to the Tribunal are the same. Many of the facts supporting this Application appear, from the materials filed, to be substantially the same as the facts relied upon in the civil claim. The civil proceeding is nearing its conclusion, and the parties have put some effort into pre-trial processes such as disclosure of documents and attendance at a pre-trial conference. In these circumstances, given the stage of the civil proceeding, the Tribunal finds it appropriate to defer consideration of this Application pending the conclusion of that action. The Tribunal directs the parties’ attention to Rules 14.3 and 14.4 which outline the process by which the Application may be brought back on after the civil claim has been concluded.

\textsuperscript{13} \textit{Krieger v. Toronto Police Services Board}, 2008 HRTO 183.

\textsuperscript{14} 2008 HRTO 189.
V. Completed Proceedings: Section 45.1

The new s. 45.1 of the Code reads as follows:

The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

The Tribunal’s rules for new applications incorporate this concept in Rule 22:

**RULE 22 WHERE THE SUBSTANCE OF AN APPLICATION HAS BEEN DEALT WITH IN ANOTHER PROCEEDING**

22.1 The Tribunal may dismiss part or all of the Application where it determines, under section 45.1 of the Code, that another proceeding has appropriately dealt with the substance of part or all of an Application.

22.2 The parties will have the opportunity to make oral submissions before the Tribunal dismisses an Application under Rule 22.1.

The Tribunal’s first two decisions under s. 45.1 came in Commission-referred complaints. Section 45.1 came into effect and applied to such matters effective June 30, 2008, by virtue of the transition provisions of the Code.\(^\text{15}\)

In *Campbell*,\(^\text{16}\) the Tribunal considered the issue of the prior proceedings under both abuse of process and s. 45.1. On the issue of s. 45.1, the Tribunal held as follows:

Having concluded that it would be an abuse of process for the Tribunal to hear matters that were the subject of findings by the SET, it remains to consider whether section 45.1 has any effect on the issues.

In the letter of July 7, 2008, the Tribunal asked the parties to address whether section 45.1 applies to this complaint. The Board submits that it does apply, insofar as section 55(2) of the Code states that the new Part IV (including section 45.1) applies to complaints referred to the Tribunal by the Commission before the effective date. In its submissions, the Commission does not disagree with this.

\(^{15}\) *Human Rights Code*, s. 55(2).

\(^{16}\) *Supra* note 10.
In addition to issue estoppel and abuse of process, section 45.1 provides a basis for the Tribunal to preclude the re-litigation of issues that have been dealt with in another forum. This provision, along with other parts of the Code, gives expression to a legislative intention to avoid the duplication of proceedings. The meaning to be given to section 45.1 remains to be developed by this Tribunal, and it is unnecessary to give any definitive opinion on it here. My conclusion for the purposes of this case is that section 45.1 provides a discretion to the Tribunal which is at least as broad as the doctrines of issue estoppel and abuse of process. On the facts of this case, the bases for my finding that abuse of process applies to prevent the re-litigation of certain issues equally support the application of section 45.1.

Both the Board and the Commission submit that some guidance as to the proper interpretation of section 45.1 can be provided by decisions under the British Columbia Human Rights Code, which contains a similarly-worded provision:

27 (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

(....)

(f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding.

The parties also refer to the policy considerations and factors applicable to issue estoppel and abuse of process, as relevant to the meaning to be given to section 45.1.

After reviewing the submissions of the parties, the wording of section 45.1 in the scheme of the Code and the decisions from B.C. to which I was referred, I find it helpful to consider that provision in two parts:

• was there another proceeding?

• if so, did it appropriately deal with the substance of the application?

The Board submits that given the purpose of section 45.1, which is to prevent duplication of litigation, the definition of “proceeding” should include any formal legal proceeding in which disputes are disposed of in a manner which ensures that due process is accorded to all parties, consistent with the requirements of Canadian law. The Commission does not disagree that the SET process constitutes a “proceeding” within the meaning of section 45.1.

I agree that, at the very least, a “proceeding” includes an adjudicative process established under a statutory regime. For the reasons I have
given in support of the application of the abuse of process principle above, relating to the character and statutory framework of SET decision-making, I am satisfied that the SET appeal was a “proceeding” within the meaning of section 45.1.

Did the SET appeal appropriately deal with the substance of the application? On this question, I find the following excerpt from the decision in Villella of assistance:

On its face, s. 27(1)(f) requires the Tribunal to make a determination as to whether the substance of the complaint was appropriately dealt with. This necessitates some kind of examination of the decision arising out of the other proceeding. The question arises as to the nature of the examination contemplated by s. 27(1)(f).

In considering this question, I have found it helpful to consider the definitions of "substance" and "appropriately". The Concise Oxford Dictionary defines "substance", so far as is relevant to the usage under consideration, as follows:

3. theme, subject, material as opposed to form ... 4. essential nature ...; essence or most important part of anything, pith, purport, real meaning; ... generally, apart from details. ...

"Appropriate" is defined as follows:

... belonging or peculiar (to); suitable or proper (to, for); hence ~ly ...

These definitions suggest that in considering whether the substance of a complaint has been appropriately dealt with, the Tribunal should consider whether the complaint, in its essence or pith, was dealt with in a manner suitable or proper to that essence or pith. This, in turn, suggests that the appropriate manner of dealing with a complaint may differ depending on the essential nature of the complaint in issue. Further, the Tribunal should be concerned with the substance as opposed to the form of the manner in which the complaint was dealt with, focusing on the substance as opposed to the details of the matter. The question is not, as submitted by Mr. Villella, whether the complaint was decided correctly in the other forum.

(paras. 14-19).

The above suggests to me that the question of whether a matter has been dealt with “in substance” does not turn on technical considerations, nor is it dependent on the kind of criteria applied under legal doctrines such as issue estoppel. Further, a decision about whether a matter has been dealt with “appropriately” does not require this Tribunal to be
satisfied that it would have reached the same conclusion as that reached in the other forum. Section 45.1 does not require the Tribunal to act like an appellate court.

In the Commission’s submissions on this part of section 45.1, it reiterates its position that the appeal to the SET did not deal with the human rights issues raised by this complaint, on the basis of the limited nature of a SET appeal and the absence of a consideration of undue hardship. I have discussed this above, and for the same reasons supporting my finding on abuse of process, I am satisfied that the SET appeal appropriately dealt with the substance of the matters in dispute.

In conclusion, I find that section 45.1 provides an additional basis for precluding the Commission and the complainant from re-litigating issues that were the subject of findings by the SET. I therefore dismiss the portions of the complaint raising the matters listed in paragraph 10 of this decision, as found in paragraphs 6, 9, 10, 11 and 13 of the Commission’s pleadings. 17

In Dunn v. Sault Ste. Marie (City), 18 the Tribunal dealt with the application of s. 45.1 where the prior proceeding, a duty of fair representation complaint at the Ontario Labour Relations Board (“OLRB”), had been settled. The Union and the employer, which had been an intervenor at the OLRB and a party to the settlement, were both respondents to human rights complaints and requested that they be dismissed under abuse of process and s. 45.1. The Tribunal dismissed the complaint against the Union, but not the one against the employer, for the following reasons:

The Effect of the OLRB Settlement

The respondents rely primarily upon s. 45.1 of the Code and the legal principle of abuse of process in support of their argument that the complaints should be dismissed because of the settlement of the OLRB application. The arguments in this case arise from a settlement that was reached during another proceeding, and I find that in these circumstances the substantive principles that apply to the two analyses are not different. Accordingly, I will not address abuse of process separately from s. 45.1, but rather focus on the s. 45.1 analysis in the context of settled proceedings. I begin by discussing some of the considerations that will affect the application of s. 45.1 in this case: general principles established

17 Ibid. at paras. 59-70.
18 2008 HRTO 149.
in the Tribunal’s jurisprudence, the context of duty of fair representation applications, and the value of human rights settlements being final and binding. I then consider whether the substance of each of these complaints was appropriately dealt with in the 2003 Labour Board proceedings.

Interpretation of s. 45.1: General Principles

Section 45.1 of the Code reads as follows:

The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

The parties accept that s. 45.1 applies to this complaint, since section 55(2) of the Code states that the new Part IV (which includes s. 45.1) applies to complaints referred to the Tribunal by the Commission before June 30, 2008.

In Campbell v. Toronto District School Board, 2008 HRTO 62 (CanLII), 2008 HRTO 62, the Tribunal discussed some principles that apply to the interpretation of s. 45.1. They include:

• Section 45.1 gives expression to a legislative intent to avoid the duplication of proceedings and the re-litigation of issues that have been dealt with elsewhere;

• The discretion given to the Tribunal in s. 45.1 is at least as broad as the doctrines of issue estoppel and abuse of process;

• In determining whether another proceeding has appropriately dealt with the substance of the application, the Tribunal should not be overly technical;

• The Tribunal does not act as an appellate court from the decisions of other tribunals, and the Tribunal need not be satisfied that it would have reached the same conclusion as that reached in the other forum.

Some of the factors the Tribunal found relevant to the exercise of its discretion to apply s. 45.1 in that case, which dealt with a decision by another tribunal as opposed to a settlement of its proceedings, were the purpose of the statutory scheme governing the other proceeding, whether the same question was decided, whether human rights principles were applied, and the safeguards available to the parties in the other administrative procedure.
Duty of Fair Representation Applications and the Code

This dispute originates from a dispute at the OLRB. Human rights issues have been prominent in labour relations for many years. The OLRB itself may be called upon to apply human rights principles in various proceedings.

The duty of fair representation flows from a union’s role as exclusive bargaining agent for the employees in the bargaining unit, and imposes duties when it exercises that power. The duty of fair representation, which emerged as a common law duty, has been codified in Ontario in s. 74 of the LRA, which reads as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The responsibilities of a union when deciding whether to refer a grievance to arbitration were summarized by the Supreme Court of Canada in Canadian Merchant Services Guild v. Gendron, 1984 CanLII 18 (S.C.C.), [1984] 1 S.C.R. 509 at p. 527, as follows:

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence,
without serious or major negligence, and without hostility towards the employee.

The scope of the duty of fair representation is "limited". As the OLRB stated in McKesson Canada, [2005] O.L.R.D. No. 966 at paras. 33-34:

The limited scope of this duty reflects the role of a union as exclusive bargaining agent and its relationship with the employees in the bargaining unit. Among other things, a union must balance competing interests of different employees in the bargaining unit and decide how to allocate scarce resources. Therefore, as representative of all employees, a union is not, and cannot be, the agent of any particular employee, in the sense of being obliged to do what that employee asks to be done. Rather the obligation of a union is to attempt to be a good representative with respect to the bargaining unit: to consider requests in relation to its representation of that bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.

Consequently, while the refusal of a union to file a grievance is clearly a use of its power as bargaining representative, it does not follow that it is an arbitrary use of such power. The union must use its power as bargaining representative to make choices. Sometimes it will choose to file a grievance; sometimes it will not. It is for this reason that this Board has long recognized, as counsel for the union argued in this case, that the duty of fair representation "does not require a union to carry any particular grievance through to arbitration simply because an employee wishes that it be done": CATHERINE SYME, SUPRA, at paragraph 20. Arbitrariness, if it exists, arises not from the fact that a choice was made, but from the manner in which the choice was made and the reasons for it.

The requirement under s. 74 of the LRA that a union not act in a discriminatory manner includes and is broader than discrimination on the grounds set out in the Code. As the OLRB stated in Kenneth Edward Homer, [1993] OLRB Rep. May 433:

The term "discriminatory" in [what is now s. 74] has been interpreted broadly to include all cases in which a trade union distinguishes between or treats members differently without a cogent reason for doing so (see, for example, The Municipality of Metropolitan Toronto, [1978] OLRB Rep. Feb. 143, Douglas Aircraft Co. of Canada Ltd., [1976] OLRB Rep. Dec. 779). [emphasis added]
This doubtless includes discrimination on Code grounds. Therefore, the OLRB can decide an allegation that a union discriminated against a member of a bargaining unit, contrary to the Code, when it adjudicates a claim that the union violated the duty of fair representation by acting in a discriminatory manner.

I emphasize that when an applicant asserts that a union violated s. 74 by failing to proceed with a grievance, including where the grievance relates to the Code, the OLRB determines whether the union acted in a manner that was arbitrary, discriminatory or in bad faith and does not determine the merits of the underlying grievance: see Gopal, [2006] O.L.R.D. No. 801 at para. 14. As stated by the OLRB in Toronto (City), [2005] O.L.R.D. No. 1742 at para. 25, “[t]he fact that [the union] may be wrong with respect to a decision not to advance a human rights argument does not render the decision itself discriminatory, or arbitrary or in bad faith”.

When the OLRB makes a finding that the union violated the duty of fair representation, an order that the grievance proceed to arbitration is usually the remedy awarded: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 938, [1995] OLRB Rep. October 1249. For this reason, the OLRB’s rules (Rule 16.2) require that an employer be named as an affected party and employers often intervene in duty of fair representation cases, as the employer did here.

Thus, in a duty of fair representation case dealing with a union’s failure to take a grievance to arbitration, the OLRB will focus on the actions of the union, and not the merits of the grievance against the employer. The union has considerable discretion, and may decide not to file or arbitrate a grievance, including a human rights grievance, for many reasons unrelated to the merits of the grievor’s claim against the employer. The employer has an interest in participating in the duty of fair representation proceeding, however, because if the Union is found to have violated the LRA, the OLRB may order that the grievance proceed as against the employer.

Settlement of Human Rights Disputes

The Code and the Tribunal’s Rules support, facilitate and enforce the final and binding settlement of human rights proceedings between parties if they choose to resolve the matter voluntarily. The current Code, in s. 45.9, provides that a settlement of an application before the Tribunal is binding on the parties, may be incorporated into a Tribunal order on the joint motion of the parties, and may be the subject of an application for enforcement. The Tribunal’s Rules of Procedure provide for Tribunal mediation, on the initiative of the Tribunal or a party. The old Code, under which these complaints were filed, required the Commission to “endeavour to effect a settlement” of any complaint filed with it.
The importance of final and binding settlements in the unionized workplace is articulated in the purposes of the LRA, which include “[t]o promote the expeditious resolution of workplace disputes”. The importance of binding agreements was articulated by the OLRB as follows in TRW Automotive (Kelsey-Hayes Canada Ltd.), [2000] OLRB Rep. July/Aug. 731 at para. 14:

Parties are entitled to rely on agreements freely entered into. Nothing would be more disruptive to orderly labour relations than to permit parties to revoke agreements among employees, their trade union, and their employer into which the parties have entered to settle disputes or potential disputes.

This is true of human rights disputes, in whatever social area they arise. There is a strong public interest in ensuring that when parties freely choose to resolve the substance of a human rights dispute, in whatever forum it is brought, the matter is at an end. This is a fundamental principle that should guide the Tribunal in the interpretation of s. 45.1, because to do otherwise could make the finality of settlements highly uncertain.

Should the Tribunal Dismiss these Complaints under s. 45.1?

With this background, I turn to the application of s. 45.1 to the facts of this case. For ease of reference, I set out the section again:

The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

I will deal first with whether a settlement of a matter commenced before a different tribunal may be a “proceeding” that has “dealt with the substance” of the complaints within the meaning of the section. I find that s. 45.1 may apply to settlements of proceedings under other statutory schemes. This conclusion is supported by both the wording and the purposes of s. 45.1. The provision refers to a “proceeding” having “dealt with” the matter, rather than using narrower words that would only encompass adjudication like “decision” or “reasons”. More important, the purpose of avoiding the duplication of proceedings and ensuring finality in litigation would be severely undercut if the section applied only to decisions. Most litigation ends in settlement. To be effective, settlements must be final, since otherwise the parties would have no incentive to make an agreement to end litigation. An interpretation of s. 45.1 that did not cover settlements would discourage parties from working to resolve human rights proceedings without recourse to litigation.
I turn now to whether the OLRB proceeding appropriately dealt with the substance of the complaints that have now been referred to the Tribunal. Given that the OLRB proceeding was settled, the analysis in these circumstances must take into account that settlements are different from decisions. Settlement is voluntary, reflecting the will of the parties, and there are many reasons a particular litigant may decide to settle. Every agreement to settle litigation involves fashioning an outcome acceptable to all parties, and a litigant may well not obtain everything sought. To examine whether a settlement was “appropriate” merely by comparing it to remedies that might be obtained if the applicant was successful in litigation would be to ignore this fact, and would not recognize that one of the benefits of settlements is that the solutions parties develop themselves are often different from what a tribunal might have ordered. It would also not be appropriate to examine the reasoning process of the parties.

In my view, the appropriate factors in determining whether the OLRB settlement appropriately dealt with the issues before this Tribunal are the facts and issues in the OLRB proceeding that was settled and the language used by the parties in their agreement to express the nature of the issues that were resolved.

The Complaint Against the Union

I address, first, the complaint against the Union. Mr. Dunn agreed to settle the OLRB proceeding in which he raised the same facts and allegations of discrimination that are now before this Tribunal in the complaint against the Union. The OLRB had the power to deal with them and familiarity with human rights issues. His human rights complaint against the Union is an allegation that it discriminated against him on the basis of disability, contrary to the Code, by failing to file a grievance alleging Code discrimination. Through the allegation that the Union discriminated against him contrary to s. 74 of the LRA, Mr. Dunn raised the same facts and issues in the OLRB proceeding, and then agreed to resolve the matter and withdraw the application. Indeed, in his oral submissions, Mr. Dunn acknowledged that the concerns he was pursuing in the human rights process were the same as those he raised at the OLRB.

I therefore find that the settlement of the OLRB proceeding appropriately dealt with the substance of the complaint against the Union that is now before the Tribunal. The settlement expresses that the parties intended to “resolve” the issues in the s. 74 application. In deciding to resolve the matter, the parties were dealing not only with the particular legal proceeding that had been filed at the OLRB, but the substantive issues that were raised in the application and that would have been addressed by the OLRB had the litigation proceeded. These included the assertion that the Union had discriminated against Mr. Dunn in its representation of him on the issue of his accommodation. It is implicit in a decision by the
parties to resolve a matter voluntarily, that the substantive issues that were raised will not be brought up again in a different forum.

This flows from the purposes of s. 45.1. Having chosen to file an application at the OLRB that raised the issue of discrimination, then agreeing to conclude and obtaining the advantages of settling that proceeding, Mr. Dunn cannot now make the same allegations again in this forum. To do otherwise would be to permit duplicate litigation and undermine the finality of settlements.

The Commission and complainant raise various arguments why the Tribunal should not dismiss these complaints as a result of the previous settlement. They make reference to the process that led to the Minutes of Settlement, including the alleged statements by the Labour Relations Officer. It is, in my view, inappropriate for this Tribunal to engage in any review of the confidential settlement process at the OLRB. Just as the Tribunal is not an appeal body from other tribunals, it does not have a general role in supervising mediation processes at other tribunals, absent exceptional circumstances such as allegations of human rights violations during the settlement process or the absence of another forum in which to raise allegations of duress. There are no allegations in this case that raise such exceptional circumstances.

They also argue the OLRB proceeding could not provide any remedy against the employer. This should not, I find, affect whether the complaint against the Union is dismissed. Section 45.1 specifically contemplates that only certain aspects of an application or complaint may be dismissed through the words “may dismiss an application, in whole or in part”, and this is in fact what occurred in Campbell, supra. The fact that it may not be appropriate to dismiss against the employer should not affect the analysis of s. 45.1 in the complaint against the Union.

The Commission cites the fact that the settlement provides only that the s. 74 application was withdrawn as against the Union, and included no release of claims under the Code. In my view, the absence of a release does not determine the issue of whether the complaint against the Union should be dismissed, in light of the fact that the very issues now raised before the Tribunal were before the OLRB. An approach that required a specific release of Code claims where these claims were specifically raised in the other proceeding would defeat the purpose of s. 45.1 in preventing duplicate litigation, and focus on form over substance. The same events form the basis of the Tribunal proceeding, the human rights issues were raised, and the OLRB had jurisdiction to deal with them. The parties should reasonably have expected that the same facts and issues could not be re-litigated in a different forum.

The Commission and complainant argue that the Tribunal should not exercise its discretion under s. 45.1 because the Minutes of Settlement were never fully implemented. They say that this is because certain tests
performed on Mr. Dunn aggravated his injuries. If the Minutes of Settlement were not properly implemented, Mr. Dunn could have sought enforcement at the OLRB under s. 96(7) of the LRA. The fact that a settlement is not implemented makes it no less binding and does not permit a party to raise the underlying substantive issues: Glover v. 571566 Ontario Inc., 2006 HRTO 14 (CanLII), 2006 HRTO 14 at paras. 32-33. The allegations against the Union properly before the Tribunal relate to its actions prior to the settlement at the OLRB. It is unnecessary to consider what the result would be if there were allegations about actions by the Union in the accommodation process after the resolution of the s. 74 application, since no such allegations have been raised here.

Finally, Mr. Dunn alleges that during the OLRB application and negotiations, the Union and/or employer were themselves attempting to re-litigate issues that had been determined during the WSIB litigation. Any assertions made by parties during litigation or negotiations, however, do not affect the basic fact that Mr. Dunn agreed to a settlement of his OLRB application, which is the critical fact affecting my conclusion.

Accordingly, the complaint against the Union is dismissed.

The Complaint Against the Employer

The analysis and the result are different, in my view, in the complaint against the employer, because the issues in the OLRB application did not relate to the employer’s actions. All the OLRB proceeding could have determined was whether the Union acted in a discriminatory (or arbitrary or bad faith) manner in not referring the grievance, not whether the employer violated the Code through a failure to accommodate Mr. Dunn. Therefore, the settlement of the s. 74 application does not itself suggest that the OLRB proceeding dealt with the substance of the complaint against the employer.

Of course, the parties may, in a settlement of an application under s. 74 of the LRA, choose to deal with the substance of both the duty of fair representation application and the underlying grievance. Employers have an interest in s. 74 applications at the OLRB, must be given notice, and often participate as intervenors because a finding that the Union violated the LRA could lead to arbitration of a grievance against the employer. For this reason, an applicant, a union and an employer may enter into comprehensive settlements that deal with the underlying issues. Part of the applicant’s bargaining power is the possibility that an arbitration ordered by the OLRB may eventually result in an award against the employer. It is important that parties, including employers, be able to enter into global settlements of both a s. 74 application and the underlying grievance or issue with the employer that motivated it.
A settlement of a s. 74 application under the *LRA* that an employer intervenor has signed may therefore, in certain circumstances, be found to have appropriately dealt with the substance of a human rights application or complaint about the underlying issues. However, because these issues cannot be adjudicated at the OLRB, this requires a clear expression in the settlement of the parties’ intention to resolve the underlying grievance or human rights issues as well as the duty of fair representation application.

Unlike the complaint against the Union, the complaint against the employer does not raise the same legal issues that were before the OLRB. Moreover, there is no indication in the settlement of an intention by the parties to finally and completely deal with the dispute between Mr. Dunn and the City about the accommodation of his disability. The settlement does not contain a release, nor any other provisions that indicate that the parties intended that the underlying issue of Mr. Dunn’s accommodation by the employer would be conclusively dealt with through the agreement. While this was implicit as against the Union through the resolution of the OLRB application that dealt with the same issues, the same is not true of the claim against the employer. Further, the agreement merely deals with a preliminary step in the accommodation process: the evaluation of the job and Mr. Dunn’s restrictions. There is nothing in the document or any other evidence before me that suggests that the parties intended to conclusively deal with the substance of Mr. Dunn’s dispute with his employer about his accommodation.\textsuperscript{19}

The next decision to address s. 45.1 was *Boncori v. TRW Canada Limited*,\textsuperscript{20} a transition application filed under s. 53(3) of the new *Code*. In this case, a previous arbitration had dealt with the issues and the Tribunal dismissed this portion of the application as follows:

**REQUEST TO DISMISS UNDER SECTION 45.1**

**General Principles**

Section 45.1 of the *Code* provides as follows:

The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

\textsuperscript{19} Ibid. at paras. 22-52.

\textsuperscript{20} 2008 HRTO 178
As a result, the issue for this Tribunal is whether the arbitrator’s decision has appropriately dealt with the substance of all or part of the Application, such that all or part of the Application should be dismissed.

In Campbell v. Toronto District School Board, 2008 HRTO 62 (CanLII), 2008 HRTO 62, this Tribunal held that it was helpful to consider s. 45.1 in two parts: (1) whether there was another “proceeding” and (2) if so, whether it “appropriately dealt with” the substance of the Application.

With regard to the second issue, this Tribunal cited the jurisprudence of the BC Human Rights Tribunal holding that it will consider whether the Application arises from the same facts that provided the basis for the other proceeding, whether the substance of the issues raised in each forum was in pith or essence substantially the same, and whether the matter raised was “appropriately dealt with” in the other proceeding: Villella v. City of Vancouver and others (No. 3), 2005 B.C.H.R.T. 405 at paras. 14 to 19; Rush v City of Richmond, 2008 BCHRT 62 (CanLII), 2008 BCHRT 62 at paras. 52, 55.

In determining whether the matter was “appropriately dealt with” in the other proceeding, the appropriate role for the Tribunal is to determine whether the arbitrator proceeded fairly and upon the proper principles, with due consideration of the facts and human rights law relevant to the discrimination issue before him: Rush v City of Richmond, supra at para. 76.

Was there another “proceeding”?

In the instant case, I am dealing with a labour arbitrator who was appointed pursuant to the terms of a collective agreement between the respondent and the applicant’s union. Nonetheless, under section 48 of the Labour Relations Act, parties are required to have an arbitration clause under the collective agreement and labour arbitrators are given express statutory powers to conduct an adjudicative hearing, including the power to interpret and apply human rights legislation, and to make decisions that are binding upon the parties and enforceable in the same manner as a court order. I have no hesitation in finding that a labour arbitration under a collective agreement is a “proceeding” within the meaning of s. 45.1 of the Code.

Was the substance of the Application appropriately dealt with in the labour arbitration?

Does the Application arise from the same facts?

I am satisfied the Application includes the same facts that gave rise to the labour arbitration. The complaint that was filed and that forms the basis of this Application describes a series of incidents, including: the removal of the ergonomic chair that was being utilized by the applicant and the failure to provide him with a replacement chair; alleged deficiencies in the
report prepared and conclusions reached by the occupational therapist; alleged failures on the respondent’s part to take actions to accommodate the applicant; and allegations about matters raised at the arbitration hearing. These are precisely the same facts that form the basis of the grievance and the labour arbitration award.

The applicant’s complaint, however, also includes reference to alleged harassment by his supervisor in 2004 when he was working in the RS Socket Operator position and his efforts to get this alleged harassment addressed by management. While the respondent submitted that this alleged harassment was part and parcel of the applicant’s overall allegation that he was not being properly accommodated, the fact is that separate grievances were filed by the union to address disciplinary actions taken against the applicant as part of the alleged harassment. These grievances were not referred to the arbitrator together with the accommodation grievance and therefore do not form part of the labour arbitration award. The parties have advised that these grievances remain outstanding.

In the end, I find that the portion of the Application dealing with the applicant’s request for accommodation does arise from the same facts as were addressed in the labour arbitration proceeding. However, I find that the harassment allegations set out in paragraphs 3 and 7 of the complaint do not arise from the same facts.

After the oral hearing in this matter was held, the applicant filed further written submissions with the Tribunal relating largely to ongoing discussions about whether the applicant can be accommodated in suitable work on the basis of current information about his functional abilities. These discussions post-date both the Commission complaint and the arbitration decision. In the absence of exceptional circumstances, the Tribunal will not allow an applicant in an Application filed under s. 53(3) of the Code to expand the subject-matter of the complaint filed with the Commission. Thus, ongoing accommodation discussions will not be considered.

Are the same issues being raised in both proceedings?

The arbitration decision deals with the issues of whether the respondent had violated the collective agreement by not allowing the applicant to work in the job of RS Socket Operator, whether the respondent failed to properly consider requests for accommodation and modification of the RS Socket Operator position, and the respondent’s general obligation to accommodate a disabled worker.

The same issues arise in relation to the accommodation allegations raised in the Application.

Accordingly, with respect to the accommodation allegations in the Application, I find that they raise the same issues as were addressed in
the arbitration decision. However, with respect to the harassment allegations, for the same reasons as articulated above, I find that these allegations raise a different set of issues that were not dealt with at arbitration.

Was the matter “appropriately dealt with” in the other proceeding?

In my view, there appears to be no real issue as to the fairness of the arbitration process. The applicant’s interests in the arbitration proceeding were well-represented by union counsel. While the applicant takes issue with the procedural wrangling that consumed several of the initial days of the arbitration hearing, the arbitrator afforded the parties the opportunity to call evidence and make submissions.

The arbitrator considered the Supreme Court of Canada decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU 1999 CanLII 652 (S.C.C.), [1999] 3 S.C.R. 3* and *Central Okanagan School District No. 23 v. Renaud 1992 CanLII 81 (S.C.C.), (1992) 95 D.L.R.(4th) 577*, which are leading decisions dealing with the duty to accommodate in the workplace and which clearly set out the proper principles. I note that while the arbitration decision primarily addresses the issue as framed by union counsel of whether the applicant was improperly disallowed from returning to a specific job, the decision does address the broader accommodation issue. The applicant has not shown me that the arbitrator failed to consider facts relevant to the accommodation issue and, after a careful review of the decision, I am satisfied there is no basis to support any alleged failure on the arbitrator’s part to give due consideration to the evidence before him as to what accommodations were being sought.

The arbitrator heard the evidence of the occupational therapist, who was qualified as an expert witness and who was subjected to a vigorous cross-examination by union counsel. In the end, the arbitrator accepted this witness’s conclusion that the applicant could not perform the essential duties of the RS Socket Operator position or any of the other positions he reviewed within the scope of his permanent medical restrictions. The arbitrator was alive to the issue of whether the RS Socket Operator position could be modified to accommodate the applicant’s disability-related needs, and in this regard the only evidence provided by the applicant as to his accommodation needs was for the use of an ergonomic chair to take “micro-breaks”. The arbitrator noted that, apart from a brief doctor’s note expressing the applicant’s need for an ergonomic chair, there was no evidence before him to support that the use of this chair would have enabled the applicant to perform the job within his restrictions. The union’s evidence was primarily based upon the fact that the applicant had been able to perform the essential duties of the job for several months while having use of a co-worker’s ergonomic chair. However, the arbitrator heard and accepted the evidence of the occupational therapist that an employee may be able to perform a job beyond his medical restrictions for a short period of time, but that this was
not sustainable. No expert evidence was called by the union to refute the occupational therapist’s evidence.

It is clear that the arbitrator accepted the evidence of the occupational therapist who had reviewed a large number of jobs and found them to be beyond the applicant’s permanent medical restrictions. In the face of this evidence, and with the exception of the applicant’s assertion about the ergonomic chair, no contrary evidence appears to have been presented to indicate that any other modifications or accommodations would have enabled the applicant to perform the essential duties and requirements of the RS Socket Operator job or any other job at the respondent’s plant for which he appropriately may have been considered. The evidence before the arbitrator indicates that as a result of a WSIB mediation in June 2005, the accommodation search was narrowed to focus on two specific jobs, the RS Socket Operator job and the PT Cruiser Socket Line Assembly job. The arbitrator’s decision does not indicate that the union advanced any modifications or accommodations that would have enabled the applicant to perform the PT Cruiser Socket Line Assembly job, or any modifications or accommodations that would have enabled him to perform the RS Socket Operator job other than the use of an ergonomic chair. There also is no indication that the union or the applicant identified any other positions that he could have performed within his restrictions, with or without modification or accommodation.

As a result, I find that the accommodation allegations raised in the Application were appropriately dealt with in the arbitration proceeding, and I accordingly dismiss this part of the Application.21

Finally, the Tribunal again addressed s. 45.1 in Berisa v. Toronto (City),22 as follows:

In the alternative, I accept the respondents’ submission that the WSIB decision of March 23, 2006 has appropriately dealt with the issue whether the employer had accommodated the employee’s disability post-November 29, 2004.

The WSIB decision dated March 23, 2006 dealt with the complainant’s request for full loss of earnings (LOE) benefits from November 14, 2004, stemming from an alleged recurrence of the November 2002 workplace injury. In order to establish eligibility for LOE benefits, the complainant had to satisfy the WSIB that he was medically unfit for work. Part of the WSIB analysis was to consider whether the complainant’s position was suitable in light of his physical restrictions and in light of any accommodations offered by the respondent employer. The WSIB concluded that the complainant was not entitled to the LOE benefits

21 Ibid. at paras. 6-23.
22 2008 HRTO 246.
beyond November 29, 2004 because the complainant’s position was suitable, in light of accommodations offered by the employer.

I find that the WSIB decision has appropriately dealt with that issue and it would be an abuse of process to hear those allegations again. Alternatively, I would exercise my discretion under section 45.1 of the Code to decline to hear that issue on the basis that the WSIB proceeding has appropriately dealt with it. In reaching that conclusion I have taken into account the following factors:

- The issue of entitlement to LOE benefits post November 2004 subsumes the issue whether the complainant’s disability was accommodated;
- The complainant was represented at the WSIB proceedings;
- The WSIB has expertise in assessing the suitability of positions for injured workers;
- The WSIB conducted two on-site ergonomic assessment of the complainant’s position in October 2004 and January 2005;
- The complainant had the opportunity to and did testify orally at the hearing to explain how the position was not suitable in light of his physical restrictions;
- The WSIB considered (but ultimately rejected) the complainant’s evidence and the evidence of the complainant’s family physician;
- There is a right to appeal to the Workplace Safety and Insurance Appeals Tribunal (“WSIAT”); and
- The complainant has exercised his right of appeal; the WSIAT has heard his appeal and a decision is pending.  

CONCLUSION

Given the significant amount of jurisprudence they have generated in a short time, it is clear that issues of overlapping jurisdiction will be prominent in the jurisprudence under Ontario’s new Code. There will doubtless be many more fact situations and types of proceedings that the Tribunal will address as applications continue to be filed and progress through the system.

23 Ibid. at paras. 38-40.