Reconciling Competing Rights: A Draft Framework for Organizations

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Shaheen Azmi, Acting Director
Policy, Education, Monitoring, Outreach, Ontario Human Rights Commission
Workshop Overview

• Context
• Draft framework at a glance
• Defining values interests & rights
• Legal principles
• Overview of the analysis
• Applying framework to your scenarios
• Questions & answers
Context

• Emerging scenarios of competing human rights claims & organizational needs
  – Competing human rights claims – where stipulated human rights collide
  – Common scenarios:
    • creed and sexual orientation
    • creed and creed
    • disability and creed
    • disability and disability
    • many more
Context

• Recent case law with balancing principles and some steps but no comprehensive process or framework to guide organizational response

• OHRC mandate

• Competing Rights Policy development
  – Research: Interviews, literature review, case law review,
  – Policy Dialogue and papers (March/10)
  – Framework Testing (Dec/10)
Framework for addressing competing human rights claims for organizations

Stage 1: Recognizing Rights
- Is this a competing human rights claim?
  - No
  - Yes

Stage 2: Reconciling Rights
- Who is involved?
  - Organizations
  - Claimants
  - External conciliator

Preparation for Reconciliation Process
- Organization informs parties of process and Stage 1 analysis - assessment of rights
- Confirm participation

Reconciliation Process
- Review Stage 1 analysis
- Determining interests
- Win - win solution?
- Next best solution?

Analysis

Stage 1: Recognizing
1. What is being claimed?
   a. Do both claims relate to individuals or groups rather than business interests?
2. Do claims connect to a human right or other legal right?
   a. Constitution, legislation, international standards or case law
   b. At least one claim falls under a human right
   c. Claims fall within the scope of the right
3. Do claims amount to more than minimal interference?

Stage 2: Reconciling
4. Is there a solution that allows enjoyment of each right?
5. If not, is there a “next best” solution that allows some enjoyment of the right?
Framework goals

- Show mutual dignity & respect
- Recognize nature of rights
  - Enshrined in domestic and international law
  - Apply equally to all
  - Come with responsibilities
- Engage in responsibilities
  - Avoid interfering in rights of others
  - Cooperate to find solutions
- Reconcile competing rights as much as possible
Framework and analysis

- Framework includes two parts
  - **Analysis**: The thinking behind the process that could be used by any person making a decision on how to balance competing rights (eg. Tribunal decision-maker).
  - **Process**: Procedure or process that may be used by an organization to resolve competing rights concerns raised by one or more parties (eg. Principal or equity lead)
Key definitions

- **Rights** – legally identified “right” or entitlement
  - Those in *Charter, Code* have higher status than other rights set out in other laws (e.g. *Residential Tenancies Act*)

- **Interests** – Issue in which a person has a concern, share, portion or stake
  - may be elevated to a right in some cases

- **Values** – Important moral principles and standards that are not actionable in law but may inform how a human rights claim is dealt with

- **Beliefs** -- Things believed to be true” or opinions “firmly held,” also not actionable in law
Distinguishing “competing rights”

• There will be many situations in which two or more of the above may come into conflict

• Human rights and other legal entitlements will usually hold a higher status than interests, values and beliefs

• Generally, the OHRC’s tool is intended to help resolve competing human rights and other rights that are legally codified
Key legal principles

Derived from case law:

- No “bright-line rules” – key legal principles operate together to provide guidance
- No rights are absolute – are inherently limited by rights of others
- No hierarchy of constitutional/human rights – all are equally deserving
- Aim is to achieve reconciliation that fully respects importance of both sets of rights
- Context is critical – rights cannot be assessed in a vacuum
Stage 1 - Draft analysis

Recognizing competing rights

1. What is being claimed?
   a. Do both claims relate to individuals or groups rather than business interests?

2. Do claims connect to a human right or other legal right?
   a. Constitution, legislation, international standards or case law
   b. At least one claim falls under a human right
   c. Claims fall within the scope of the right

3. Do claims amount to more than minimal interference?
Stage 2 - Draft analysis

Reconciling competing rights

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

5. If not, is there a “next best” solution that allows some enjoyment of the right?
Framework – procedural component

- Overlays the analysis and guides organizational response
  - organization not a claimant but has legal liability
  - must consider all options

- Organization applies two step process
  - Stage 1 -- Process to apply stage one analysis to context
  - Stage 2 – If competing rights situation, then go into alternative dispute resolution process
Stage 1 Process

- Organization applies analysis in two step process
  - Step 1: Preliminary quick process, if appropriate
    - Investigation, analysis, preliminary decision to confirm competing rights claim, discussion aimed at win/win resolution
    - processes may be combined and relatively informal and quick
Stage 1 Process

- If not resolved move to Step 2: more formal process
  - investigation, analysis, decision to confirm if competing rights scenario If competing rights situation
  - typically more complicated scenarios – slower, more legalistic process
  - Proceed to formal ADR Stage 2 if confirmed as competing rights scenario not amenable to quick resolution
Stage 2: Reconciling Process

- Are active claimants involved?
  - Where no claimants present:
    - Policy development route (prevention)
    - or find claimants and convert to ADR route
  - Where one or more claimants:
    ADR route
    - Determine configuration of dispute (organization, 1/2/3 parties)
    - Conciliation or negotiation
    - Aim at win/win first – “next best” second
ADR approaches

- **Negotiation**
  - A formal process of dispute resolution that does not involve a neutral party facilitator

- **Conciliation**
  - A formal process in which an impartial third party facilitates constructive communication and negotiations aimed at reconciling the competing claims and interests of involved parties
  - May include internal or external conciliator
Framework for addressing competing human rights claims for organizations

STAGE 1: RECOGNIZING RIGHTS
Is this a competing human rights claim?

1. Are claimants?
2. Institution is concerned about potential competing rights issues.
3. Engage in policy development aimed at prevention.

NO EXTERNAL CONCILIATOR
Organization plays either negotiator or conciliator role plus represents corporate interest & obligations.

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Organization plays either negotiator or conciliator role plus represents corporate interest & obligations.

NOT RECONCILED
Possible adjudication

RECONCILED

STAGE 2: RECONCILING RIGHTS
Who is involved?
Organizations
Claimants
External conciliator

PREPARATION FOR RECONCILIATION PROCESS
Organization informs parties of process and Stage 1 Analysis - assessment of rights.
Confirm participation

STAGE 2: RECONCILING
Review Stage 1 Analysis
Determining interests
Win - win solution?
Next best solution?

Analysis

STAGE 1: RECOGNIZING
1. What is being claimed?
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STAGE 2: RECONCILING
4. Is there a solution that allows enjoyment of each right?
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Next steps

• **OHRC:**
  - Future consultation & involvement from sectors other than education
  - Refinement of framework and detailing
  - Policy statement
  - Promotion and training
  - Feedback
Question and Discussion
For discussion

• What scenarios have you encountered?
• Could you apply the analytical component of the Draft Framework to resolve this?
  – What rights are being claimed?
  – Are they substantially interfering with one another?
  – What options are there for resolving the matter?
Improving the Framework

- Are the draft Framework and its analytical and procedural components easy to understand and apply?
- What do you like or not like about the draft Framework?
- What would you change?
- What about other alternatives?