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Undercompensating for Discrimination: An Empirical Study of General Damages Awards Issued by the Human Rights Tribunal of Ontario, 2000-2015

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Introduction

The Human Rights Tribunal of Ontario (“Tribunal” or “HRTO”) has the power to award damages to applicants for violations of the Ontario *Human Rights Code* (“Code”) for the “injury to dignity, feelings and self-respect” they experience as a result of discrimination.¹ Significant concerns have been raised in recent years that these damages awards, typically referred to by the Tribunal as “general damages”, are generally too low to properly reflect the importance of equality rights, and thus do not adequately compensate those who have endured the harm of discrimination. Notably, in his thorough and persuasive study of the impact of amendments to the *Code* that came into effect in 2008, Andrew Pinto reported that many stakeholders felt that general damages were “routinely too low”.² Following his review of the Tribunal’s jurisprudence Pinto concluded that “there appears to be a widening gap between the Tribunal’s insistence that human rights awards should be meaningful, and the actual monetary compensation that is awarded in most instances.”³ As a result, the Pinto Report recommended that the HRTO reconsider its approach to general damages and significantly increase the monetary range of these awards.⁴

Pinto’s view is widely shared within the Ontario human rights bar. In surveying 50 Ontario human rights lawyers in the fall of 2014, Nadia Halum found that 93% of the lawyers who represent applicants agreed that general damages awards are too low, 91% of the lawyers who represent both applicants and

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¹ *Human Rights Code*, RSO 1990, c H.19, s 45.2(1)1 [*Code*].

² Office of the Ministry of the Attorney General of Ontario, *Report of the Ontario Human Rights Review 2012* by Andrew Pinto (Ontario: Ontario Ministry of the Attorney General, November 2012) at 70 [“Pinto Report”].

³ *Ibid* at 73.

⁴ *Ibid*.

respondents shared this opinion, and even 36% of lawyers who represent respondents believed that general damages awards are too low.⁵

In his report, Pinto did not present data on the size of general damages awards. He did note that, in November 2012, \$5,000, \$10,000 and \$15,000 were the typical amounts of low, medium and high awards issued by the Tribunal, and that this range of awards appeared to be similar to the range of awards issued before the 2008 legislative reforms took effect.⁶

Against the backdrop of this debate, we present a comprehensive picture of the size of general damages awards issued by the Tribunal. What amounts has the Tribunal ordered respondents to pay successful applicants as general damages to compensate for the experience of discrimination? How have these amounts changed over time? In particular, was Pinto right to observe that the range of awards issued by the Tribunal had not changed following the 2008 changes to the *Code*? And in the years since the release of the Pinto Report in November 2012, has the Tribunal responded to his recommendation that it should reconsider its approach and significantly increase the size of general damages awards?

To answer these questions, we compiled a database that includes all final decisions of the Tribunal that made a finding of discrimination from 2000 to 2015. We tabulated all general damages awards made by the Tribunal in these cases during this period (464 awards in total). Our analysis of the data reveals that the average size of general damages awards trended upward from 2000 to 2006, then dropped sharply from 2007 to 2009 (the period of transition to the direct access model of adjudication implemented by the 2008 *Code* amendments). Then, from 2010 to 2015, the average size of general damages awards gradually increased.

In Part I of this paper, we begin by briefly describing Ontario's human rights system, and how it has changed as a result of the 2008 legislative amendments. In Part II, we summarize the conventional approach to general damages assessment consistently followed by the Tribunal throughout the period under study and discuss what Pinto and others have had to say about the range of general damages awards issued by the Tribunal. Part III describes the method we adopted to compile the data on general damages awards. Part IV constitutes the core of the paper. In that Part, we present the data on the mean, median and range of general

⁵ Nadia Halum, "The Undignified Value of Dignity in Human Rights Adjudication" (Anti-Discrimination Intensive Program, Osgoode Hall Law School, December 2014) [unpublished, on file with the authors] at 7-8 ["Halum"].

⁶ Pinto Report, *supra* note 2 at 72.

damages awards from 2000 to 2015. We also adjust the data to take into account the impact of inflation. The data reveals that, as Pinto observed, the range of the vast majority of general damages awards has remained relatively unchanged across the legislative reforms, and indeed from 2000 to 2015, with his \$5,000, \$10,000 and \$15,000 low, medium and high benchmarks confirmed as relatively accurate descriptors of this range. After adjusting for inflation, our data reveals that the range has, in real terms, decreased.

Our data, and our study of the cases in our database, has led us to share Pinto's view that HRTO general damages awards are too low to reflect the importance of the equality rights protected by the *Code*. In Part V, we consider what steps the Ontario Human Rights Commission, the Human Rights Tribunal of Ontario, the Human Rights Legal Support Centre and the legislature might take to ensure that the size of general damages awards is increased and not steadily eroded due to inflation.

I. Introduction to Ontario's human rights system

The Ontario *Human Rights Code* prohibits discrimination based on a list of enumerated grounds, such as disability, sex and race, in certain social areas, predominantly employment, housing and services.

For those who have experienced a *Code* violation, the *Code* establishes special institutions and procedures aimed at providing prompt and affordable access to justice. The *Code* establishes three institutional bodies, or "pillars":⁷ the Human Rights Tribunal of Ontario ("Tribunal"), the Ontario Human Rights Commission ("Commission"), and the Human Rights Legal Support Centre ("Centre").

The Tribunal is an adjudicative body specifically designed to provide accessible adjudication of individuals' human rights applications, by Tribunal members with expertise in interpreting and applying the *Code*.⁸ Individuals who have experienced discrimination file applications directly with the Tribunal at no cost. The Tribunal provides applicants with optional mediation services before their applications may proceed to a hearing. The Tribunal has expansive remedial powers and broad discretion in determining its own procedure.⁹ The Tribunal also has the power to establish rules of procedure that are "alternatives to

⁷ The Ontario *Code* is unique in the country for creating a human rights infrastructure with three pillars. Two recent books provide excellent overviews of the state of human rights institutions in Canada: Shelagh Day, Lucie Lamarche and Ken Norman eds, *14 Arguments in Favour of Human Rights Institutions* (Toronto: Irwin Law, 2014) (*14 Arguments*); Pearl Eliadis, *Speaking Out on Human Rights: Debating Canada's Human Rights System* (Kingston/Montreal: McGill-Queen's University Press, 2014).

⁸ *Code*, *supra* note 1, Part IV.

⁹ *Ibid*, s 40.

traditional adjudicative or adversarial procedures”, allowing the Tribunal to assist self-represented applicants through “active adjudication”.¹⁰ For example, the Tribunal may define or narrow the issues required to dispose of an application, limit the evidence and submissions of the parties on such issues, and conduct examinations in chief or cross-examinations of a witness.¹¹

The Centre provides free legal assistance to those who have filed, or are considering filing, human rights applications with the Tribunal.¹² Individuals may receive different levels of legal service provision, from summary advice by phone up to representation at a hearing, depending on the nature of their issue and the stage of their application.

The Commission is tasked with a range of responsibilities, including the creation of human rights policies, undertaking public education initiatives, protecting and promoting human rights through institutional partnerships and other activities, and instituting and intervening in Tribunal proceedings in the public interest.¹³

To understand the operation of Ontario’s human rights system over the period of this study and as it currently stands, one must be aware of the dramatic impact of amendments to the *Code* that came into force in 2008 and which overhauled Ontario’s human rights system in a number of ways, three of which we will discuss here. First, the amendments established a “direct access model”. Before 2008, the Commission had responsibility for screening applications and determining which ones it would carry forward to the Tribunal

¹⁰ *Ibid*, s. 43(3)(a). On the trend toward “active adjudication”, see Michelle Flaherty, “Self-represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law” (2015) 38 *Dalhousie LJ* 119; Lorne Sossin and Samantha Green, “Administrative Justice and Innovation: Beyond the Adversarial/Inquisitorial Dichotomy” in Sasha Baglay, Laverne Jacobs, eds., *The Nature Of Inquisitorial Processes In Administrative Regimes: Global Perspectives*, Routledge, 2013.

¹¹ *Ibid*, s. 43(3)(b)(i), 43(3)(c).

¹² *Ibid*, Part IV.1. For background and discussion of the adoption of the direct access model in Ontario, see Mary Cornish, Fay Faraday and Jo-Anne Pickel, *Enforcing Human Rights in Ontario* (Aurora, ON: Canada Law Book, 2009); Le Tribunal des droits de la personne & Barreau du Québec ed., *L'accès direct à un tribunal spécialisé en matière de droit à l'égalité: l'urgence d'agir au Québec? / Access to a Specialized Human Rights tribunal: An Urgent need to act in Quebec?* (Cowansville: Éditions Yvon Blais, 2008) (especially the contributions by Juliet S. Robin, “Modernising Ontario’s Human Rights System: The Human Rights Code Amendment Act, 2006”, at 321, Michael Gottheil and Kathy Laird, “Direct Access to a Specialized Human Rights Tribunal: The Ontario Experience”, at 145, and Pearl Eliadis, “Human Rights Tribunals and Direct Access to Adjudication: A New Generation of Human Rights Protection?” at 205); J. Manuel Mendelzon, “Rights, Remedies and Rhetoric: On a Direct Access Model for Human Rights Complaints in Ontario”, (2008-09) 6 *J.L. & Equality* 51; Tiffany Tsun, “Overhauling the Ontario Human Rights System: Recent Developments in Case Law and Legislative Reform”, (2009) 67 *U. Toronto Fac. L. Rev.* 115; Michelle Flaherty, “Ontario and the Direct Access Model to Human Rights”, in *14 Arguments*, *supra* note 7, at 169 .

¹³ *Code*, *supra* note 1, Part III. See Shaheen Azmi, “Ontario Human Rights Commission Promotion Activities: The Experience of Responding to Racial Profiling by Police”, in *14 Arguments*, *supra* note 7, at 305.

in the public interest. Dissatisfaction with the Commission's gatekeeper role and chronic delays in the processing of applications led the Ontario legislature to adopt a direct access model, hoping to provide applicants with more autonomy over their cases and speedier access to remedies.¹⁴ As a result of the 2008 reforms, all applications are now filed directly with the Tribunal and all applicants whose claims fall within the Tribunal's jurisdiction have a right to an oral hearing.¹⁵

Second, the 2008 amendments established the Human Rights Legal Support Centre in order to provide applicants with legal assistance. After 2008, applicants had responsibility over their own applications but no longer benefitted from the legal assistance previously provided by the Commission. The Centre was established to meet applicants' need for legal advice and support.

Third, the amendments strengthened the Tribunal in a number of ways: they ensured its expertise,¹⁶ expanded its control over its procedures,¹⁷ abolished appeals from its rulings, put in place a strong privative clause aimed at minimizing interference with Tribunal rulings by courts on judicial review,¹⁸ and expanded its remedial powers.¹⁹

At the Tribunal, individuals can seek a wide range of remedies for their human rights violations, all of which are remedial in nature, not punitive. Individuals may receive the following remedies to compensate for loss caused by discrimination: general damages, which compensate for the "injury to dignity, feelings and self-respect" caused by discrimination;²⁰ special damages, which compensate for directly quantifiable losses, such as lost wages; and non-monetary remedies, such as a reinstatement following a discriminatory termination. The Tribunal may also order a *prospective* remedy; that is, a remedy not aimed at compensating for loss, but rather at promoting future compliance with the *Code*.²¹ These are often referred to as public interest remedies. For example, the Tribunal may order that the respondent complete human rights training.

¹⁴ Bill 107, *Human Rights Code Amendment Act, 2006*, S.O. 2006, c.30.

¹⁵ *Code*, *supra* note 1, s.34(1) and s.43(2)1.

¹⁶ *Ibid*, s.32(3).

¹⁷ *Ibid*, ss.39-45.1.

¹⁸ *Ibid*, s.45.8.

¹⁹ *Ibid*, s.45.2.

²⁰ *Ibid*, s.45.2(1)1.

²¹ *Ibid*, s.45.2(1)3.

The 2008 legislative amendments altered the Tribunal’s general damages power in the following manner. Prior to the 2008 amendments, the Tribunal awarded general damages under two heads. The first was pursuant to the Tribunal’s power to award “monetary compensation, for loss arising out of the infringement”.²² The Tribunal and the courts interpreted this as including intangible loss.²³ Second, the Tribunal could award damages for “mental anguish” up to a maximum of \$10,000 if “the infringement ha[d] been engaged in wilfully or recklessly”.²⁴ The Tribunal routinely evaded the \$10,000 cap on damages for mental anguish by awarding additional damages for non-pecuniary loss pursuant to the open-ended monetary compensation provision, which had no willful or reckless behaviour requirement and was uncapped.

The 2008 legislative changes explicitly affirmed the Tribunal’s general damages-granting power, and did not subject it to a cap. Section 45.2(1)1 of the *Code* now empowers the Tribunal to award “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.” In addition, the Tribunal’s “mental anguish” award-granting power was removed. Many viewed these changes as a legislative encouragement of increased general damages awards, given that the Tribunal’s power to award monetary damages for intangible loss was explicitly affirmed and left uncapped.

When the Tribunal finds that the applicant has established a violation of the Code’s prohibitions on discrimination, applicants often receive an award of both special damages and general damages where both types of loss are established by the evidence. However, the Tribunal did not order an award of special damages to successful applicants in 256 of the 464 cases in our database (55%). Moreover, the Tribunal did not make a future compliance order or any other non-monetary order in 220 of the cases in our database (47%). General damages were the only damages awarded to successful applicants over half of the time, and were the only remedy received by successful applicants in a quarter of cases (116 of 464).

We will now turn to a discussion of the approach the Tribunal takes to the assessment of general damages.

II: The conventional approach to general damages assessment

²² *Human Rights Code*, RSO 1990, c H.19, s 41(1)(b) (past version: in force between 20 Aug 2007 and 29 Jun 2008).

²³ *Ontario (Human Rights Commission) v Shelter Corp*, 103 ACWS (3d) 324, [2001] OJ No 297 at para 43 (Div Ct).

²⁴ *Code*, *supra* note 23, s. 41(1)(b). For a thorough discussion of how the Tribunal and courts approached these remedial powers, see *ADGA Group Consultants v. Lane*, 2008 CanLII 39605 (Ontario SCJ) (*Lane*) at paras 130-162.

General damages compensate for the injury to dignity, feelings and self-respect caused by discrimination. In describing this injury, the Tribunal has noted:

The harm [...] of being discriminatorily denied a service, an employment opportunity, or housing is not just the lost service, job or home but the harm of being treated with less dignity, as less worthy of concern and respect because of personal characteristics, and the consequent psychological effects.²⁵

How does the Tribunal determine the appropriate amount of general damages to compensate individuals for this injury? Throughout the time period we studied – 2000 to 2015 – the Tribunal has assessed the appropriate general damages award in a particular case by “mak[ing] a general evaluation of the circumstances of the *Code* violation and its effects”.²⁶ The Tribunal conducts this “general evaluation” by focusing on two criteria: the objective seriousness of the discriminatory conduct, and the effect of the conduct on the applicant.²⁷ The first criterion recognizes that an injury to dignity will be more serious for *Code*-infringing conduct that is objectively more severe. For example, a discriminatory termination will generally yield a higher award of general damages award than a single discriminatory comment, because the former breach is generally understood to cause a more serious injury to dignity. The second criterion – effect on the applicant – recognizes that an injury to dignity may differ between two applicants who experience the same objective conduct if their particular circumstances or vulnerability differ. Factors the Tribunal will consider in determining the effect of the discrimination on the applicant are: “humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment”.²⁸

After undertaking an assessment of these two criteria, the Tribunal will make an award that is similar to awards previously issued in cases with similar facts.²⁹ This is what we call the Tribunal’s “conventional” approach to general damages assessment. The Tribunal does this by canvassing the awards made in previous cases with similar facts, although this canvassing is not always explicitly discussed in the cases. The rationale for applying a conventional approach is connected to the inherent difficulty in measuring injuries to dignity and the desirability of some consistency and thus predictability in general damages assessments. As the Tribunal explained in *Arunachalam v Best Buy Canada*:

²⁵ *Arunachalam v. Best Buy*, 2010 HRTO 1880 at para 45 [*Best Buy*].

²⁶ *Ibid* at para 45. A similar approach was taken prior to 2008: see *Lane*, *supra* note 25 at paras 130-162. For an example of how the Tribunal applied the conventional approach to general damages assessment before the 2008 legislative changes took effect, see *Pridham v En-Plas Inc*, 2007 HRTO 8 at paras 47-62.

²⁷ *Best Buy*, *supra* note 26 at para 52.

²⁸ *Lane*, *supra* note 25 at para 154.

²⁹ For a fuller articulation of the Tribunal’s post-2008 approach to general damages assessment, see *Best Buy*, *supra* note 26 at paras 44-55.

Cases with equivalent facts should lead to an equivalent range of compensation, recognizing, of course, that each set of circumstances is unique. Uniform principles must be applied to determine which types of cases are more or less serious. Of course there will always be an element of subjective evaluation in translating circumstances to dollars, but the Tribunal has a responsibility to the community and parties appearing before it to ensure that the range of damages based on given facts is predictable and principled.³⁰

The conventional approach is based on a review of the nominal value of awards awarded by the Tribunal in the past. Since the real value of past awards is diminished over time by the impact of inflation, consistent treatment of similar cases over time requires that the nominal value of past awards be adjusted for inflation. The Tribunal has noted on a number of occasions that it “should be attentive to the possibility of ongoing inflation of [general] damage awards for non-pecuniary losses that was recognized [by the Supreme Court of Canada] in the tort context in [*Andrews v Grand & Toy Alberta Ltd*] ... in the 1970s”.³¹ Vice-Chair Judith Keene emphasized repeatedly in her rulings that the Supreme Court “has taken steps to avoid the erosion of the quantum of compensatory awards for intangible loss by ensuring that the original ‘cap’ on such awards should be indexed to inflation.”³² As a result of the courts’ taking into account the impact of inflation, the cap on non-pecuniary damages in common law tort actions has risen from \$100,000, the original amount imposed by the Supreme Court in *Andrews* in 1978,³³ to \$350,000 in recent decisions.³⁴ Despite these repeated acknowledgements by the Tribunal that its conventional approach must similarly take inflation into account to avoid the erosion of the real value of awards, no Tribunal ruling to date has explicitly factored inflation into general damages assessment.

While the dominance of the Tribunal’s non-indexed conventional approach to general damages assessment is evident from a review of the case law, the scholarly literature tells us little about the size of general damages awards or how they have changed over time. The most useful source is the Pinto Report. As mentioned above, in November 2012, as part of the statutorily mandated three-year review of the impact of the 2008 legislative reforms to Ontario’s human rights system, Andrew Pinto reviewed Tribunal jurisprudence on general damages. He found that, in the time period following the system change on June

³⁰ *Best Buy*, *supra* note 26 at para 51.

³¹ *Ibid* at para 49. This passage was quoted by the Tribunal in *Lastella v. Oakville Hydro Corporation*, 2011 HRTO 1071 at para 19; *Piechocinski v. Toronto Standard Condominium Corporation No 1519*, 2011 HRTO 1430 at para 20; and *Purres v. London Athletic Club (South) Inc.*, 2012 HRTO 1758 at para 41.

³² *McDonald v. Mid-Huron Roofing*, 2009 HRTO 1306 at para 54; *Direk v. Coffee Time Donuts*, 2009 HRTO 1887 at para 90; *Dixon v. 930187 Ontario*, 2010 HRTO 256 at para 64; *Nemati v. Women’s Support Network of York Region*, 2010 HRTO 327 at para 122; *Vetricek v. 642518 Canada Inc.*, 2010 HRTO 757 at para 75; *McLean v. DY 4 Systems*, 2010 HRTO 1107 at para 104; *MK v. [...] Ontario Inc.*, 2011 HRTO 705 at para 44.

³³ *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229 at 265, 83 DLR (3d) 452 (*Andrews*).

³⁴ See, e.g., *Sorochan v. Bouchier*, 2015 ABCA 212 at para 22.

30, 2008 up to November 2012, the Tribunal was “typically” granting awards “in the range of \$500 to \$15,000”. Pinto found that higher awards of \$25,000 to \$40,000 were awarded “exceptional[ly]... in serious cases involving sex discrimination, termination of employment, and/or multiple intersecting grounds of discrimination”.³⁵ While there was a widely-held expectation that the range of general damages would increase following the 2008 legislative changes, Pinto concluded that the range of damages awarded by the Tribunal had not increased as anticipated, and “but for a few exceptional cases, the monetary awards for successful applicants [were] not fundamentally different than before Bill 107”.³⁶

As a result of his findings, Pinto agreed with many stakeholders in concluding that general damages awards were “routinely too low” to adequately compensate applicants for the injury to dignity caused by discrimination.³⁷ As a result, he advocated their increase: “In order for Tribunal awards to be meaningful, I recommend that the Tribunal significantly increase the range of damages that are awarded to successful applicants”.³⁸

In the years following the release of the Pinto Report, some commentators suggested that general damages were increasing. In their 2014 guide to the Ontario *Human Rights Code*, Knight, McNaught and Hudson commented that general damages had in fact increased as a result of the 2008 legislative changes to the Tribunal’s general damages-granting power, although their method of determining this was not described.³⁹ Others suggested that general damages were increasing as a result of the release of the Pinto Report. For example, Canadian Lawyer magazine noted:

Maureen Quinlan, an associate with Hicks Morley, pointed to the 2012 Pinto Report as one factor that has led to increased awards to plaintiffs in human rights cases... “We have seen that come to fruition,” said Quinlan. “Numbers now range up to the \$80,000 range. The numbers have steadily increased from case to case. Each case tops the previous one.”⁴⁰

³⁵ Pinto Report, *supra* note 2 at 72.

³⁶ *Ibid.*

³⁷ *Ibid* at 73.

³⁸ *Ibid.*

³⁹ Jamie Knight, Melanie McNaught & Deborah J Hudson, *Ontario Human Rights Code: Quick Reference*, 2014 ed (Toronto: Carswell, 2014) at 103 (“[t]he removal of the \$10,000 cap applicable to damages for mental anguish under the former *Code* has resulted in increased compensation awards for injury to dignity, feelings and self-respect”) [2014 Quick Reference].

⁴⁰ Jennifer Brown, “The rise of ‘HR malpractice’ insurance”, *Canadian Lawyer InHouse* (March 2 2015) online: Canadian Lawyer <<http://www.canadianlawyermag.com>>. We note that Brown’s reference to damage awards in the \$80,000 range must be in reference to the size of awards in some cases for special and general damages cumulatively. See also Ranjan K. Agarwal, “Human Rights Damages on the Rise?”, *Bennett Jones Thought Network* (20 February 2014), online: Bennett Jones Thought Network <<http://blog.bennettjones.com>> (“Andrew Pinto recommended that the Human Rights Tribunal of Ontario ‘reconsider its current approach to general damages awards in cases where discrimination is proven. The monetary range of these awards should be significantly increased.’ ... The Tribunal may

In contrast, Dijana Simonovic, former counsel at the Human Rights Legal Support Centre, concluded from reviewing all awards issued from May 2012 to May 2014 that awards continued to fall within the range described by Pinto.⁴¹

The debate around this issue can be approached with more clarity if more is known about the amounts successful applicants actually receive in general damages. Thus, we undertook to provide this clarity by collecting every award issued by the HRTO from 2000 to 2015, analyzing the resulting data, and describing the results in this paper. Greater certainty about the amounts successful applicants receive in general damages should provide a better grounding from which debates about the appropriate amount of general damages may proceed constructively.

III. Methodology

Using the HRTO database on CanLII, we compiled a list of all decisions issued by the Tribunal in which one or more applicants successfully proved that they had experienced some form of discrimination contrary to the *Code* from January 1, 2000 to December 31, 2015.⁴² From this list, we created a database of all general damages awards issued from January 1, 2000 to December 31, 2015. We allocated one entry in the database for each applicant. Thus, for cases with multiple applicants each receiving general damages awards, we created separate entries for each general damages award received.⁴³

be listening. On December 4, 2013, the Tribunal awarded a total of \$71,000 in general damages and \$27,592 in lost income to three applicants who it found were subject to racial and religious discrimination.”) The \$71,000 in general damages was the total amount awarded to three applicants who received awards of \$37,000, \$22,000 and \$12,000, respectively in *Islam v. Big Inc*, 2013 HRTO 2009 at para 302.

⁴¹ Dijana Simonovic, “Update on Human Rights Tribunal Remedies 2012-2013” (Paper delivered at the OBA Annual Human Rights Update, 17 June 2013), [unpublished]; Dijana Simonovic, “Update on Human Rights Remedial Awards Rendered by Tribunals and the Civil Courts of Ontario in 2013-2014” (Paper delivered at the OBA Annual Update on Human Rights, 23 May 2014), [unpublished].

⁴² We are grateful for the assistance provided by the Human Rights Legal Support Centre and the Human Rights Tribunal of Ontario in collecting final decisions. We also relied on final decisions compiled by Simonovic in her articles cited in note 42, *supra*, as well as by Dana Achtemichuk in her article “Losing the Public Interest: Remedies Issued under Ontario’s Direct Access Model” (Anti-Discrimination Intensive Program, Osgoode Hall Law School, April 2014) [unpublished, on file with the authors]. We checked the data drawn from these sources against our own review of every HRTO ruling included in the CanLII database from 2000 to 2015.

⁴³ Notably, cumulatively large awards issued in *Islam v Big Inc*, 2013 HRTO 2009, and *OPT v Presteve Foods*, 2015 HRTO 675, were split into multiple entries. In *Islam*, \$71,000 in general damages was awarded cumulatively; we split this into three entries corresponding to the individual general damage amounts awarded to each of the three applicants: \$12,000 for Mr. Islam, \$22,000 for Mr. Hossain, and \$37,000 for Mr. Malik. In *Presteve Foods*, a cumulative general damage award of \$200,000 was split into two entries corresponding to the amounts awarded to the two applicants: \$50,000 for the claimant identified as M.P.T., and \$150,000 for the claimant identified as O.P.T. In

We included entries for all applicants who successfully proved that they experienced discrimination even when the applicant did not actually receive a general damages award. These were included as awards of zero dollars. These cases fell into three general categories:

- rulings where discrimination was found against the respondent, but the Tribunal found that the evidence did not establish a violation of dignity, feelings or self-respect.⁴⁴
- rulings where discrimination was found against the respondent, but the applicant did not request, and was not awarded, a remedy of general damages. We included these rulings because they involve exercises of the Tribunal’s remedial discretion. The Tribunal has awarded remedies, including general damages, even when not requested by applicants.⁴⁵ One of the reasons for this practice is that self-represented applicants in particular may not be aware of the full range of the Tribunal’s remedial authority.
- rulings where discrimination was found against the respondent, but a law was found to be the cause of the discrimination. The Tribunal is bound by court precedents that preclude the availability of damages for these kinds of cases absent proof of serious government wrongdoing.⁴⁶ These cases did not involve the exercise of discretionary damage assessment by the Tribunal. Nevertheless, they were instances of successful applicants receiving no compensation for dignitary harm, a situation that the legislature could alter with a *Code* amendment, and for this reason we included them in the database.

Of the 464 general damages awards in our database, 26 were awards of zero dollars. We explore the impact of our decision to include these “0” damage awards in our analysis below, at page 19.

For clarity, we note that the following rulings were excluded from the database:

one case involving several applicants receiving general damage awards, we did not split the awards issued to multiple applicants into separate entries. In *Gilbert v. 2093132 Ontario*, 2011 HRTO 672, a claim involving six applicants regarding a single discriminatory comment, general damages of \$600 were awarded corresponding to \$100 for each applicant. This was included as a single entry because the injury to dignity that each applicant experienced stemmed from a single comment made by the respondent to all of the applicants as a group.

⁴⁴ For example, *McLarry v Universal Supply Group*, 2011 HRTO 893 at para 52.

⁴⁵ See, for example, *Vallee v. Fairweather Ltd*, 2012 HRTO 325 at para 26.

⁴⁶ *Mackin v. New Brunswick (Minister of Finance)*; *Rice v New Brunswick*, 2002 SCC 13, [2002] 1 SCR 405. In *Mackin*, the Supreme Court held that when governments are found to have breached the *Charter* through the application of a law, damages will be unavailable unless the applicant can show governmental action that is “clearly wrong, in bad faith or an abuse of power” (at para 78). In *Québec (Commission des droits de la personne et droits de la jeunesse) v. Communauté Urbaine de Montréal*, 2004 SCC 30, [2004] 1 SCR 489 (*Quebec v. CUM*), the Court applied the *Mackin* rule to the award of damages against government for breach of human rights statutes resulting from a law. The Ontario Divisional Court has said that *Mackin* and *Quebec v. CUM* have the effect of precluding the award of damages for violations of the Ontario *Code* resulting from a discriminatory law: *Ontario (Attorney General) v. Ontario Human Rights Commission*, 2007 CanLII 56481 (ON SCDC), 2007 CanLII 56481 (ON S.C.D.C.) (*Braithwaite*). The HRTO is bound by these rulings and thus is precluded from awarding general damages against government where the breach of the *Code* at issue flows from a law: see, e.g., *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360 at paras 168-171.

- rulings where no discrimination amounting to a breach of the *Code* was found;
- rulings finding that a *Code* breach occurred, but it did not involve discrimination against the applicant;⁴⁷
- rulings making awards for breach of settlement (since these awards are not general damages; that is, they are not compensation for the dignitary harm of discrimination);
- rulings on requests for reconsideration (none during this period altered the Tribunal's original general damages awards);
- consent orders (since they do not involve the exercise of damage assessment discretion by the Tribunal);
- rulings which were overturned on judicial review on the finding of liability or the quantum of general damages; in the former case, the HRTO ruling was removed from the database; in the latter case, the award substituted by the final court ruling was included.

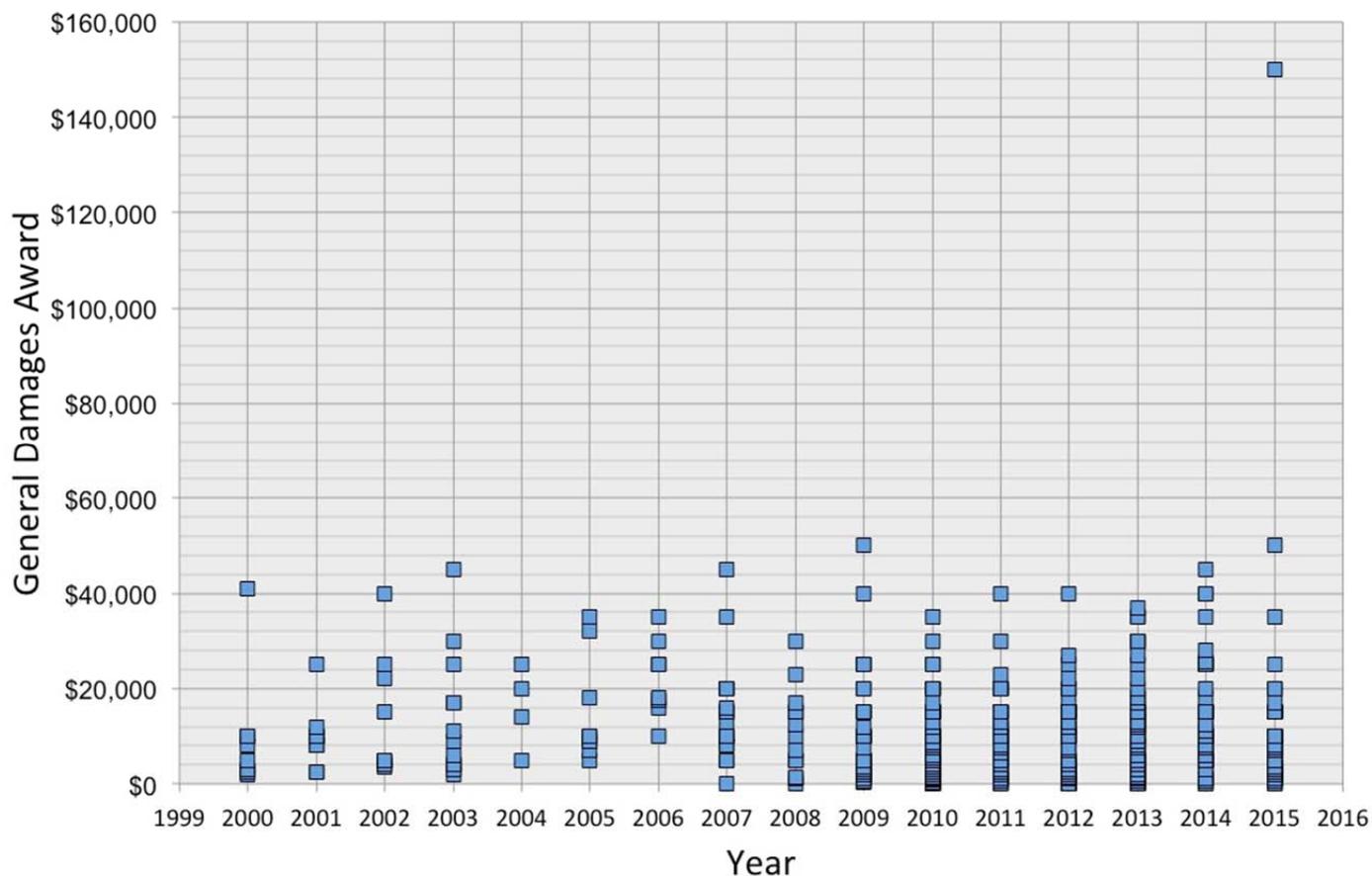
While some decisions regarding which cases to include in our database involved difficult judgment calls, we believe the decisions we made are consistent with our aim to provide a complete and accurate picture of the amounts of general damages awarded by the Tribunal to applicants who proved discrimination in violation of the *Code*.

IV. Results

The following figure is a scatter plot of general damages awards received from January 1, 2000 to December 31, 2015 by applicants who succeeded in proving discrimination at the HRTO. Each blue square represents the amount of an individual award (or awards) received by successful applicants for experiencing discrimination. Awards were tracked by year issued, but not by month or day issued, which explains how the awards are clustered across time.

Figure 1. General Damages Awards Received from 2000 to 2015

⁴⁷ For example, *Washington v. Student Federation of the University of Ottawa*, 2010 HRTO 1976 at para 90.



Immediately apparent from Figure 1 is the fact that the range of awards has remained relatively unchanged from 2000 to 2015, apart from the \$150,000 outlier in the top right corner, which represents the landmark award issued in 2015 in *Presteve Foods*, a case that involved the egregious sexual exploitation of female temporary migrant workers.⁴⁸

Pinto’s conclusion that awards are “typically... in the range of \$500 to \$15,000” with awards of \$25,000 to \$40,000 only “exceptional[ly]” being awarded in a few cases, appears to be true not only for the 2008-2012 period he surveyed, but also for awards issued from 2000 to 2015 as a whole.⁴⁹ While 80% of the general damages awards in our database are \$15,000 or less (370 of 464), we should add that there are a significant number of awards that exceed the typical range described by Pinto: 36 awards of \$15,001-\$20,000, 23 awards of \$20,001-\$25,000, 12 awards of \$25,001-\$30,000, 9 awards of \$30,001-\$35,000, 7 awards of \$35,001-\$40,000 and 7 awards over \$40,000. The *Presteve Foods* award of \$150,000 to one of the

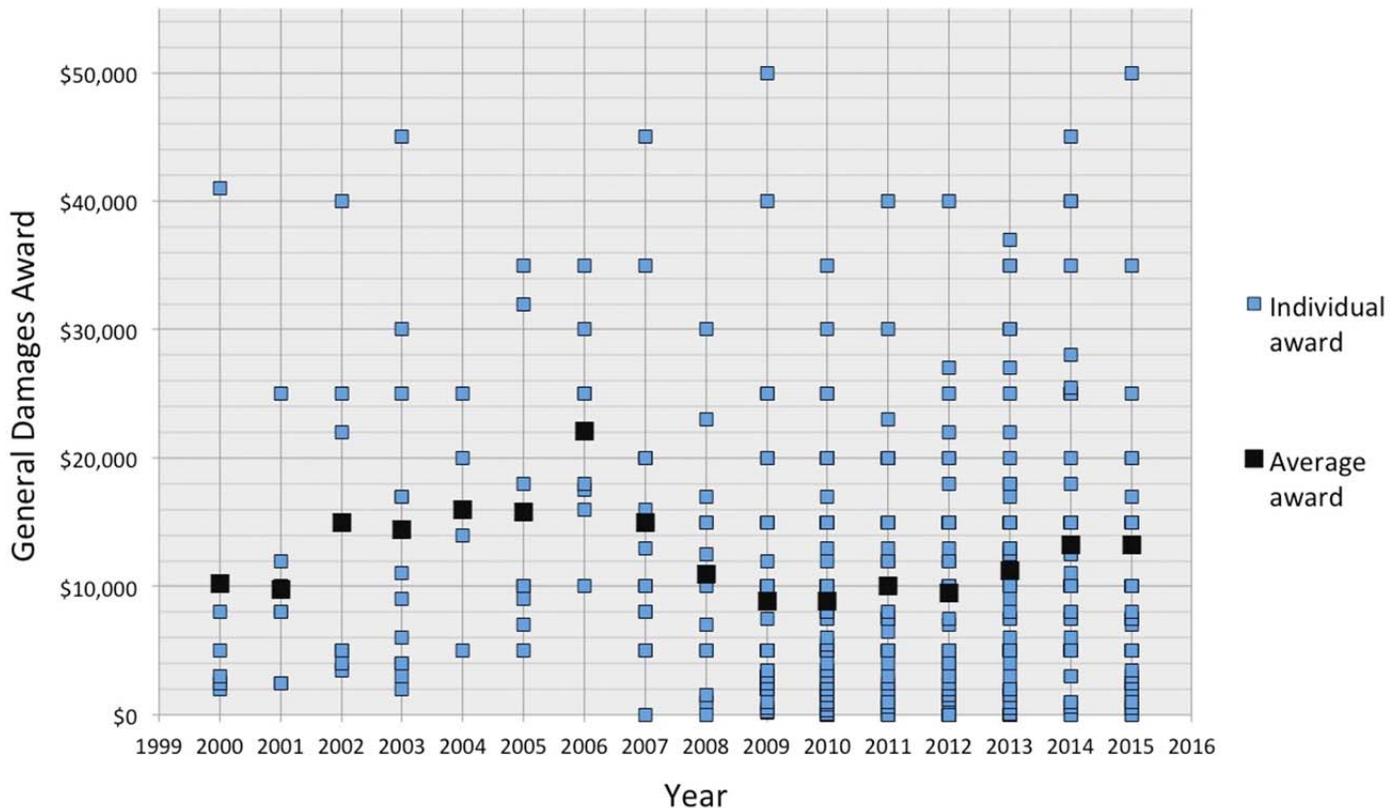
⁴⁸ *Presteve Foods*, *supra* note 44.

⁴⁹ Pinto Report, *supra* note 2 at 72.

applicants in that case thus far stands apart as an outlier rather than an indication of an upward trend in general damages at the HRTO. The award in *Presteve Foods* was not referenced in any other HRTO rulings in 2015, and the only court ruling we are aware of to mention it distinguished it on the grounds that it spoke to the appropriate amount of general damages only in cases of “sexual exploitation”.⁵⁰

Figure 2 below shows, with blue square symbols, all awards except the \$150,000 outlier from *Presteve Foods*. We created this graph in order to make the spread of awards more visible. The average award per year, in solid black squares, is also included.

Figure 2. General Damages Awards Received from 2000 to 2015, excluding the \$150,000 award issued in *OPT v Presteve Foods*



⁵⁰ *Strudwick v. Applied Consumer & Clinical Evaluations Inc*, 2015 ONSC 3408 at para 28. The award of general damages issued by the trial judge in *Strudwick* was doubled on appeal: *Strudwick v Applied Consumer & Clinical Inc*, 2016 ONCA 520. While the Court of Appeal in *Strudwick* did not mention the awards in *Presteve*, its ruling is a similar example of a willingness to issue increased general damages awards in cases involving severe forms of discrimination. See the discussion accompanying notes 98-100, *infra*.

From Figure 2, it is apparent that while the range of awards from 2000 to 2015 has remained relatively unchanged, a greater proportion of smaller awards were issued from 2008 to 2015. Changes in the proportion of awards are explored in more detail in Table 2, and are discussed later in this paper.

Table 1, below, provides numerical data on the yearly average, median, and range of awards received by successful applicants from January 1, 2000 to December 31, 2015. Also shown is the number of applicants each year who succeeded in proving that they experienced discrimination.

Table 1. Numerical data on general damages awards from 2000 to 2015

Year	Average	Median	Range⁵¹	# of applicants who proved discrimination
2000	10,188	6,500	2,000 – 41,000	8
2001	9,778	10,000	2,500 – 25,000	9
2002	14,938	10,000	3,500 – 40,000	8
2003	14,417	10,000	2,000 – 45,000	12
2004	16,000	17,000	5,000 – 25,000	4
2005	15,750	10,000	5,000 – 35,000	8
2006	22,063	21,500	10,000 – 35,000	8
2007	15,000	13,000	0/5,000 – 45,000	17
2008	10,923	10,000	0/1,000 – 30,000	13
2009	8,837	5,000	200 – 50,000	49
2010	8,814	8,000	0/100 – 35,000	75
2011	10,033	9,000	0/600 – 40,000	48
2012	9,504	10,000	0/1,000 – 40,000	52
2013	11,264	10,000	0/100 – 37,000	59
2014	13,198	10,000	0/600 – 45,000	51
2015	13,279	8,000	0/500 – 150,000	43
Total	11,216	10,000	0/100 – 150,000	464

⁵¹ Where the lowest award in a year was 0, the second lowest award above 0 is also shown.

We then plotted a graph of the average general damages award issued in each year from 2000 to 2015, shown below in Figure 3.

Figure 3. Average General Damages Award Received Per Year

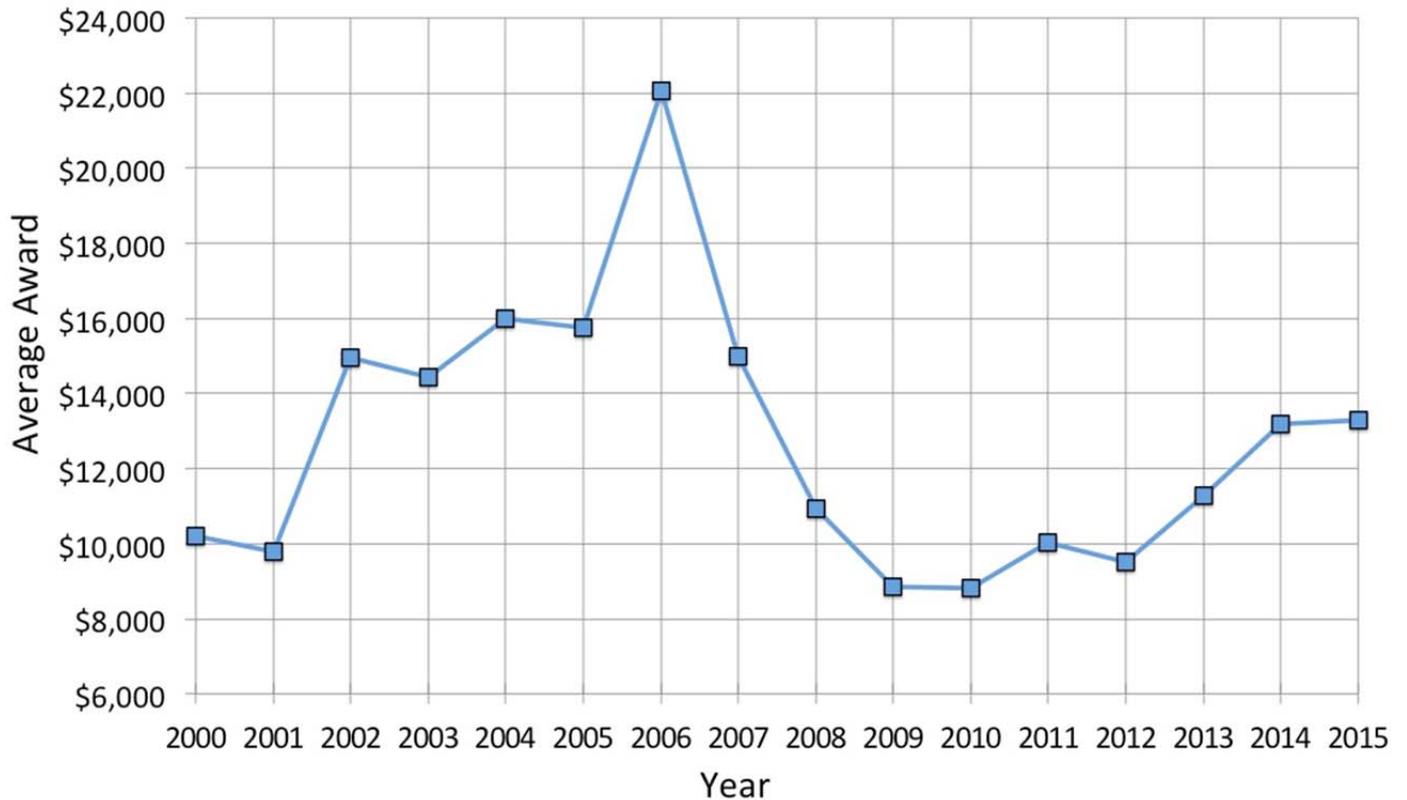


Figure 3 demonstrates how the average annual general damages award changed over time. We discern from Figure 3 four distinct periods:

- I. an increase in average awards from 2000 to 2006;
- II. a sharp decrease in average awards from 2007 to 2009;
- III. a stagnation of average awards from 2010 to 2012; and
- IV. an increase in average awards from 2013 to 2015.

In the first period, from 2000 to 2006, the average general damages award increased steadily, peaking at over \$20,000 in 2006, an increase of more than \$10,000 from 2000. During this period, and indeed through to the end of 2008, as Table 1 reveals, relatively few cases reached the Tribunal for final decision compared to the situation beginning in 2009, when applications filed directly with the Tribunal under the new model

started to produce a larger number of final decisions. The cases that did reach the Tribunal under the old model were carried forward by the Commission, which aimed to allocate its litigation resources to the cases that raised the most important issues from the point of view of the public interest. In all cases that reached the Tribunal under the old system, expert Commission counsel appeared to make submissions regarding *Code* violations and remedies, and in some cases applicants also had their own counsel or representative.

The most striking aspect of Figure 3 may be what occurred in the second period: the steep drop in average awards from 2007 to 2009, a drop of over \$10,000. This period corresponds to the period of transition from the old Commission-centred model of adjudication to the direct access model. Bill 107 was enacted in December 2006 and the legislative changes it introduced came into effect on June 30, 2008. The Tribunal’s approach to general damages assessment did not change substantively from the old to the new regime, and the Tribunal and its membership were strengthened by the *Code* amendments.⁵² Although it is impossible to know for certain what explains the downward trend in general damages awards from 2007-2009, we believe the most likely explanation is the significant change in the volume and nature of the cases that reached the Tribunal under the new direct access model. As mentioned, under the pre-2008 Commission-based model, the Commission decided which cases would come forward to the Tribunal for a final hearing, and it would prioritize cases that engaged systemic issues or otherwise had potentially broad impacts on matters of public concern. After June 30, 2008, all applicants – even those whose cases raised relatively minor issues, like a single discriminatory comment endured at work – had a right to a hearing before the Tribunal. Under the old model, the Commission on occasion did bring forward cases that received general damages awards at the low end of the scale: for example, in 2003, 4 of the 12 (or 33%) cases brought to the Tribunal received an award less than \$5,000. Nevertheless, Figures 1 and 2 above, as well as Table 2 below, make clear that under the direct access model a greater proportion of cases received awards within the \$0 to \$10,000 range.

Table 2. Proportion of awards per period: 2000-2015

	Period I (2000-2006)	Period II (2007-2009)	Period III (2010-2012)	Period IV (2013-2015)
Proportion of award type per total awards in the period				
% \$0 awards ⁵³	0%	3%	9%	6%

⁵² *Code*, *supra* note 1, Part IV.

⁵³ See pages 10-11, *supra*, for an explanation of which decisions we classified as resulting in awards of \$0.

% >\$0 to \$1,000 awards	0%	6%	7%	7%
% >\$1,000 to \$5,000 awards	28%	39%	25%	24%
% >\$5,000 to \$10,000 awards	26%	18%	26%	22%
% >\$10,000 to \$20,000 awards	19%	23%	27%	27%
% >\$20,000 and over awards	26%	11%	6%	15%
Total number of awards per period	57	79	175	153

In our database for the entire 2000-2015 period, we included information for each award on whether applicants' claims were brought forward by the Commission (which of course was always the case under the old regime), and, under the new regime, whether applicants were represented by Centre counsel, private counsel or were self-represented. We then calculated the average amount of general damages awarded in each situation. The results are summarized below in Table 3. We include them here because they may help shed some light on the changes in average awards during the four periods that emerge from a study of Figure 3.

Table 3. Average Damage Awards 2000-2015 According to Nature of Representation

Counsel	Number of General Damages Awards	Average Amount of General Damages Award
Commission counsel	110	\$14,041
Centre counsel	72	\$13,965
Private counsel or rep	124	\$12,508
Self-represented	148	\$7,116
No counsel indicated	10	\$4,980
Total	464	\$11,216

We can speculate about potential causes of the variation observed above. First, one might expect that those represented by expert Commission counsel under the old model, or represented by expert Centre counsel or private counsel under the new model, would tend to receive higher awards than self-represented applicants because of the quality of representation provided. However, it is important to note that the Tribunal is acutely sensitive to the challenges faced by self-represented litigants who make up a large proportion of

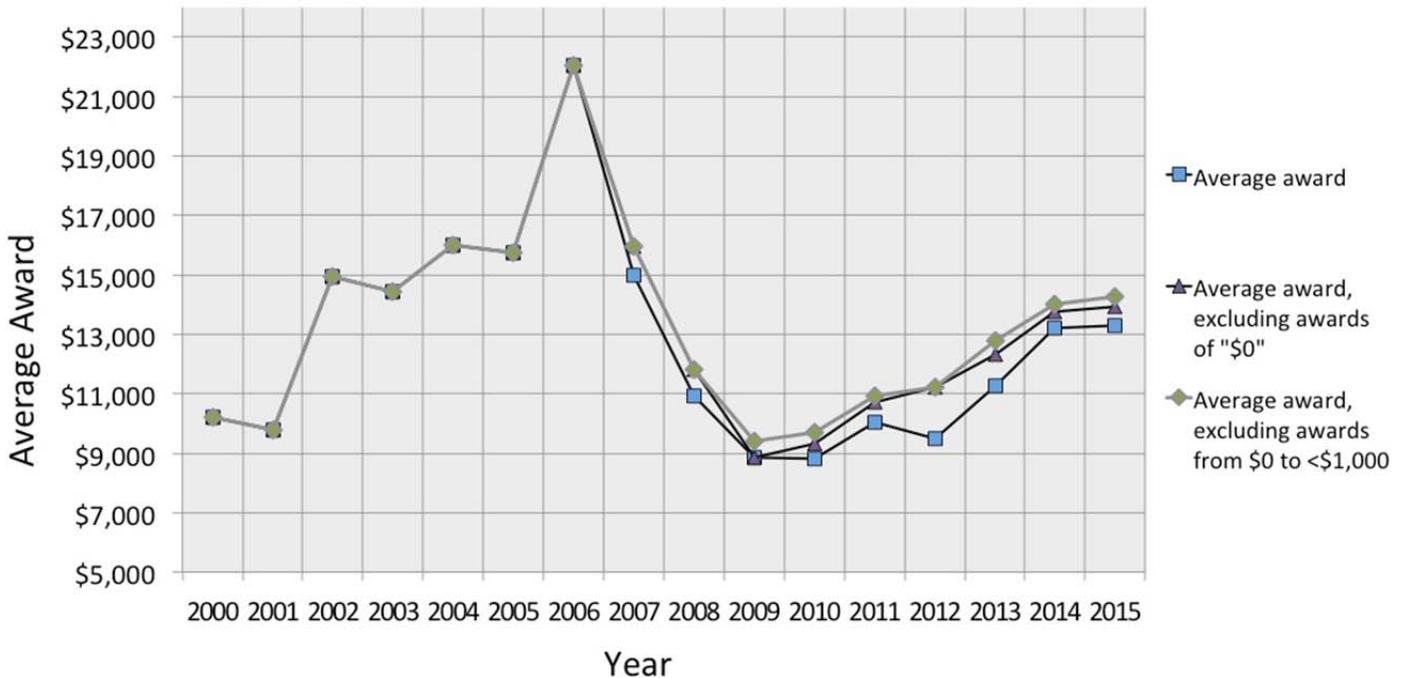
applicants under the new system. Indeed, our data reveals that under the new system, self-represented litigants have made up 43% of the applicants who have succeeded in demonstrating a finding of discrimination before the Tribunal.⁵⁴ The Tribunal makes extensive efforts to support self-represented applicants through ‘active adjudication’, including by considering remedies that applicants have not requested in their submissions. These efforts may reduce the impact the quality of advocacy might otherwise have on the size of general damages awards.

Another reason for the variation between awards received by those with different forms of representation could be the fact that Commission counsel, Centre counsel, and private counsel tend to select clients that have experienced more serious *Code* breaches. The Commission under the pre-2008 model could choose to take forward to a hearing only the most significant unsettled cases. Similarly, the Centre in the post-2008 model allocates its finite resources at least in part by reference to the difficulty and significance of the issues raised. Moreover, private counsel will be retained by applicants typically in cases where more is at stake - that is, where instances of discrimination with severe or widespread consequences are alleged. A higher proportion of cases involving self-represented litigants are therefore likely to involve less serious allegations of discrimination. For this reason, in our view the data in Table 3 may support the argument that the post-2008 situation – where self-represented litigants are free to carry their cases to the Tribunal on their own, regardless of the severity of the incident of discrimination – has had a significant impact on the average size of general damages awards. In particular, it could explain the sharp drop in the average size of general damages awards that accompanied the legislative changes.

To explore whether our decision to include certain awards of zero general damages was contributing to the trend in average awards observed above, we removed awards of zero dollars and re-calculated average award values. We then went further, removing all awards under \$1,000, to explore what impact very low-award cases could be having on the average award trend line. The results are shown in Figure 4 below.

⁵⁴ If we remove from the data presented in Table 3 the cases carried by the Commission and the cases where no counsel was indicated in the reported case, we are left with 148 damages awards made to self-represented litigants out of a total of 344, or 43% of the total. The Pinto Report similarly found “that 44% of applicants who were successful in their cases before the Tribunal were self-represented”: *supra* note 2 at 102. As the Report noted, this number, like ours, “provides some corroboration that the Tribunal system is not as impossible to use for self-represented applicants as critics claim; and that the Centre’s decision to decline representation does not necessarily impair applicants from proceeding before the Tribunal.”

Figure 4: Average general damages awards received per year -- comparing results obtained from excluding awards of \$0 and awards under \$1,000



Thus, even when removing “awards” of \$0 and awards under \$1,000, the general trend observed in Figure 3 remains relatively intact. What appeared to be a stagnation in award values from 2010 to 2012 was due to an increase in awards of zero general damages being issued by the Tribunal in this period.

The changes we have found in the average annual value of general damages awards need to be understood in the context of the transformation in the scale of the Tribunal’s adjudicative role produced by the 2008 legislative reforms. Once the Commission’s gatekeeper role was removed, and all applicants could file their claims directly with the Tribunal, the volume and range of applications reaching the Tribunal increased dramatically. As a result, beginning in 2009, the number of general damages awards issued annually by the Tribunal also increased dramatically, as illustrated by Figure 5 below. Over the 2000-2008 period as a whole, the Tribunal issued on average of 9.7 general damages awards annually. From 2009-2015, the average number of awards issued annually was 54, a six fold increase over 2000-2008.

Figure 5: Number of general damages awards issued annually by the HRTO, 2000-2015

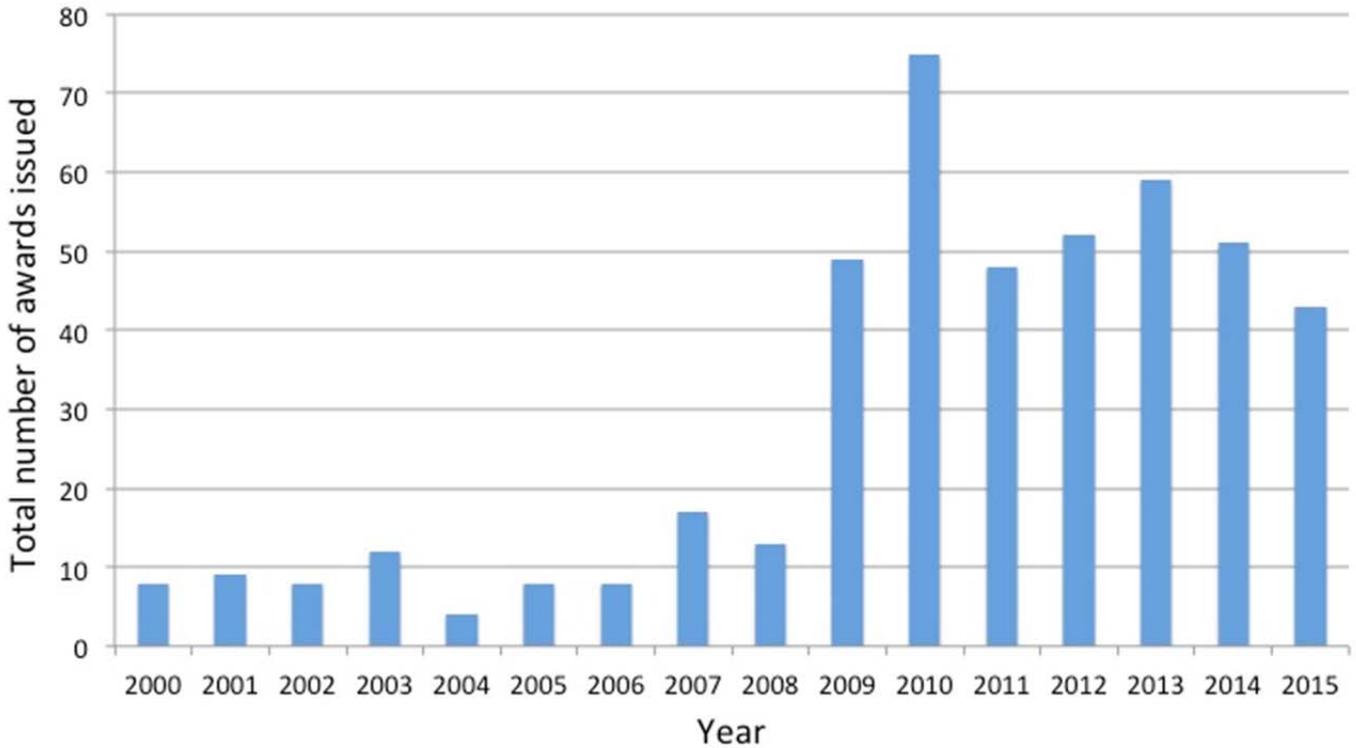
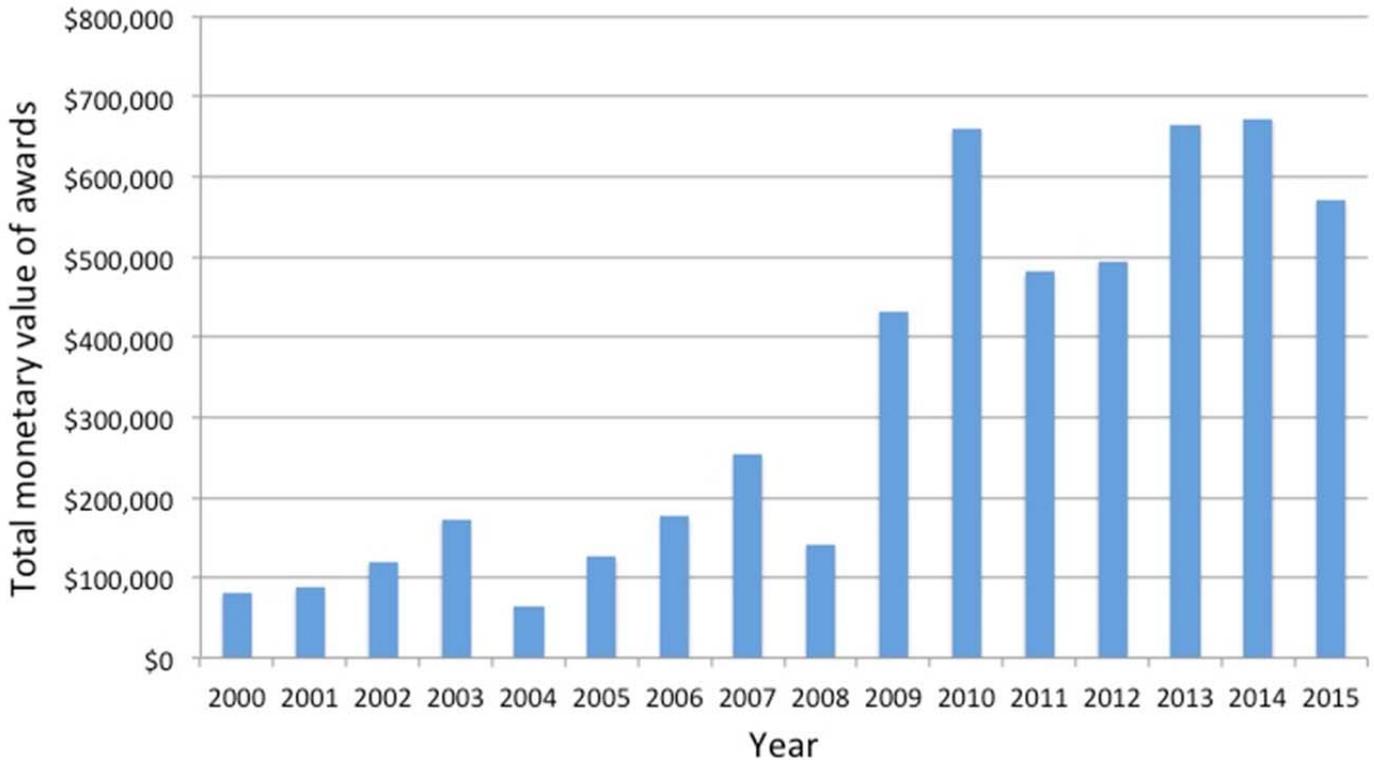


Figure 6 below depicts the dramatic increase in the total dollar value of all general damages awards made by the Tribunal each year from 2000 to 2015. We see a major and sustained increase following the coming into force of the 2008 amendments, with a high of over \$673,000 in 2014. We found that the average annual total amount of general damages awards issued by the Tribunal from 2000 to 2008 was \$136,167; from 2009 to 2015 it was \$568,360, a four-fold increase under the new regime.

Figure 6: Total monetary value of all general damages awards issued by the HRTO by year from 2000-2015

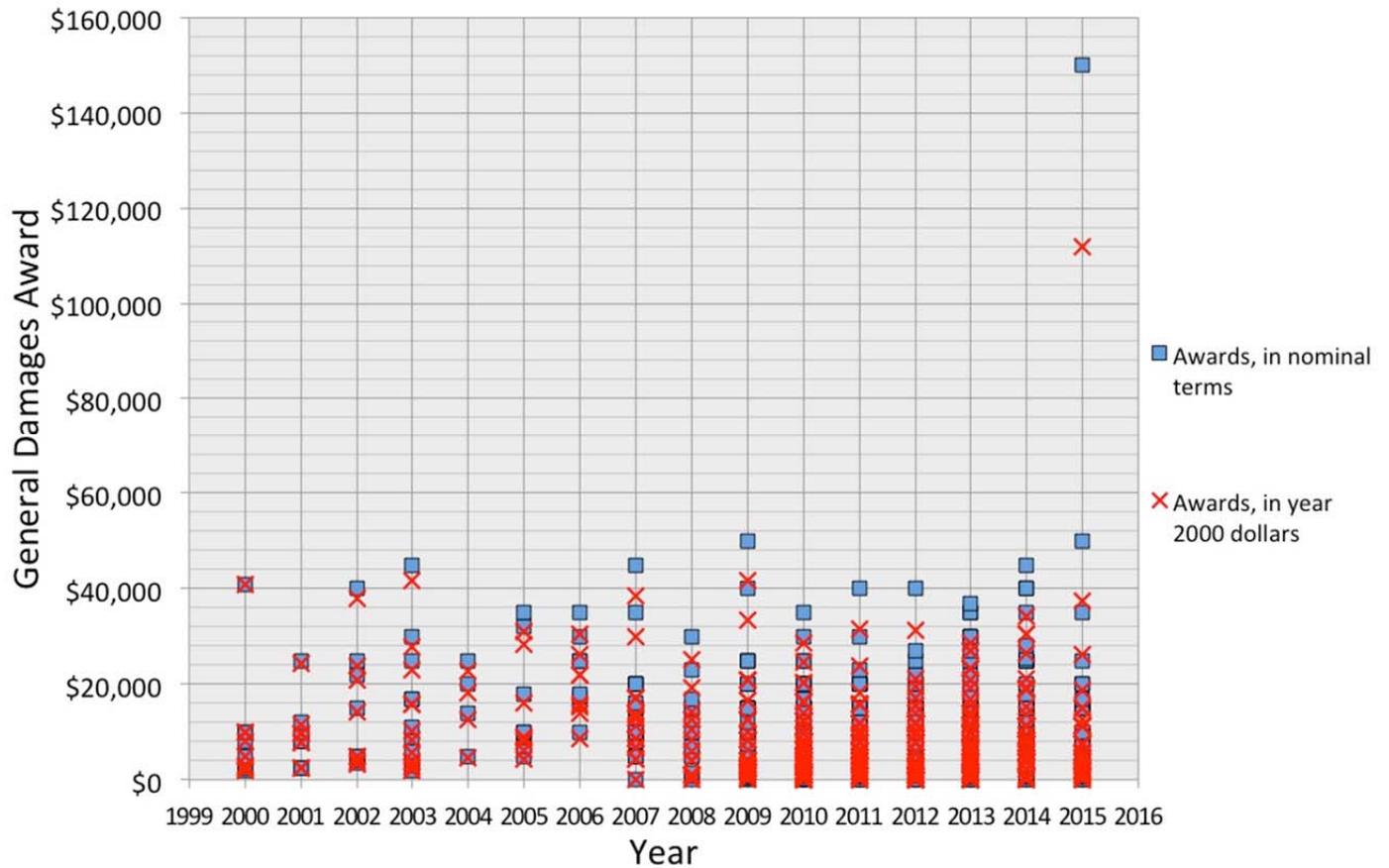


Inflation has eroded the real value of awards

We adjusted our data to take into account the effect of inflation so we could depict changes in the real value of general damages awards over time. This was done by assigning the year 2000 as the “base year”, and multiplying each award by a ratio of the Ontario consumer price index (“CPI”) in the year 2000, over the Ontario CPI of the year in which the award was issued.

Figure 7, below, shows an overlay of all inflation-adjusted awards (in red “x” marks) over all non-adjusted awards (in blue squares) issued between January 1, 2000 and December 31, 2015. In this way, awards are depicted in nominal and real terms. The red “x” marks represent awards in ‘year 2000 dollars’; that is, awards that were adjusted for inflation. The blue squares represent award values as issued to the applicant; that is, the nominal value of the awards when they were issued.

Figure 7. General Damages Awards Received from 2000 to 2015, in nominal terms and in “year 2000 dollars”



In Figure 8, below, we have removed the \$150,000 award from *Presteve Foods* from this graph to make it easier to see the spread of the remaining awards.

Figure 8. General Damages Awards Received from 2000 to 2015, in nominal terms and in “year 2000 dollars”, excepting the \$150,000 award issued in *OPT v. Presteve Foods*

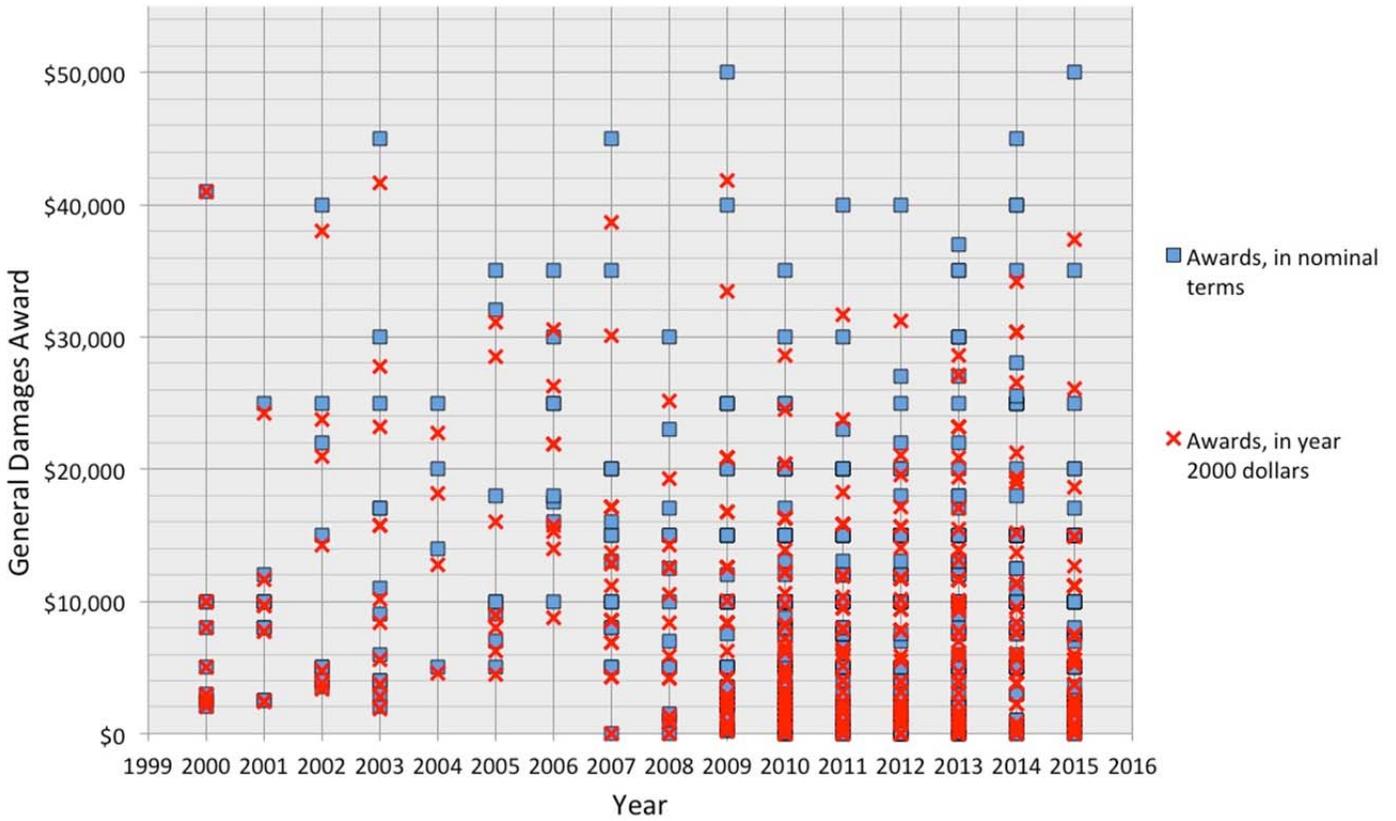
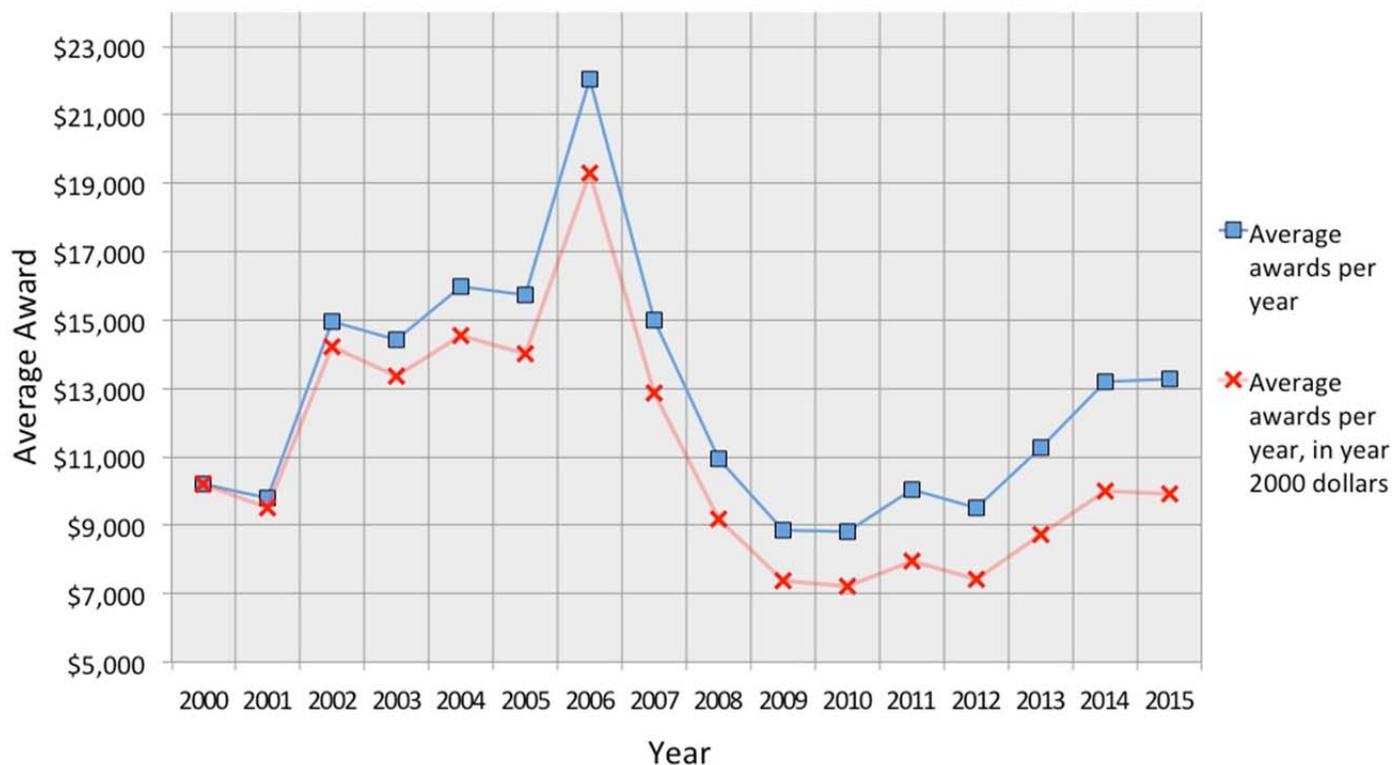


Figure 9, below, includes two trend lines illustrating changes in the average general damages award, per year, in nominal terms (blue squares) and in inflation-adjusted terms (red “x” marks), over time.

Figure 9. Average general damages awards per year, from January 1, 2000 to December 31, 2015



Figures 7-9 demonstrate how inflation has caused a reduction in the real value of nominal awards, opening up an increasingly large gap between the size of real and nominal awards in the period under study. Since the nominal range of general damages awards has remained relatively unchanged from 2000 to 2015,⁵⁵ when inflation is taken into account, the real range has decreased. This demonstrates the importance of indexing awards to keep pace with inflation’s eroding impact on the real value of general damages awards.

We then removed awards under \$1,000, calculated average awards based on this new data set, and adjusted the average award data for inflation. The results are shown in Figure 10 below:

⁵⁵ See figures 1 and 2, *supra*.

Figure 10: Average general damages awards per year – comparing results obtained from excluding awards under \$1,000

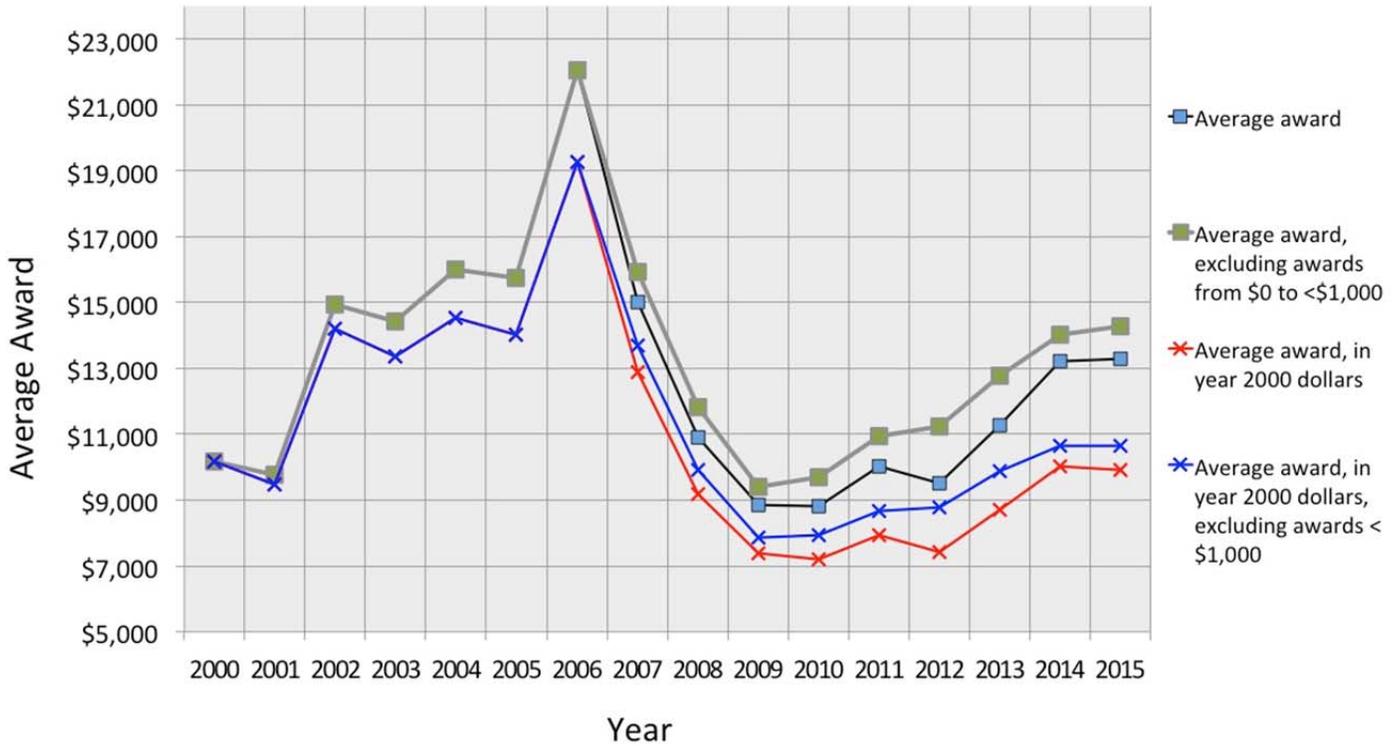


Table 4. Data on general damages awards from 2000 to 2015

Year	Average award, in nominal terms	Average award, in “year 2000 dollars”	Median award, in “year 2000 dollars”	Range, in “year 2000 dollars”
2000	10,188	10,188	6,500	2,000 – 41,000
2001	9,778	9,488	9,704	2,426 – 24,260
2002	14,938	14,206	9,510	3,329 – 38,040

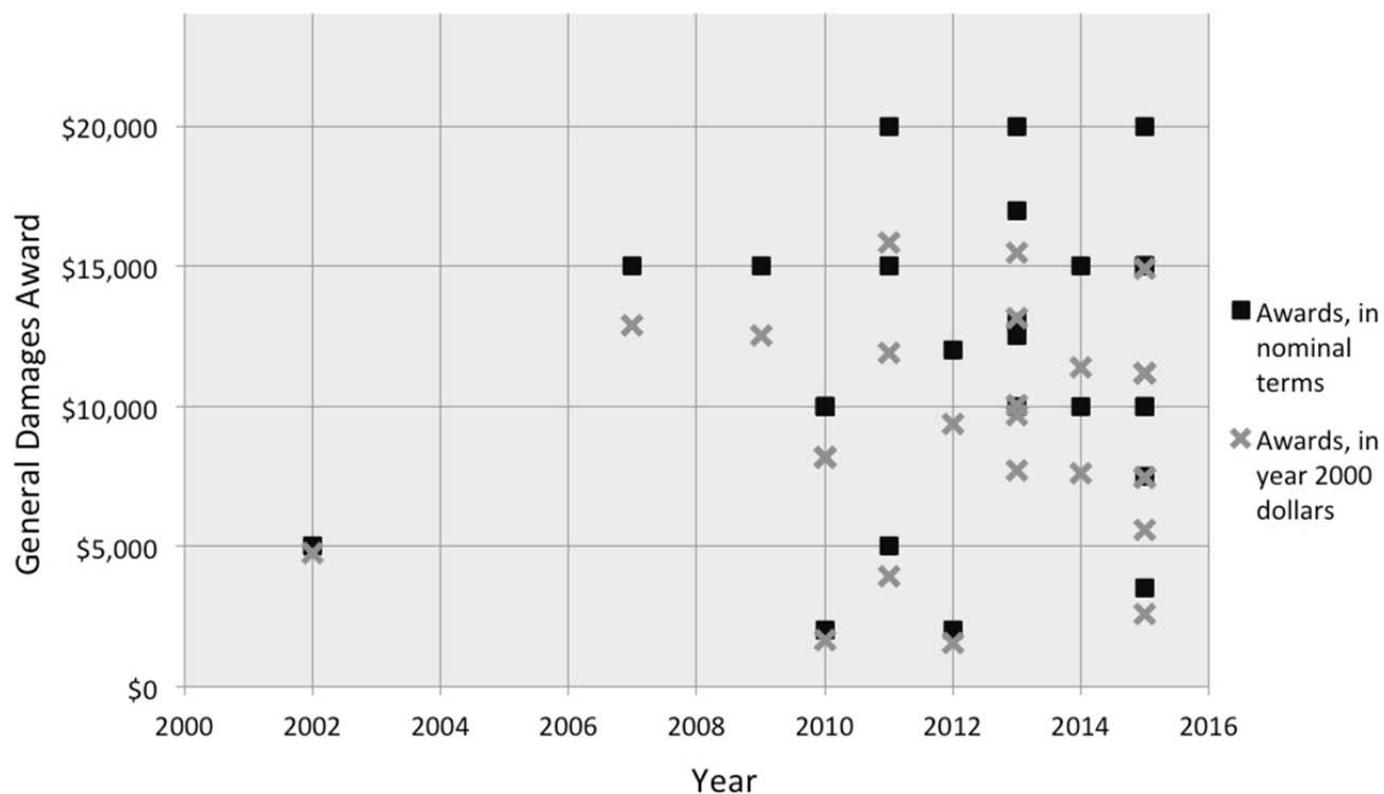
2003				1,852 –
	14,417	13,350	9,260	41,670
2004				4,546 –
	16,000	14,547	15,456	22,729
2005				4,448 –
	15,750	14,011	8,896	31,137
2006				8,741 –
	22,063	19,284	18,793	30,593
2007				0/4,292 –
	15,000	12,875	11,158	38,624
2008				0/839 –
	10,923	9,168	8,394	25,181
2009	8,837	7,391	4,182	167 – 41,821
2010	8,814	7,195	6,530	0/82 – 28,571
2011				0/475 –
	10,033	7,945	7,127	31,674
2012				0/781 –
	9,504	7,420	7,808	31,232
2013	11,264	8,709	7,732	0/77 – 28,607
2014				0/455 –
	13,198	10,017	7,590	34,154
2015				0/373 –
	13,279	9,912	5,972	111,970

Awards in cases involving termination of employment based on pregnancy

Because the nature of the issues raised in applications that are the subject of final decisions by the Tribunal varies over time - especially with the move from a Commission-centred model to a direct access model in 2008 - we reviewed our database to determine whether there were any recurring scenarios with similar facts that came before the Tribunal over the period of our study. By isolating a recurring and factually similar group of cases, we can shed further light on trends in the assessment of general damages by the Tribunal. We decided to select cases involving a form of sex discrimination that recurs with distressing frequency:

employers terminating female employees shortly after finding out they are pregnant. We isolated all of the cases in our database – 27 in total⁵⁶ – where the applicant established that her employment was terminated at least in part on the basis of pregnancy. The scatter chart below depicts the pattern of awards in these cases of employment termination based on pregnancy, in nominal and real terms.

Figure 11. General Damages Awards in Pregnancy/Employment Termination Cases from 2002 to 2015, in nominal terms and in “year 2000 dollars”



⁵⁶ *Chacko v. Transpharm Canada Inc.*, 2002 CanLII 46514; *Dodds v. 2008573 Inc. (Sharks Sports Pub)*, 2007 HRTO 17; *Maciel v. Fashion Coiffures*, 2009 HRTO 1804; *Gonneau v. Denninger*, 2010 HRTO 425; *Guay v 1481979 Ontario*, 2010 HRTO 1563; *Osvold v Videocomm Technologies*, 2010 HRTO 770; *Charbonneau v Atelier Salon & Spa*, 2010 HRTO 1736; *Splane v Ultimate Fitness*, 2011 HRTO 195; *Bickell v The Country Grill*, 2011 HRTO 1333; *Graham v 3022366 Canada Inc.*, 2011 HRTO 1470; *Chowdury v 2023628 Ontario Inc. o/a Quizno's Sub*, 2012 HRTO 1892; *Ong v. Poya Organics & Spa Ltd.*, 2012 HRTO 2058; *Tekyi-Annan v. 2191214 Ontario Inc.*, 2013 HRTO 1947; *Peart v. Distinct HealthCare Services Inc.*, 2013 HRTO 305; *Korkola v. Maid Day! Maid Day! Inc.*, 2013 HRTO 525; *McKenna v. Local Heroes Stittsville*, 2013 HRTO 1117; *Shinozaki v. Hotlomi Spa*, 2013 HRTO 1027; *Huang v High Life Heating, Air Conditioning & Security Inc.*, 2014 HRTO 1356; *Lugonia v Arista Homes*, 2014 HRTO 1531; *Golovaneva v Atkinson Schroeter Design Group Inc.*, 2015 HRTO 1471; *Angeles Toledo v Mexitaco*, 2015 HRTO 1464; *Richards v 905950 Ontario Ltd o/a Storybook Childcare Centre*, 2015 HRTO 517; *Lougheed v Little Buddies Preschool Centre*, 2015 HRTO 909; *Watters v Creative Minds Childrens Services LTO Daycare*, 2015 HRTO 475; *Marne v Aptco Capital Corporation*, 2015 HRTO 588; *Despres v The Crossbar Inc.*, 2015 HRTO 1624; *Wratten v 2347656 Ontario Ltd.*, 2015 HRTO 1041.

In the first pregnancy/employment termination case in our database, *Chacko* (2002), the Tribunal assessed general damages at \$5,000. The second award, *Dodds* (2007), was for \$15,000. The *Graham* case, decided in 2011, set a new high of \$20,000.

Depending on factors such as the length of employment, the presence or absence of discriminatory actions in addition to the termination, the conduct of the respondent, any contributing responsibility of the applicant, and especially the strength of the evidence of the financial and emotional impact of the discriminatory termination on the applicant, the awards issued by the Tribunal range from \$2,000 to \$10,000 on the low end (13 cases), \$12,000 to \$17,000 in the mid-range (11 cases) and \$20,000 at the high end (3 cases). While there are only two decisions that pre-dated the coming into force of the direct access model, it is notable that most subsequent awards are in line with the range established by those first two decisions.

The range of general damages awards in pregnancy/employment termination cases has remained more or less constant over the course of the period under study. This is especially apparent when the impact of inflation is taken into account. The Tribunal has established a new high end of the range by making awards of \$20,000 beginning in 2011. However, in real terms an award of \$20,000 in 2015 is a modest increase over the first award of \$15,000 issued in 2007.

V. Discussion and Recommendations

Our data confirms the accuracy of Pinto's observation that the range of awards during the 2008-2012 period remained the same as under the pre-2008 system. Indeed, his observation holds true not only for the time period he studied but also for the entire time period we have studied. From 2000 to 2015, 80% of general damages awards have been granted in the range up to \$15,000 identified as typical by Pinto. Awards of over \$15,000 to \$40,000 accounted for another 19% of awards, and the remaining 3% of awards were \$40,000 or higher.⁵⁷

Given that the range of general damages awards has remained roughly the same from 2000 to 2015, it follows that, in real terms, inflation has caused this range to decrease over the 15 year period studied. We

⁵⁷ See Figures 1 and 2, *supra*, pages 12-13; Table 2, *supra*, pages 16-17.

have illustrated the magnitude of this decrease by adjusting the data for inflation and graphing the results in Figures 7 and 8 above.⁵⁸

In examining the average award over time, we observed that it has gone through several periods characterized by upward trends (2000-2006 and 2010-2015), and a sharp decline at the time of transition to the direct access system (2007-2009).⁵⁹ In real terms, the average award dipped steeply below its year 2000 value in 2009, ultimately recovering to a level roughly equivalent to year 2000 levels in 2014.⁶⁰ If awards under \$1,000 are excluded from the data, the average award, in real terms, returned to year 2000 levels in 2013.⁶¹

Is the current level of general damages too low? As discussed above, in November 2012 Pinto thought that general damages awards were too low and recommended that they be significantly increased. We agree with Pinto's conclusion and recommendation for the following reasons.

First, failing to correct for inflation has resulted in applicants being awarded less than an individual would have received in an earlier year for the same or substantially similar harm. This is a problem, because there is no reason that applicants should receive less than others in similar cases simply because they experienced discrimination later in time. Failing to correct for inflation ensures results that run directly counter to the purpose underlying the conventional approach – the goal of ensuring that similar applicants receive similar awards across time. It results in similar applicants receiving *less* over time. The courts take into account the impact of inflation when assessing non-pecuniary damages in other areas of tort law, as we discuss in more detail below. The Tribunal should do the same when assessing general damages for *Code* violations.

Second, even when correcting for inflation's devaluing effect, in our view the nominal value of general damages awards for discrimination under the *Code* is too low.

The special and important nature of equality rights must be kept in mind when evaluating the current nominal value of general damages awards. In his 1982 opinion in *Heerspink*, Justice Lamer (as he then was) commented that anti-discrimination laws are "fundamental", considered by the people to be, "save their

⁵⁸ *Supra*, pages 22-25.

⁵⁹ See Figure 9, *supra*, page 22.

⁶⁰ See Figure 3, *supra*, page 15.

⁶¹ See Figure 10, *supra*, page 25.

constitutional laws, more important than all others."⁶² Since then, the Supreme Court has variously described anti-discrimination statutes as "public and fundamental law of general application",⁶³ as declaring "public policy regarding matters of general concern",⁶⁴ as being "of a special nature, not quite constitutional but certainly more than ordinary",⁶⁵ as incorporating "certain basic goals of our society",⁶⁶ as "intended to give rise, amongst other things, to individual rights of vital importance",⁶⁷ and as "often the final refuge of the disadvantaged and disenfranchised".⁶⁸ In recognition of its importance, the *Code*, like human rights legislation in other Canadian jurisdictions, has what the Supreme Court of Canada has described as a "special, quasi-constitutional status."⁶⁹

One consequence of the quasi-constitutional status of anti-discrimination statutes that the Supreme Court has repeatedly emphasized is that their provisions must be given large, liberal and purposive interpretations that best advance the goal of achieving substantive equality.⁷⁰ This obligation extends to remedial provisions: the remedial powers of human rights tribunals must be interpreted and exercised in a broad and flexible manner to ensure the attainment of their goals.⁷¹ Therefore, the general damages-granting provision of the *Human Rights Code* should be interpreted liberally. This is particularly important given that the general damages power is the only power that can be used to compensate for the injury to dignity caused by discrimination. Injury to dignity is not a loss that is ancillary to the range of harms that are caused by discrimination – rather, it lies at the *core* of what makes discrimination harmful. The importance of the dignity interest is evident from the *Code*'s preamble, which discusses human dignity three times in the span of two recital clauses.⁷² We must ask ourselves whether, in 2015, assessing the value of the injury to human

⁶² *BC v. Heerspink*, [1982] 2 SCR 145 at 158, 137 DLR (3d) 219.

⁶³ *Winnipeg School Division No 1 v. Craton*, [1985] 2 SCR 150 at 156, 21 DLR (4th) 1

⁶⁴ *Ibid.*

⁶⁵ *Ontario Human Rights Commission and O'Malley v. Simpsons Sears*, [1985] 2 SCR 536 at 547, 23 DLR (4th) 321 (*O'Malley*).

⁶⁶ *Robichaud v. Canada*, [1987] 2 SCR 84 at 90, 8 CHRR 4326 (*Robichaud*)

⁶⁷ *Canadian National Railway Co v. Canada (Human Rights Commission)*, [1987] 1 SCR 1114 at 1134, 8 CHRR 4210 (*Action Travail des Femmes*).

⁶⁸ *Zurich Insurance Co v. Ontario*, [1992] 2 SCR 321 at 339, 93 DLR (4th) 346.

⁶⁹ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 SCR 789 at para 30.

⁷⁰ See, e.g., *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 SCR 108 at para 17; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 at paras 33 and 62; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU (Meiorin)*, [1999] 3 SCR 3 at para 44; *B v. Ontario (Human Rights Commission)*, [2002] 3 SCR 403, 2002 SCC 66 at para 44; *O'Malley*, *supra* note 66 at 547.

⁷¹ *Action Travail des Femmes*, *supra* note 68; *Robichaud*, *supra* note 67.

⁷² *Code*, *supra* note 1, Preamble. We also note that the Supreme Court of Canada, in discussing the section 15 *Charter* prohibition on discrimination, has repeatedly emphasized that the human dignity of every individual is an "essential value underlying the section 15 equality guarantee: *R v. Kapp*, 2008 SCC 41 at para 21, [2008] 2 SCR 483.

dignity caused by discrimination at an average of \$9,912 (in real terms) truly reflects the importance of equality rights legislation.

It is true that the valuation of an appropriate monetary remedy for an injury to dignity is difficult, as the injury itself cannot be measured in dollars. As is the case with awards for non-pecuniary loss in other areas of tort law, assessing general damages is thus, to some extent, an unavoidably subjective task.⁷³ To help meet this challenge, we find it useful to compare general damages awards for human rights violations with the size of non-pecuniary damages issued by courts for other tortious wrongs. The special status of the *Code* suggests that general damages awards for its violation should be higher than non-pecuniary damages aimed at compensating tortious wrongs that lack a constitutional or quasi-constitutional dimension. Yet, if we compare human rights general damages to non-pecuniary damages issued in other tort actions, we find that human rights damages are lower. For example, awards for general damages issued for injuries to reputation in defamation cases cover a range from \$25,000 to \$500,000, a range significantly higher than the range of general damages issued for *Code* violations.⁷⁴ In a recent study of damage awards in defamation cases, Hilary Young found that the average general damages award for harm to reputation and pain and suffering in cases decided from 2003 to 2013 was \$48,799, more than four times higher than the average general damages award of \$11,216 issued by the HRTO over the 2000-2015 period of our study.⁷⁵ Reputational damages in defamation cases provide a useful comparator, given that Justice Cory famously described injury to a plaintiff's reputation caused by defamation as being "closely related to the innate worthiness and dignity of the individual".⁷⁶ The same is true of discrimination as recognized by s.15 of the *Charter* and human rights legislation, laws that have superior normative significance in our legal system. In our view, the range of general damages awards for the injury to "dignity, feelings and respect" for violations of the *Code* should be at least comparable to awards for injury to dignity resulting from torts lacking constitutional status. But if they remain at their current levels, as Pinto noted, they threaten to "send a message that human rights and breaches of the *Code* are of limited importance".⁷⁷

⁷³ See, e.g., *Andrews*, supra note 34 at 261 (SCR), where Justice Dickson (as he then was) wrote, in the context of assessing non-pecuniary damages for negligently caused physical injury: "There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution."

⁷⁴ Halum, supra note 5 at 14-19; *Sagman v. Politi*, 2014 ONSC 4183 at para 21; Roger D McConchie & David A Potts, *Canadian Libel and Slander Actions* (Toronto: Irwin Law, 2004) at 865-866.

⁷⁵ Hilary Young, "The Canadian Defamation Action: An Empirical Study" (2016) at 33, online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802787.

⁷⁶ *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 107, 126 DLR (4th) 129.

⁷⁷ Pinto Report, supra note 2 at 70-71.

Third, while the focus of general damages awards under human rights legislation is compensatory, not punitive, inherent in any award is a deterrent effect. Tort damages awards have the twin goals of providing compensation to plaintiffs and deterring future tortious behaviour by defendants and others. The HRTO acknowledges the deterrence function of general damages awards when it states, as it frequently does, that they should not be so low as to amount to a “licence fee” for discrimination. But we are concerned that the costs of complying with the *Code* may frequently be higher than the amount of general damages awards issued by the Tribunal. If general damages remain low, respondents may well decide that violating the *Code* is cheaper than the costs of compliance.

Finally, the Tribunal must consider the impact of low general damages awards on access to justice for persons who have experienced discrimination. Applicants are frequently members of vulnerable and disadvantaged groups, who urgently need the benefit of the *Code*’s protections. The *Code*’s prohibitions are aimed at ensuring women can work free from sexual harassment in employment, at protecting racialized individuals from being discriminated against in securing housing, in ensuring those with disabilities can access the same services that the general public is offered, among other protections. As Denise Réaume has noted, “[t]he fact that employment, housing, and services are covered is not just a technical legal fact about the scope of the legislation. These areas are covered because of their historical implication in social patterns of inequality that have been deep and damaging as well as their ongoing importance in giving people a modicum of control over the shape and quality of their lives.”⁷⁸

The *Code* is intended to provide individuals with speedy access to remedies for discrimination issued by an expert Tribunal at low cost. No fees are charged to applicants under the *Code*. The Tribunal’s rules do not permit the award of legal costs against unsuccessful parties, so as not to deter applicants from seeking remedies for discrimination. Nevertheless, the litigation process imposes a host of costs on parties, including the time, stress and wages forgone that may result from filing applications, producing documents and other evidence, and participating in mediation and in hearings before the Tribunal. Given the increasing demand for the Centre’s services,⁷⁹ many who require representation or other services may not be able to access legal assistance free of charge. Applicants who are not represented by the Centre may find it

⁷⁸ Denise Réaume, “Defending the Human Rights Codes from the Charter”, (2012) 9 JLE 67 at 69. See also Claire Mummé, “The Ontario *Human Rights Code*’s Distributive and Recognitional Functions in the Workplace”, (2015) 18 CLELJ 145.

⁷⁹ Human Rights Legal Support Centre, *Annual Report 2014-2015* (Ontario: Human Rights Legal Support Centre, 2015) at 2.

necessary to hire counsel to navigate the litigation process effectively, and thus may incur substantial legal costs. For those who need but cannot afford private counsel, low general damages awards impose a barrier to accessing justice if the remedy is ultimately too small to justify pursuing a lengthy and stressful ordeal of filing and pursuing a human rights application.⁸⁰ Most troubling, even though the 2008 amendments abolished appeals from Tribunal rulings, and sought to insulate the Tribunal from judicial intervention by adding a strong privative clause to the *Code*,⁸¹ applicants who are successful at the Tribunal are exposed to the possibility of a costs award if the Divisional Court is persuaded that the Tribunal's ruling was unreasonable.

Three examples drawn from the case law during the period under study help illustrate the significance of this problem. In *Saadi v. Audmax*, the applicant was successful at the Tribunal and received a general damages award of \$15,000.⁸² Her employer sought judicial review. The Divisional Court overturned the Tribunal's findings of liability and ordered Ms. Saadi to pay \$10,000 in legal costs.⁸³ In *Pieters*, the Tribunal's findings of racial discrimination and awards of \$2,000 in general damages to each of the two applicants⁸⁴ were overturned by the Divisional Court.⁸⁵ While the Court of Appeal restored the Tribunal's findings and general damages awards,⁸⁶ Mr. Pieters and Mr. Noble were burdened with a \$20,000 costs award issued by the Divisional Court. This costs award was five times higher than the total of the two general damages awards the applicants received from the Tribunal.⁸⁷ In *Nemati v. Ontario College of Teachers*, the applicant received \$10,000 in general damages from the Tribunal after demonstrating discrimination on the basis of her place of origin.⁸⁸ Ms. Nemati sought judicial review in an attempt to persuade the Divisional Court that the general damages awarded to her were inadequate. The Court upheld the Tribunal's award and ordered Ms. Nemati to pay the respondent \$12,000 in legal costs.⁸⁹

In light of the fundamental public policy rationale underlying the *Code* of promoting speedy and affordable access to remedies for discrimination, we find it disturbing that costs awards on judicial review can so easily

⁸⁰ Pinto Report, *supra* note 2 at 71.

⁸¹ *Code*, *supra* note 1, s.45.8 (“a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.”).

⁸² *Saadi v. Audmax*, 2009 HRTO 1627.

⁸³ *Audmax Inc. v. Ontario Human Rights Tribunal*, 2011 ONSC 315.

⁸⁴ *Pieters v. Peel Law Association*, 2010 HRTO 2411 [*Pieters*].

⁸⁵ *Peel Law Association v. Pieters*, 2012 ONSC 1048.

⁸⁶ *Peel Law Association v. Pieters*, 2013 ONCA 396.

⁸⁷ *Pieters*, *supra* note 86 at para 60.

⁸⁸ *Nemati v. Ontario College of Teachers*, 2010 HRTO 1808.

⁸⁹ *Nemati v. Human Rights Tribunal of Ontario*, 2011 ONSC 5431 at para 11.

match or outstrip the general damages awards issued by the Tribunal. Are the harms of discrimination really no greater than the costs of hiring a lawyer to defend an award on judicial review? Moreover, persons considering filing applications with the Tribunal who receive responsible legal advice must be told that while it costs them nothing to initiate an application to the Tribunal, if they are successful, the result could be overturned on judicial review in which case they could be forced to bear a portion of the respondent's legal costs. The public policy in favour of ready access to the Tribunal has been undermined by a costs regime more suitable to private litigation infiltrating the process at the judicial review stage. The result is a deterrent impact on the filing of applications. And for those who choose to file applications, significant pressure is placed on them to accept modest settlement offers rather than incur the risks of proceeding to a hearing at the Tribunal.

In sum, low general damages awards cause a host of consequences that are detrimental to the achievement of substantive equality in Ontario. Low awards relative to other tortious wrongs send a message that breaches of the *Code* are of lesser importance, trivializing the value of these quasi-constitutional, fundamental rights.⁹⁰ Low awards risk creating insufficient incentives for employers, landlords and service providers to undertake actions that advance a culture of compliance with the *Code*. Low awards jeopardize access to justice at the Tribunal when they are outstripped by the costs and risks of litigation.⁹¹ For these reasons, low general damages awards fail to achieve the *Code*'s purpose of recognizing the inherent dignity and worth of all Ontarians.

Increasing General Damages Awards

In theory at least, increases in general damages awards could be encouraged by the three pillars of Ontario's human rights system – the Tribunal, the Centre and the Commission – or by the courts or the legislature. In the discussion that follows we consider the possibilities of change being instigated by each of these institutions.

The Courts

It appears unlikely that the Divisional Court would play a role in initiating change in judicial review of general damages awards issued by the Tribunal. The *Code* gives the Tribunal broad discretion in the

⁹⁰ Pinto Report, *supra* note 2 at 70.

⁹¹ *Ibid* at 71.

assessment of general damages for *Code* violations. The Divisional Court has described the damage assessment process as resting “at the heart of the expertise of the Tribunal”.⁹² As a result, the standard of review for Tribunal decisions on general damages awards is at the most deferential end of the spectrum of reasonableness review.⁹³ When the Divisional Court has altered general damages awards issued by the Tribunal, with the exception of one case⁹⁴ it has been to quash or reduce those awards.⁹⁵

On the other hand, courts awarding general damages themselves, pursuant to s. 46.1 of the *Code*, appear to be taking a modestly more expansive approach to assessing general damages.⁹⁶ Section 46.1 of the *Code* enables courts to issue general damages awards for violations of the *Code* if those violations accompany the commission of other civil wrongs (like wrongful dismissal) that are the subject of the court proceeding. The courts have more latitude in assessing general damages awards under s. 46.1 compared to the deferential posture that is appropriate on judicial review of Tribunal rulings.

In the limited case law to date, the courts have taken the Tribunal’s lead in applying the same non-indexed conventional approach to the assessment of general damages, but seem to have awarded slightly higher general damages awards⁹⁷

⁹² *Quereshi v. Toronto (Board of Education)* (2006), 268 DLR (4th) 281 at para 64, 2015 OAC 102 (Div Ct).

⁹³ *Lane*, *supra* note 25 at para 160.

⁹⁴ *Smith v. Ontario (Human Rights Commission)*, 2005 CanLII 2811 (ON SCDC), increasing the general damages award issued by the Tribunal in 2002 CanLII 46512 (from \$8,000 to \$18,000).

⁹⁵ In the period under study, the Divisional Court overturned damages awards issued by the HRTO in six cases: *Ontario (Attorney General) v. OHRC (Braithwaite)*, 2007 CanLII 56481 overturning 2006 HRTO 15; *Great Blue Heron Charity Casino v. Ontario Human Rights Commission*, 2008 CanLII 45003 (ON SCDC), overturning 2007 HRTO 33; *Audmax Inc. v. HRTO*, 2011 ONSC 315, overturning 2009 HRTO 1627; *Toronto Community Housing Corp. v. Boyce*, 2011 CanLII 38447 (ON SCDC), overturning 2011 HRTO 827; *Walton Enterprises v. Lombardi*, 2013 ONSC 4218, overturning 2012 HRTO 1675; and *Crêpe It Up! v. Hamilton*, 2014 ONSC 6721, overturning 2012 HRTO 1941. In two cases, the Divisional Court reduced the general damages awards issued by the Tribunal: *Papa Joe's Pizza v. Ontario Human Rights Commission*, 2007 CanLII 23487 (ON SCDC), reducing two awards issued by the Tribunal in 2005 HRTO 46 (from \$20,000 to \$13,000 and \$12,000 to \$8,000, respectively); *Quereshi v. Toronto (Board of Education)*, 2006 CanLII 63704 (ON SCDC), reducing the award issued by the Tribunal in 2003 HRTO 11 (from \$35,000 to \$25,000).

⁹⁶ We are grateful to Andrew Pinto for his comments on trends in awards issued by courts pursuant to s.46.1, which we have drawn on in this discussion.

⁹⁷ We are aware of seven civil claims where general damages were assessed or awarded under section 46.1: *Leclair v Ottawa (Police Services Board)*, 2012 ONSC 1729 at para 114 (general damages of \$2,500 assessed but no finding of liability); *Wilson v Solis Mexican Foods Inc*, 2013 ONSC 5799 at para 92 (general damages of \$20,000 awarded for wrongful dismissal based in part on disability); *Strudwick v Applied Consumer and Clinical Evaluations Inc.*, 2016 ONCA 520 (general damages of \$40,000 awarded for wrongful dismissal based in part on disability); *Silvera v Olympia Jewellery Corporation*, 2015 ONSC 3760 at para 153 (general damages of \$30,000 awarded for sexual assault and sexual/racial harassment); *Nason v Thunder Bay Orthopaedic Inc*, 2015 ONSC 8097 at para 192 (general damages of \$10,000 awarded for wrongful dismissal based in part on disability); *Partridge v. Botony Dental Corporation*, 2015 ONCA 836 (upholding general damages of \$20,000 awarded for wrongful dismissal based in part

Two recent appeal court rulings encourage a more generous approach to general damages assessment that goes beyond the conventional range established by human rights tribunals. In *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*,⁹⁸ the Ontario Court of Appeal issued an award of \$40,000 for general damages for violation of the *Code*, double the amount issued by the trial judge, in a wrongful dismissal case involving discrimination on the basis of disability. Justice Epstein reviewed the range of compensation awarded by the Tribunal in similar cases, and noted that past awards “should be by no means determinative of the ultimate award” and “that there should be no cap on damages arising from the violation of an individual’s human rights.”⁹⁹ In light of the “particular severe” effects of the discrimination against Ms. Strudwick, she concluded that “the circumstances here require damages in excess of those awarded in [previous HRTO] cases.”¹⁰⁰

The *Strudwick* opinion indicates that tribunals and courts should not be hesitant to issue awards that exceed the conventional range where circumstances warrant. The same message emerges from the British Columbia Court of Appeal decision in *University of British Columbia v. Kelly*¹⁰¹ that restored an award of \$75,000 in general damages issued by the B.C. Human Rights Tribunal. The B.C. Supreme Court had characterized the general damage award as “patently unreasonable” because it was “more than double the previous high of \$35,000 for similar discrimination”.¹⁰² In a unanimous ruling, the Court of Appeal disagreed. Just as Justice Epstein observed regarding the Ontario *Code* in *Strudwick*, Justice Donald in *Kelly* noted that there is no cap on injury to dignity awards under the B.C. *Code*.¹⁰³ Moreover, he stated that the Tribunal is not bound by the conventional range of awards established in previous cases. “Ranges established by previous cases”, he noted, “play a more diminished role in the Tribunal’s determination of an award for injury to dignity.”¹⁰⁴ It

on disability; the Court noted, at para 19, that “[w]hile on the high end, this award is clearly within the range supported by the case law and by the trial judge’s findings of the appellant’s wilful misconduct...”; and *Williams v Vogel of Canada*, 2016 ONSC 342 at paras 105-106 (general damages of \$5,000 were awarded for breach of the *Code* to the plaintiff’s estate, for wrongful dismissal based on disability). The courts have been guided by the range of awards issued by the HRTO in similar cases. In other words, when assessing general damages for *Code* breaches pursuant to s.46.1, the early indications are that judges will follow the same non-indexed conventional approach as the Tribunal.

⁹⁸ 2016 ONCA 520.

⁹⁹ *Ibid* at para 72.

¹⁰⁰ *Ibid* at paras 65 and 74.

¹⁰¹ 2016 BCCA 271.

¹⁰² 2015 BCSC 1731 at para 176.

¹⁰³ *Supra* note 102 at para 60.

¹⁰⁴ *Ibid*.

is not unreasonable, he held, for a Tribunal to exceed the conventional range.¹⁰⁵ It is for the Tribunal, he said, to measure appropriate compensation based on all of the evidence, not the reviewing judge.¹⁰⁶

The Ontario Legislature

In our view it would be inadvisable for the legislature to consider amendments to the *Code* that would alter the broad remedial discretion currently granted to the Tribunal. The discretion to tailor appropriate remedies should remain with the Tribunal as the specialized body with the requisite expertise to administer Ontario's human rights system with sensitivity to the specific facts of each case as well as the broader patterns of disadvantage that produce discrimination.

Nevertheless, we would suggest four amendments to the *Code* that we believe are worth considering and that would not interfere with the Tribunal's remedial discretion. One would be to amend the *Code* to provide that general damages can be awarded against the government when discrimination flows from a statute, regulation or a by-law. The Tribunal is currently bound by court decisions that preclude general damages awards in these circumstances absent government action that is "clearly wrong, in bad faith or an abuse of power."¹⁰⁷ This rule, originally adopted in the context of *Charter* claims, is intended to relieve legislative bodies from concerns about incurring tortious liability when exercising law-making responsibilities. While this is an important consideration, it should not lead in our view to a rule that in practice amounts to a blanket immunity. A better approach would be to amend the *Code* to permit the Tribunal to exercise its discretion to award general damages against governments for discrimination caused by laws, and directing the Tribunal to consider the burden on law-making bodies when doing so. In this way, the goal of compensating individuals for injury to "dignity, feelings and self-respect" could be appropriately balanced against the need to not unduly burden law-making bodies.

Second, the legislature should consider an amendment to restrict the award of costs by the courts when respondents found liable in Tribunal decisions are successful on judicial review. Such an amendment would remove a significant form of financial jeopardy that applicants to the Tribunal currently face. It might also lead respondents to pause before initiating judicial review applications, a consequence that would be consistent with the legislature's adoption of a strong privative clause stating that Tribunal decisions are

¹⁰⁵ *Ibid* at para 61.

¹⁰⁶ *Ibid* at para 62.

¹⁰⁷ See *Mackin, Quebec v. CUM and Braithwaite*, *supra* note 47.

“final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.”¹⁰⁸

Third, the legislature should consider restoring the Tribunal’s power to award damages, in addition to general damages, where the respondent has willfully or recklessly violated the *Code*. While the legislature apparently intended to increase damages awards when Bill 107 repealed the provision of the *Code* that allowed the Tribunal to make awards in these circumstances of up to \$10,000 for “mental anguish”, the result appears to have been the opposite. Moreover, recent awards issued by the Canadian Human Rights Tribunal, which can consist of two prongs pursuant to s.53 of the *Canadian Human Rights Act* – one as compensation for “pain and suffering”, and another as “special compensation” for wilful or reckless violations¹⁰⁹ – have tended to be greater in combination than the single awards for general damages issued by the HRTO.¹¹⁰ The two-pronged approach may encourage the Tribunal to focus not just on compensation, but also in a more sustained way on the need to fashion awards with sufficient deterrent impact (especially for reckless or repeat violators of the *Code*) to create a culture of human rights compliance.

The Human Rights Legal Support Centre

Counsel from the Centre assisting individuals with applications before the Tribunal (and private counsel for applicants) could adopt a range of different practices aimed at increasing general damages awards. First, counsel making submissions before the Tribunal could advocate directly for the Tribunal to adopt indexation practices. It may be useful for the Centre to adopt an institutional policy or practice of promoting indexing, such as a policy of consistently referring to not only the nominal value of general damages awards

¹⁰⁸ *Code*, *supra* note 1, s.45.8.

¹⁰⁹ Sections 53(2)(e) of the *Canadian Human Rights Act (CHRA)*, RSC 1985, c. H-6, empowers the Canadian Human Rights Tribunal (CHRT) to issue an award to compensate the applicant “for any pain and suffering” resulting from a discriminatory practice, up to a maximum of \$20,000. In addition, the CHRT may order “special compensation” of up to \$20,000 if the respondent engaged in a discriminatory practice “wilfully or recklessly”: *ibid*, s.53(3). The two-pronged federal counterpart to HRTO general damages awards is thus capped at a combined amount of \$40,000. The caps are unfortunate. In our view, legislation that stipulates minimum or maximum awards for human rights violations is an undesirable interference with human rights tribunals’ remedial discretion.

¹¹⁰ For example, in the CHRT’s three rulings that made findings of discrimination issued in 2015, the Tribunal issued the following equivalents of what in Ontario we would call general damages awards: \$30,000 in *Turner v. Canada Border Services Agency*, 2015 CHRT 10 (\$15,000 for pain and suffering and \$15,000 as special compensation), the finding of discrimination was overturned by the Federal Court in *Canada (Attorney General) v Turner*, 2015 FC 1209, affirmed *Canada (Attorney General) v Turner*, 2017 FCA 2; \$20,000 in *First Nations Child & Family Caring Society of Canada v. Attorney General of Canada*, 2015 CHRT 14 (\$10,000 for pain and suffering and \$10,000 as special compensation); and \$40,000 in *Tanner v. Gambler First Nation*, 2015 CHRT 19 (\$15,000 for pain and suffering and \$25,000 as special compensation for two discriminatory incidents).

granted in previous cases, but also the indexed value when making submissions during settlement negotiations, mediation, or adjudication.

Second, and separate from the issue of inflation, counsel may want to consider some of the practices recently exhibited by lawyers in labour arbitration cases. As Lisa Feinberg has described,¹¹¹ labour arbitrators are increasingly awarding higher general damages amounts for *Human Rights Code* breaches,¹¹² and these awards are being granted in cases where counsel are adopting practices rarely seen at the Tribunal.¹¹³ Feinberg identified three notable practices that may have played a role in persuading arbitrators to award higher amounts. First, union counsel are referring directly to the Pinto Report's recommendation on general damages.¹¹⁴ Second, union counsel are requesting awards in the six-figure plus range. In three notable labour cases reviewed by Feinberg, counsel requested amounts ranging from \$75,000 to over \$3.5 million.¹¹⁵ In these cases, the arbitrators granted awards ranging from \$25,000 to \$98,000 – amounts which, while still being significantly lower than the amounts requested, are notable for being generally higher than awards typically seen at the Tribunal.¹¹⁶ Finally, rather than requesting a single lump sum award for the respondent's breach of the *Code*, union counsel are breaking down their request for general damages into separate amounts for each *Code* breach found.¹¹⁷ For example, in *Hamilton (City) v Amalgamated Transit Union, Local 107*, a case alleging sexual harassment of a transit inspector by her supervisor in the Hamilton public transit service, union counsel broke down the request for general damages into separate awards for each instance of a *Code* violation: \$10,000 for unwanted touching, \$10,000 for the receipt of pornographic emails, \$15,000 for public humiliation as a result of the offensive comments and gestures made, \$20,000 for the City's failure to investigate, and \$20,000 for reprisal.¹¹⁸ In this case, the arbitrator noted that the Tribunal does not generally award separate general damages amounts for each *Code* breach in one application, but awarded a total general damages award of \$25,000, "bearing in mind the ATU's distinct

¹¹¹ Lisa Feinberg, "General Damage Awards since the Pinto Report: What human rights litigators can learn from labour arbitration cases", Paper delivered at the OBA Annual Update on Human Rights, 23 May 2014), [unpublished] at 10-14 ["Feinberg"].

¹¹² See, for example, *Ontario Public Service Employees Union v Ontario (Ministry of Safety and Correctional Services)*, [2013] OGSBA No 116 [*Ranger Grievance*] (\$98,000 in general damages awarded); *Hamilton (City) v Amalgamated Transit Union, Local 107*, [2013] OLAA No 371[*AB Grievance*] (\$25,000 in general damages awarded); *Ontario Public Service Employees Union v Ontario (Community Safety and Correctional Services)*, [2014] OGSBA No 1 [*Hyland*] (\$30,000 in general damages awarded).

¹¹³ Feinberg, *supra* note 112 at 14. In a similar vein, some CHRT rulings have made separate damages awards for separate discriminatory incidents: see, e.g, *Tanner*, *supra* note 111.

¹¹⁴ Feinberg, *supra* note 112 at 14.

¹¹⁵ *Ibid* at 10-14.

¹¹⁶ *Ibid* at 14-15.

¹¹⁷ *Ibid* at 15.

¹¹⁸ *Ibid* at 12; *AB Grievance*, *supra* note 113 at para 160.

claims for specific violations on AB’s behalf.”¹¹⁹ While the Tribunal typically awards a single general damages award even in cases involving multiple discriminatory incidents, issuing separate awards for each incident would fall within the Tribunal’s broad remedial discretion pursuant to s.45.2 of the *Code*.

In addition, counsel may wish to consider citing case law from other areas of law, such as non-pecuniary damages issued in tort law. Non-pecuniary tort damages awards made by the courts are for pain and suffering, lost enjoyment of life and lost expectation of life caused by the tort (or for harm to reputation and pain and suffering in the defamation context), concepts that are not equivalent to the injury caused by discrimination to “dignity, feelings and self-respect”. But where there is overlap or a close affinity between discriminatory wrongs and common law wrongs, non-pecuniary damages awards should provide useful reference points for the Tribunal. For example, non-pecuniary damages awards made by courts in sexual harassment tort cases may provide useful comparators for the Tribunal in fashioning general damages remedies for claims involving sexual harassment.

The Ontario Human Rights Commission

The Ontario Human Rights Commission could assist in increasing general damages awards in several ways. First, the Commission could advocate for the indexation of awards in its submissions to the Tribunal, either while acting as an intervenor in s. 34 applications or when it is bringing an application in the public interest pursuant to s. 35 of the *Code*. Second, the Commission could conduct research into the state of general damages awards in Ontario and other jurisdictions as part of its “duty to protect the public interest” and “to promote the elimination of discriminatory practices.”¹²⁰ Drawing on this research, and as part of its mandate to engage in public legal education¹²¹ and to promote and advance respect for human rights in Ontario,¹²² the Commission could advocate for indexation or other strategies aimed at ensuring general damages awards issued by the Tribunal are adequate.

The Commission could also consider developing and approving a policy on general damages assessment, or on the Tribunal’s remedial practices more generally, pursuant to its authority to craft and approve policies “to provide guidance on the application of Parts I and II” of the *Code*.¹²³ The *Code* provides that the

¹¹⁹ *Ibid* at para 171.

¹²⁰ *Code, supra* note 1 at s 29.

¹²¹ *Ibid*, s 29(b).

¹²² *Ibid*, s 29.

¹²³ *Ibid*, s 30.

Tribunal is bound to consider Commission policies if parties or interveners raise them during proceedings at the Tribunal.¹²⁴ If the Commission was a party or an intervenor in an application at the Tribunal and the Commission believes that the Tribunal made a decision or order that was inconsistent with a Commission policy, the Commission can require the Tribunal to “state a case” to the Divisional Court relating to that decision.¹²⁵

However, we have doubts about whether the Commission has the authority to develop and approve a policy on general damages assessment. Section 30 of the *Code* provides that the Commission can develop and approve policies relating to Parts I and II of the *Code*, the Parts that set out prohibitions on discrimination and address their interpretation and application.¹²⁶ However, the Tribunal’s power to award general damages is located elsewhere in the *Code*. Part IV establishes the Tribunal and gives it broad powers to determine its procedures and practices, including remedial practices, for the resolution of applications.¹²⁷ In other words, while the *Code* recognizes that the Commission has expertise in interpreting the scope and applicability of the *Code*’s prohibitions on discrimination, it has designated the Tribunal, not the Commission, as the expert in determining what procedures and practices will best ensure a “fair, just and expeditious” resolution of applications.¹²⁸ Thus, it is likely that if the Commission were to craft a policy on general damages assessment, it would be exceeding the scope of its authority and encroaching on the authority of the Tribunal.

The Ontario Human Rights Tribunal

As noted above, the Tribunal has frequently acknowledged in principle the importance of taking inflation into account when assessing general damages.¹²⁹ However, the Tribunal has never explicitly taken inflation into account in the assessment of general damages in a particular case. In our view, the Tribunal needs to adopt a consistent practice of indexing general damages awards to account for inflation’s devaluing effect on the nominal size of awards over time.

Persuasive precedent exists in other areas of the law for adopting such a practice. In 1978 the Supreme Court of Canada imposed a \$100,000 cap on non-pecuniary damage awards in common law personal injury

¹²⁴ *Ibid*, s 45.5(2).

¹²⁵ *Ibid*, s 45.6(1).

¹²⁶ *Ibid*, s.30.

¹²⁷ *Ibid*, sections 40, 41, 43 (broad rule making power) and 45.2 (broad remedial discretion)

¹²⁸ *Ibid*, sections 40 and 41.

¹²⁹ *Best Buy*, *supra* note 26 at para 49, and the other cases cited in notes 32-33, *supra*.

actions and noted that these awards should be “viewed flexibly in recognition of... changing economic conditions”.¹³⁰ Four years later, the Court affirmed that the cap should be indexed to account for inflation.¹³¹ Courts now routinely adjust the \$100,000 cap on non-pecuniary damages in personal injury actions. For example, in *Knight v. Knight*, counsel agreed that the cap had risen to \$350,000 by 2014 when adjusted for inflation.¹³²

Courts have also adopted indexation mechanisms for statutory non-pecuniary awards. For example, courts have indexed awards issued under s. 61(2)(e) of the Ontario *Family Law Act* for the loss of “guidance, care and companionship” when a family member is negligently injured or killed.¹³³ The Ontario Court of Appeal has described these relational losses as “immeasurable” and “incalculable”.¹³⁴ In *Fiddler v Chiavetti*, the Court adjusted the range of s.61(1)(e) damages as follows:

In February 1992, (the month of the *To* accident) the consumer price index for Canada was at 83.3. In January 2005, the month of the deceased’s death, the consumer price index was at 105.3. Given that increase in the consumer price index, therefore, the damages in January 2005 equivalent to \$100,000 in February 1992 are roughly \$125,000. That is, it would take approximately \$125,000 in January 2005 dollars to purchase the same basket of goods purchased for \$100,000 in 1992. I therefore find that the upper end of the acceptable range of damages in this case would be limited to approximately \$125,000.¹³⁵

What approach could the Tribunal take to indexing general damages awards to account for inflation? We suggest that the Tribunal adopt a rule pursuant to s. 43(1) of the *Code*, which grants the Tribunal the power to “make rules governing practice or procedure before it”.¹³⁶ The rule could stipulate that when the Tribunal considers the size of general damages awards in previous rulings interpreting the *Code*, or when parties make submissions on the size of general damages awards in previous rulings, the amount will be described by referring to both the nominal size of the award at the time of the ruling and the current size of the award after having accounted for inflation.

The Tribunal could consider adopting a practice direction to counsel directing them to use a certain specific inflation calculator – for example, the Tribunal could create one which could be accessible through the

¹³⁰ *Andrews*, *supra* note 34 at 263.

¹³¹ *Lindal v Lindal*, [1981] 2 SCR 629, 129 DLR (3d) 263 at 640-641.

¹³² *Knight (Litigation guardian of) v Knight*, 2014 BCSC 1478, [2014] BCJ No 2034 at para 82. See also *Sorochan*, *supra* note 35.

¹³³ *Family Law Act*, RSO 1990, c F.3, s 61(2)(e).

¹³⁴ *To v Toronto Board of Education*, 204 DLR (4th) 704, 2001 CanLII 11304 at paras 21-30 (Ont CA).

¹³⁵ *Fiddler v. Chiavetti*, 2010 ONCA 210, 317 DLR (4th) 385 at para80,.

¹³⁶ *Code*, *supra* note 1, s 43(1).

Tribunal’s website, or it could refer counsel to the Bank of Canada’s online inflation calculator.¹³⁷ However, the Bank of Canada’s calculator uses the national consumer price index, and the Tribunal may prefer to craft their own using the Ontario index as we have done in our calculations, as that approach would more accurately ensure that Ontario residents are receiving the same value of awards as Ontario residents have in previous years.

Implementation of the above-described practice could occur in the following manner. Take as an example the following paragraph from *Richards*,¹³⁸ one of many we could have selected that typifies the Tribunal’s non-indexed conventional approach to general damages assessment. We have altered it in a manner that would reflect how it might look if the Tribunal adopted the rule we have just proposed, with our alterations highlighted in bold text:

The applicant requests that the Tribunal award her \$15,000 dollars in general damages. In reviewing decisions of the Tribunal where pregnancy was either a factor or the sole reason to terminate employment, I note that to date, awards for injury to dignity, feelings and self-respect have generally ranged between \$10,000.00 and \$20,000.00. See for example: *Bickell v. The Country Grill*, 2011 HRTO 1333 (CanLII)(\$15,000.00N; **\$15,874R**), *Graham v 3022366 Canada Ltd.*, 2011 HRTO 1470 (CanLII) (\$20,000.00N; **\$21,165R**), *Maciel v. Fashion Coiffures*, 2009 HRTO 1804 (CanLII) (\$15,000.00N; **\$16,618R**)... *Purres v. London Athletic Club (South) Inc.*, 2012 HRTO 1758 (CanLII) (\$10,000.00N; **\$10,435R**).¹³⁹

The Tribunal issued a general damages award of \$10,000 in *Richards*.¹⁴⁰ In light of the above adjustments, the Tribunal chose an award that had a real value below the low end of the range of cases it cited. To fulfill the Tribunal’s desire for consistent awards in similar cases in real terms, a more appropriate award would have been \$10,435.

We believe the case for indexing general damages awards is unimpeachable. It better fulfills the Tribunal’s desire for consistency that drives its adherence to a conventional approach. But in our view, indexing is not enough. Indexing simply prevents the low value of general damages awards from sinking even lower through the eroding effects of inflation. If one accepts that the range of general damages awards needs to be significantly increased, as the Pinto Report and we have argued, the Tribunal needs to be willing to step beyond the conventional range of awards. The unprecedented \$150,000 general damages award issued by

¹³⁷ Bank of Canada, “Inflation Calculator”, online: <<http://www.bankofcanada.ca/rates/related/inflation-calculator/>>.

¹³⁸ *Richards v. 905950 Ontario Ltd o/a Storybook Childcare Centre*, 2015 HRTO 517 [*Richards*].

¹³⁹ *Ibid* at para 31.

¹⁴⁰ *Ibid* at para 35.

Vice-Chair Mark Hart in *Presteve Foods*¹⁴¹ provides an encouraging example. In a careful and thoroughly reasoned opinion, he explained why the circumstances of that case required such an unusually large award. Tribunal members should be able to present similarly careful reasoning to justify awards that go beyond the conventional range in other cases, including cases that involve common scenarios, like terminations of employment based in part on the applicant's disability or pregnancy.

It is true of course that increasing the range of general damages awards will initially come at some cost to the virtues of consistency and predictability that have driven the Tribunal's adherence to a conventional approach. But while consistency and predictability are important values, allowing them to have a determining impact on damage assessment will have the effect of preventing Pinto's recommendation from ever being implemented. One might also argue that Tribunal members who are bold enough to issue awards beyond the conventional range will be doing applicants no favours, as those awards will be vulnerable to being altered on judicial review. This is indeed a real risk in light of the one-sided direction of the Divisional Court's interventions with Tribunal general damages awards on judicial review.¹⁴² But this risk can be minimized if Tribunal members carefully and persuasively make the case for departing from the conventional range. Damage assessment, as the courts have repeatedly emphasized, lies at the heart of the Tribunal's expertise. As the Ontario Court of Appeal recognized in *Strudwick*,¹⁴³ and the B.C. Court of Appeal recognized in *Kelly*,¹⁴⁴ it cannot be the case that the only reasonable exercise of the Tribunal's remedial discretion is to continue to adhere to the same conventional range of general damages awards.

Conclusion

Our analysis of general damages awards issued by the HRTO has revealed that, consistent with the findings of the Pinto Report, the range of general damages awards has remained more or less constant in nominal terms over the entire 2000-2015 period. We have also found that, in real terms, the range of general damages awards has decreased. Compared to the size of non-pecuniary damages awards made by the courts in other areas of tort law, such as defamation, HRTO general damages awards have been modest in size throughout the period under study, notwithstanding the quasi-constitutional status of the rights protected by the *Code*. We have argued that the Pinto Report was right to urge the Tribunal to reconsider its approach to

¹⁴¹ *Supra* note 44.

¹⁴² *Supra* notes 95-96 and accompanying text.

¹⁴³ *Supra* note 99.

¹⁴⁴ *Supra* note 102.

general damages and significantly increase the monetary range of these awards. While the average size of general damages awards has followed an upward trend from 2010 onwards, the increase has been modest, especially in real terms. The Tribunal has not altered its non-indexed conventional approach to general damages assessment, and until it does, the significant change recommended by Pinto will not be realized. The non-indexed conventional approach will continue to produce a stable pattern of nominal awards whose real value is steadily eroded by the Tribunal's failure to account for the impact of inflation.

We have suggested a number of steps that could be taken by the Tribunal to redress the situation. An easily adopted reform, consistent with precedent in other areas of tort law, would be for the Tribunal to systematically adjust the size of past awards for inflation to ensure that its conventional approach to general damages assessment does not lead to the steady erosion of the real value of awards.

Indexation is a necessary but insufficient step. We have argued that the Tribunal needs to move beyond its conventional approach to the assessment of general damages in order to accomplish meaningful compensation and deterrence. Awards should reflect the quasi-constitutional status of the rights protected by the *Code*. They should also be sufficient to ensure that litigants receive compensation that surpasses the costs and risks associated with the *Code* application process, including the danger of costs being awarded against applicants on judicial review. To ensure meaningful deterrence of human rights violations, the Tribunal often makes the point in its rulings that it must avoid issuing awards that are so modest as to amount to nothing more than a "licence fee" for discrimination. Yet our data reveals that 181 of the 464 general damages awards issued by the Tribunal from 2000 to 2015 (or 39%) were for amounts of \$5,000 or less. In our view, the Tribunal's actual general damages assessments do not conform to its own guiding principles.

While our study has focused on HRTO general damages assessments, and has led us to critical conclusions, our focus should not detract from the signal accomplishments of the Tribunal since the direct access model came into force in 2008. As Andrew Pinto noted in his report, under the new system "a greater volume of cases are resolved faster without a backlog developing and, for those cases that do not settle and proceed to a hearing, they are decided much faster."¹⁴⁵ Our data reveals that after 2008, the Tribunal is issuing general damages awards at a rate six times higher than it did prior to the reforms, and the total amount of general damages issued annually by the Tribunal is on average four times greater than was the case under the old system. The significant drop in the average value of general damages awards after the 2008 changes is to a

¹⁴⁵ Pinto Report, *supra* note 2 at 43.

large extent explained by the much higher volume of cases reaching the Tribunal, cases that raise a broader range of discrimination issues, from relatively minor “single incident” infringements of the *Code* to more serious systemic issues.

Moreover, we have no reason to believe that other Canadian human rights tribunals have a better record than the HRTO when it comes to awarding non-pecuniary damages as compensation for the experience of discrimination. The woefully thin body of case law issuing damages for breaches of *Charter* rights and freedoms hardly provides inspiration to statutory tribunals.¹⁴⁶ While we have not undertaken a systematic study of general damages awards issued by other Canadian human rights tribunals, we do note that in the past year both the Canadian Human Rights Tribunal and the B.C. Human Rights Tribunal have issued awards that on average are higher than the norm in Ontario. For example, in 2015, the average size of the CHRT’s three final rulings ordering general damages was \$30,000.¹⁴⁷ The average size of the 20 awards issued by the B.C. Human Rights Tribunal in 2015 for injury to “dignity, feelings and self-respect” was \$16,452, over \$3,000 higher than the average award in Ontario in 2015.¹⁴⁸

In terms of the volume and quality of jurisprudence produced nationally on anti-discrimination law since 2008, the work of the HRTO is unmatched. However, in our view the Tribunal’s record in assessing general damages does not live up to the promise of its impressive body of work on liability issues. Since the adoption of a comprehensive *Code* and the establishment of the Commission in 1961, both firsts of their kind in the country, Ontario “has long served as a model for other human rights systems in Canada”.¹⁴⁹ Just as it has in protecting human rights in other ways in the past, we would like to see Ontario take the lead in

¹⁴⁶ The courts have rarely exercised their discretionary power pursuant to s.24(1) of the *Charter* to issue damage awards as just and appropriate remedies for *Charter* violations. In its first decision to confirm an award of *Charter* damages, the Supreme Court upheld a damage award of only \$5,000 for a strip search the Court characterized as an “egregious” violation of the *Charter* right to be free from an unreasonable searches: *Vancouver (City) v. Ward*, [2010] 2 SCR 28; 2010 SCC 27 at paras 64, 79. For more on *Charter* damages principles, see *Henry v British Columbia*, 2015 SCC 24. In *BC Teachers’ Federation v BC*, 2014 BCSC 121, Justice Griffin broke new ground by issuing a *Charter* damages award of \$2,000,000. On appeal, her finding of a *Charter* violation was reversed, and the damages award therefore nullified: *BCTF v BC*, 2015 BCCA 184. The majority of the Supreme Court of Canada allowed the appeal, adopting the reasons of Donald J.A.’s dissent, but did not restore in the damages award, in *BCTF v BC*, 2016 SCC 49, [2016] 2 S.C.R. 407.

¹⁴⁷ See the cases cited in note 111, *supra*.

¹⁴⁸ See *Dawson v. Vancouver Police Board (No. 2)*, 2015 BCHRT 54 (\$15,000); *PN v FR (No. 2)*, 2015 BCHRT 60 (\$50,000); *Edwards v. 0720941 B.C. Ltd. (No. 2)*, 2015 BCHRT 59 (\$5,000); *Flak v. Andersen*, 2015 BCHRT 87 (\$2,000); *Garneau v. Buy-Rite Foods*, 2015 BCHRT 77 (\$15,000); *Dunkley v UBC*, 2015 BCHRT 100 (\$35,000); *McNair v. International House*, 2015 BCHRT 123 (\$6,000); *Brar v. B.C. Veterinary Association*, 2015 BCHRT 151 (13 separate awards totaling \$219,500).

¹⁴⁹ Michelle Flaherty, “Ontario and the Direct Access Model to Human Rights” in *14 Arguments*, *supra* note 7 at 173.

its approach to general damages awards. We hope that the analysis and recommendations in this paper might help point the way forward.