# Human Rights Adjudication

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# I. INTRODUCTION

It is everyone's desire that human rights issues be dealt with seriously, expeditiously and effectively. The question is whether this goal is best achieved through the courts of general jurisdiction, "the common law courts", or through specialized tribunals. This paper will consider what constitutes the best forum for the adjudication of issues involving human rights.

## A. Legislative Review

Canadian Human Rights legislation has taken many forms over the years. Each province has passed legislation dealing with specific human rights issues and most have enacted charters, bills or acts which are of a *quasi-constitutional nature*,[1] enshrining human rights policy at the provincial level. Examples of these provincial laws are:

1) *Human Rights Act of British Columbia* 1984

2) *Alberta Bill of Rights* 1972

3) *Saskatchewan Bill of Rights* 1947

4) *Manitoba Human Rights Act* 1974

5) *Ontario Human Rights Code* 1980

6) *Charte québécoise des droits et libertés de la personne* 1975

7) *Human Rights Act of Nova Scotia* 1969

For its part, the Federal Government passed the *Canadian Bill of Rights* in 1960. Although sometimes classified as "*quasi-constitutional*", its effectiveness as a means of protecting human rights in Canada was hindered by the courts' restrictive interpretation[2] of

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1. "Quasi-constitutional" refers to laws which address fundamental rights. Although these laws are not constitutional, due to the importance of the principles they protect, they are deemed to hold a rank above that of regular legislation. The insertion of a "notwithstanding" clause ensures their application over all other legislation. It is important to note that although a parliament must respect these laws, it has the power to repeal them by a simple parliamentary majority. The same process of repeal is not available to parliament in the case of a truly constitutional law. Examples of "quasi-constitutional" legislation are *The Canadian Bill of Rights*, 1960, or *The Saskatchewan Bill of Rights*, 1947. For further insight read G.A. Beaudoin, *Le Partage des pouvoirs* (Ottawa: Les Editions de l'Université d'Ottawa, 1983) at 163 et seq.

2. The reasons for the restrictive interpretation, as noted by Justice D.G. Blair of the Ontario Court of Appeal, were explained in the following manner:

   "The most obvious reason for the Bill's limited effect is that it lacked the authority of a constitutional document".

it. Then came the *Canadian Human Rights Act,* R.S.C. 1976-77 c. 33, with much the same effect.

It was not until 1982 that the *Canadian Charter of Rights and Freedoms* was passed. The *Charter*, of course, forms part of our Constitution.

Many other countries possess laws which protect human rights. They will be referred to later for comparative purposes. In addition to human rights legislation in various other countries, legislation has been enacted at the international level respecting human rights, such as *The International Covenant on Civil and Political Rights* of 1966 and the *European Convention on Human Rights* of 1948.

The mechanisms that these documents employ in order to ensure that the principles they announce are respected, differ from act to act.

## B. Review of Mechanisms Presently in Place

Under the *Charte des droits et libertés de la personne du Québec* S.Q. 1976, c. 6, an individual who believes that his or her rights have been infringed can either appear before a court of regular jurisdiction or file a complaint before the Quebec "Commission des droits de la personne du Québec". Should he or she choose the latter, then the Commission will use its powers of inquiry to determine if in fact there has been a violation. If the Commission determines that a violation exists, it will try to mediate the dispute in an attempt to find a solution acceptable to both sides. If such conciliatory attempts fail, the Commission, with the written permission of the plaintiff, would until recently institute an action in the courts of common jurisdiction. In June 1989, however, the *Quebec Charter* was amended, so that now, should the Commission fail in its conciliatory role, the recourse on behalf of the plaintiff will be brought before a specialized "tribunal des droits de la personne". Many characteristics of the new "tribunal des droits de la personne" distinguish it from other human rights tribunals. These differences will be considered later in this paper.

The procedure followed under the *Canadian Human Rights Act*, R.S.C. 1976-77, c. 33,[3] resembles in certain ways that of the new *Quebec Charter*. However, the appeal process and the structure of their respective tribunals are substantially different.

The *Canadian Charter of Rights and Freedoms* does not establish any particular mechanism of recourse or remedy. The wording is extremely broad, simply stating that the *Charter* is to be applied by courts of competent jurisdiction and that a reasonable remedy is to be granted (Section (24(1)). It defines neither the notion of court of competent jurisdiction, nor the nature of the remedy, requiring only that it be reasonable.

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D.G. Blair, "The Charter and the Judges: A View from the Bench" (1984) 13 Man. L.J. 445.

3. The purpose of the Act is to protect individuals' rights to equality as well as access to personal files.

Broad remedies are to be found in other constitutions but jurisdiction is usually attributed to a particular court.[4]

## C. Importance of the Subject

Under the Rule of Law, the executive and administrative bodies are subject to the law as interpreted by the courts. This same hierarchical framework is present in the application of our Constitution in that Parliament must conform to the principles it sets out.

It is no coincidence that human rights legislation most often takes the form of a "supra"[5] law in that it is considered to be a guide for government, by ensuring the government itself respects the principles of human rights.

The idea of a power above that of Parliament breaks away from the doctrine of parliamentary supremacy which was adopted from the United Kingdom. This doctrine is applied absolutely in the United Kingdom. Dicey observes that Parliament has:

> *Under the English Constitution, the right to make or unmake any Law whatever; and further, that no person or body is recognized by the Law of England as having the right to override or set aside the Legislation of Parliament.*[6]

Although this doctrine has not been followed as religiously in Canada as it has in England, Canadian courts, prior to 1982, were very reluctant to review any legislation passed by a competent legislature. This trend was evidenced by the very restrictive interpretation applied to the *Canadian Bill of Rights.*

With the advent of the *Charter* and its constitutional status, the role of the judiciary has been amplified. Quoting once again Justice D.G. Blair,[7]

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4. For example, in Nigeria, Section 42(1) of the constitution provides that the competent court of jurisdiction is the High Court.

   Section 42(1)

   Any person who alleges that any of the provisions of this chapter has been, is being, or is likely to be contravened in any state in relation to him may apply to the High Court in that State for redress.

5. "Supra Law" is an expression used in a fashion somewhat similar to the expression "quasi-constitutional" above. It describes laws which are not constitutional but nonetheless have been given a place of supremacy over other legislation by the legislator. Examples of "supra" laws would be the "Charte des droits et libertés de la personne", L.R.Q. c. C-11. Pierre-André Côté provides an analysis of the notion of "supra" laws in his book, *Interprétation des lois*, (Cowansville, Que.: Yvon Blais, 1982) at 320.

6. In his book entitled *Introduction to the Study of the Law of the Constitution,* 10th ed. (London: McMillan, 1959) at 40.

7. *Supra* note 2.

> *The* Charter *has conferred immense power on the judiciary. It has become the ultimate arbiter in Canadian society on Charter issues, legally supreme over both the legislative and the executive branches of government.*

Even though not all human rights legislation has reached a constitutional status, the fact that human rights are specifically addressed in the Canadian Constitution has created a situation where all human rights legislation in Canada is given paramount consideration. Such legislation, even when not constitutional, is also to be construed in the broadest sense.[8]

The guardianship of the Constitution is exercised by the courts.[9] In our Canadian judicial system, there are three levels of courts. The first level is those courts which come under Section 96 of the British North America Act (the Superior Courts). Other tribunals or courts cannot be substituted for these courts.[10] Their jurisdiction is exclusive. Secondly, there exist what are called Provincial Courts, courts created by a provincial legislature, to which jurisdiction can be expressly conferred by the provincial legislature provided it respects the jurisdiction of Section 96 courts such as it existed in 1866. Lastly, there are the administrative or specialized tribunals, which are created by statute, and have the task of adjudicating on issues arising under the statute. These specialized tribunals have been qualified by the Supreme Court as being courts of justice for the purposes of specific acts. For instance, in *Commission des droits de la personne c. P.G. du Canada et autres* [1982] 1 R.C.S. 215, the Commission was held to be a court within the meaning of Section 41(2) of the Federal Court Act.

This brief summary of human rights legislation and of the structure of our Canadian judicial system will be helpful in resolving the question: what is the best forum to deal with

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8. *Ontario Human Rights Commission* v. *Simpson-Sears,* [1985] 2 S.C.R. 547.

   It is not in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J.in *Insurance Corporation of British Columbia* v. *Heerspink*, [1982] 2 S.C.R. 145 at 157-58), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary — and it is for the courts to seek out its purpose and give it effect. The code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result of the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalites, or restrictive conditions not imposed on other members of the community, it is discriminatory.

   (Mr. Justice McIntyre)

9. Michel Lebel in his article "Les tribunaux canadiens et la protection des droits de la personne" (1981) 12 R.G.D., page 403, observes:

   "Le texte constitutionnel est encore plus discret en ce qui concerne le pouvoir des tribunaux de contrôler la constitutionnalité des lois. Malgré ce silence, les tribunaux canadiens ont toujours exercé ce contrôle a l'égard de la Constitution et ceci en vertu du vieux principe général de "Common Law" qui veut qu'il appartient aux tribunaux de dire le droit (Rule of Law)".

10. *P.G. du Québec* v. *Farrah* [1978] 2 S.C.R. 638.

human rights issues, our traditional courts of justice or specialized tribunals? We are, after all, debating who has the power to adjudicate one of the most important subjects of the decade, and hopefully, of all times to come.

## II. ANALYSIS

In considering what would constitute the best forum to adjudicate on human rights issues, I have broken the topic down into three parts: procedural aspects, structural aspects, and remedial aspects.

### A. Procedural Aspects

#### 1. Competing Jurisdictions

Human Rights violations often occur in situations which give rise to many other legal issues, aside from the human rights one. As important and compelling as the human rights component of a situation may be, these other questions of law and fact must also be dealt with. In attempting to segregate the human rights issues so they can be dealt with by a specialized human rights tribunal, the possibility of a global solution by a single forum is lost. In order to have a complete picture, a judge, arbitrator or Commissioner must take into account all the relevant events, without compartmentalizing a problem that must be considered as a whole. There are literally thousands of actions which give rise at once to an arbitration, a hearing before a health and safely board, a regular court and a human rights tribunal. Before each of these forums, the parties are of course entitled to a full and complete airing of the circumstances. Sometimes, but not always, proceedings before one forum are suspended pending the final decision of another. Sometimes all competent forums pour over all the details of the matter regardless of one forum's finding or of the proceedings taking place before another one. Although the multiplicity of forums is quite legitimate where the parties are not identical (the state may seek a conviction while the victim seeks compensation), in cases involving the same parties, it creates delays, appeals, confusion and, of course, costs. Is such a multiplicity of forums really desirable?

Inevitably, the introduction of a specialized tribunal such as a human rights tribunal also provides the opportunity for judicial or quasi-judicial bodies to render different judgments on the same set of facts. It is a fundamental concept of our law that the courts be consistent. The rule of *stare decisis* in Common Law provinces requires that the courts respect the decisions of other courts, in that decisions of higher courts on similar issues must be followed. In all jurisdictions, including civil jurisdictions, the principles of *res judicata* or *litis pendens* prevent two courts from adjudicating on the *same* legal issues in the same case (same parties). But adjudicating on *different* legal issues in the same case (involving these same parties) can lead to some odd results and deal a serious blow to the consistency that our courts strive to establish.

## 2. Internal Procedural Considerations

Apart from the inter-relationship between two courts, the internal procedure of the proposed specialized tribunal itself must also be considered.

Administrative bodies that can adjudicate on the parties' rights are deemed to be quasi-judicial.[11] Often they are masters of the procedural rules of evidence to be followed before them. But the "traditional" rules of evidence have been developed by the judiciary over a long period of time precisely because judges came to realize that by insisting that the best evidence be adduced, the truth would more likely be obtained. What kind of procedural safeguards do we want a court deciding on human rights issues to possess?

Mr. Justice James McRuer, Chief Justice of the High Court of Ontario, in the course of the Royal Commission Inquiry into Civil Rights, studied the laws and regulations of that Province and concluded that "procedural safeguards are essential to ensure the fair exercise of statutory powers":

> *The fundamental protection of the rights of the individual is not so much in the substantive law as in the procedure by which it is administered.*

An extensive procedural framework is required for any human rights tribunal. It is of interest to note that the decisions of the "Tribunal des droits de la personne" under the *Quebec Charter* can be appealed from (upon leave) to the Quebec Court of Appeal.[12]

The procedure used before specialized or administrative tribunals has been considered on numerous occasions.[13] In 1955, the English "Committee on Administrative Tribunals and Inquiries (Frank Committee)" recognized the importance of setting out procedural rules for administrative bodies.[14]

There appears to be a consensus that procedure before specialized tribunals is important. In order to ensure that our human rights issues be dealt with coherently, consistently and fairly, should not an extensive procedural framework be required? Can this

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11. "Quasi-judicial" refers to decision-making processes which are neither purely judicial nor purely administrative in nature. Administrative bodies that use a decision-making process which could be considered analogous to that of the courts of justice are often referred to as quasi-judicial. The reader is advised to consult P. Garant, *Droit Administratif*, 2d ed., (Montreal: Yvon Blais, 1985).

12. An act to amend the Charter of Human Rights and Freedoms concerning the commission and establishing the Tribunal des droits de la personne, 1989, Bill 140 (assented June 22, 1989), art. 132.

13. Rapport du Groupe de travail sur les tribunaux administratifs (Québec: Ministère de la justice, Québec, 1971) at 11. Commission de réforme du droit du Canada, Les organismes administratifs autonomes (Document de travail no. 25, Ottawa, 1980).

14. The Report of the Committee on Administrative Tribunals and Inquiries (London: H.M.S.O., 1958) led to the creation of the "Council on Tribunals".

lack of procedural structure allowed most quasi-judicial bodies be permitted when dealing with these important human rights issues?[15]

## B. Structural Aspects

### 1. Impartiality

Fundamental rules of justice require that a court remain (and appear to remain) both independent and impartial.[16] It has been recognized for almost four hundred years[17] that administrative or quasi-judicial tribunals must manifest clear impartiality. Impartiality gives rise to some complex considerations which must be met when considering the public's perception of justice.[18]

The notions of the apprehension, likelihood or real likelihood of bias have been often considered.[19] The incompatibility of the practice of law with quasi-judicial functions is increasingly argued.[20] Some question the practice of having lists of tribunal members adopted, after which a tribunal is appointed from the list on an *ad hoc* basis. Built-in bias of administrative tribunals has been feared on the basis that judges or adjudicators so appointed may feel the need to heed a certain policy to ensure their re-appointment.

### 2. Independence

Factors which are examined to gauge judicial independence are:

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15. Although strict procedural rules are desirable when attempting to achieve the highest quality of justice, and the most extensive procedural structure can be found when before the Superior Courts, one must keep in mind the chilling effect that a strict procedure and the necessity of appearing before a Superior Court may have on a potential complainant. Perhaps there is a compromise to be made between accessibility and the quality of evidence.

16. "The Royal Commission Inquiry into Civil Rights", Tome 1 (Toronto: Queens Printer, 1968) noted at 54:

    [If] "it is appropriate that a particular power should be exercised by impartial persons independent of political control, who in making their decisions strive to do justice in the same sense as the courts, the power should be treated as judicial power".

17. Dating as far back as the year 1610 in an affair known as *Dr. Bonham's Case* ((1610) 8 Coke Rep, 114, 38 Digest 85).

18. *R.* v. *Pickersgill* (1971) 14 D.L.R. (3d) 717 at 722.

    "Bias, of course, is a question of fact, however conscious or unconscious of its existence may be he whose conduct is impugned".

19. *R.* v. *Association of Professional Engineers of Saskatchewan* (1969), 2 D.L.R. (3d) 588 at 597.

20. *Iwasky and Pennywise Foods Ltd.* v. *Human Rights Commission* (1977), 6 W.W.R. 699.

a) The nomination process of judges;

b) The length of appointment and job security;

c) Possible conflicts of interest with respect to other employment, therefore job exclusivity;

d) Mode of remuneration;

e) Recruiting tactics;

6) Retirement schemes.

There is no shortage of arguments, in other words, to raise about the independence or apprehended partiality of specially-appointed tribunals. These arguments, which in turn lead to more delays, sometimes paralyze the system. Should we make human rights issues so dependent on the integrity of specially-appointed bodies?

It is often argued that the judges of special tribunals possess specific training enabling them to better serve the goals of the concerned legislation. Due to the judgmental nature of human rights issues, it is of the utmost importance that all our judges be well versed in and ready to deal with human rights issues. Does that mean that the Tribunals should be specialized? In 1975 the Quebec Minister of Justice in a white paper entitled "La justice contemporaine" stated that "les justiciables ont surtout besoins de juges specialisés et non de cour specialisées".[21]

Again of interest in the light of recent modifications of the *Quebec Charter* is the fact that the President of the "Tribunal des droits de la personne" be chosen from amongst the judges of the Court of Quebec.[22]

## C. Remedial Aspects

Without a mechanism for enforcement, a law does nothing more than announce principles.[23] True enough, the American Constitution, for one, does not expressly provide for remedies. The courts of that country have applied what they feel are appropriate remedies, taking the onus upon themselves to give the country's Constitution appropriate prominence.

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21. Loosely translated, the sentence means that specialized judges, not specialized courts, are required to deal with human rights issues.

22. An Act to amend the Charter of Human Rights and Freedoms concerning the commission and establishing the Tribunal des droits de la personne, *supra* note 12 at 101.

23. Judge Holt in *Ashby* v. *White* (1703) 2 Id Raym. 938 at 953 put it bluntly:

"it is a vain thing to imagine a right without a remedy".

After several attempts at drafting the enforcement clauses of the *Canadian Charter of Rights and Freedoms*, it was found that there was very strong opposition to whatever draft was proposed. The proposal that no enforcement clause be used was eventually submitted and that idea drew even greater opposition, the strongest coming from the "Special Joint Committee of the Senate and the House of Commons". The enforcement clause was re-instated.[24]

Although injunctive relief may be the most appropriate in human rights cases, in Canada the courts have often been reluctant to turn to injunctive relief, much more so than their American counterparts. The apprehension Canadian courts have against injunctive relief is that it often requires on-going supervision and that the Crown has historically been immune to injunctive measures.[25]

Authors Richards and Smith propose to first consider the remedy sought, then work backwards to decide which court is empowered to provide it.[26]

In applying human rights legislation, the court or adjudicatory body empowered to do so must have at its disposal all the legal remedies available so that it may tailor a decision appropriate to each individual case. Could it not be said that this type of judicial power is so vast as can only be granted to a Court of general jurisdiction under our Canadian Constitution? Authors Richards and Smith again point out that "it seems highly doubtful that, with a stroke of a pen, s. 24 enlarged the remedial powers of each and every court and tribunal in Canada."[27]

If the powers we are looking to give a human rights tribunal are so great due to the importance of the subject, then perhaps the Superior Courts are logically the only courts which should be called upon to exercise them.

## III. CONCLUSION

Human rights have become a topic of great public interest. In response to this interest, governments have enacted "supra" laws designed to ensure that our humanitarian values not be compromised. Courts or tribunals which are designated to decide on these issues should possess qualities deserving of such a distinguished task.

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24. Unlike what was proposed in the forerunner of section 24 of draft Bill C-60 introduced in Parliament in June 1978, the remedies available under the Canadian Charter are not enumerated.

25. Professor J. Cameron of Osgoode Hall states in his "Enforcing the Charter: Four Remedial Vignettes" (1989) 9 Advocates' Q. 257:

    "The task of enforcing the Charter remains largely unexplored in the literature and in the absence of any settled principles to deal with the remedial issues, Courts have relied on assumptions drawn from other areas of adjudication".

26. J.G. Richards & G.J. Smith, Q.C., "Applying the Charter" (1983) 4 Advocates' Q, 129.

27. *Ibid*. at 153.

It has been the pattern to create a specialized tribunal to deal with such issues. When considering all the characteristics we would want this tribunal to possess, such as an extensive procedural framework, independent and impartial members and full remedial powers, we end up describing the courts of common jurisdiction which are already in place.

The idea that a specialized tribunal would be more sensitive to human rights issues than the judiciary may hold some truth, but only as far as the mechanics of the complaint process are concerned. The two major functions served by a commission are as a board of inquiry, and then as a conciliator. Both these objectives are valid, but why shouldn't the members of the Bar be expected to take on the roles of conciliator or negotiator themselves, as they do in other types of litigation? In issues involving human rights questions, the members of the Bar should make a concerted effort, as they do in other areas of law, to help foster a non-adversarial solution to the problem. Should an amicable solution not be possible, the referral to the courts would take place in the normal course of events. Of course, most will argue that it is too much to expect from lawyers trained in our adversarial system.

The creation of specialized tribunals has been difficult and costly. Procedural difficulties, jurisdictional challenges and the resulting delays and additional court costs can but tarnish the image of those tribunals in the eyes of the public.

Our courts of general jurisdiction adjudicate on the majority of issues facing our society today. Do they not best possess the qualities required to deal with the important issue of human rights?

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