

# **Institutions — Human Rights Protectors — Efficacy**

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The Honourable Mr. Justice Mark R. MACGUIGAN, P.C.\* \*\*

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\*\* I want to thank Katharine Evans and Gillian Blackell for their assistance in researching this paper.



## I. THE LEGITIMACY OF THE ADMINISTRATIVE PROCESS

The theme of this panel, the comparative efficacy of human rights commissions and tribunals on the one hand and courts on the other as protectors of human rights, is very narrowly drafted, no doubt so as to avoid any issue as to judicial review, a subject which falls under the succeeding panel. Our theme is nevertheless at its root of deep significance, even to the extent of plumbing the depths of human reaction to the notion of government itself.

As human freedom began to be more fully actualized in the nineteenth century in the emerging democracies of that time, the institutions of government began correspondingly to expand in order to cope with the excesses of economic and political liberalism. As always, reaction led to counteraction, thesis to antithesis.

The relative merits of the government institutions of the administration and the judiciary were therefore not just a neutral question of efficacy, but quickly became rather a matter of fundamental legitimacy. To those who were savouring their new freedom of action, governmental intrusion through the administrative process was highly undesirable. To those who were suffering the degradations and deprivations of laissez faire capitalism, any relief was welcome. Attitudes towards agencies and courts varied accordingly.

It was in this context that A.V. Dicey<sup>1</sup> in 1885 developed his theory that "regular law" was supreme, and that the officials of the state, who are endowed with arbitrary power, are subject to the jurisdiction of the "ordinary" courts in the same way as are individual people. There seemed to be about Dicey a heavy overlay of feeling that judges alone could be trusted because they were "chaps just like us". As late as 1929, Lord Chief Justice Hewart<sup>2</sup> was maintaining that administrative law was fundamentally opposed to the rule of law. However, gradually the view grew up that officials had to be allowed a certain degree of discretion and that accordingly the decisions of administrative tribunals should not be subjected to the same standards of review as courts.

But the opposing point of view died hard. As recently as the parliamentary hearings on the *Canadian Human Rights Act*<sup>3</sup> in 1977 (which came only after every Canadian province had enacted similar legislation), the Canadian Bar Association recommended that appeals, rather than judicial review under then section 28 of the *Federal Court Act*,<sup>4</sup> be made available on questions of law or on jurisdictional facts from decisions of human rights tribunals.<sup>5</sup> That objection was easily disposed of by the Minister

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1. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1885).
  2. Lord Hewart of Bury, *The New Despotism*, (London: E. Benn, 1945).
  3. *Canadian Human Rights Act*, S.C. 1976-77, c. 33.
  4. *Federal Court Act*, R.S. 1995, c. 10 (2nd Supp.).
  5. *Standing Committee on Justice and Legal Affairs* (SCJLA), 29-3-1977, 7:46-7, 7A:33. S.P. Chotalia, *The 1996 Annotated Canadian Human Rights Act* (Toronto: Carswell, 1995) is a useful source for the text of the *Canadian Human Rights Act* and the current case law.

(Ron Basford),<sup>6</sup> on the basis that there was no difference between that kind of appeal and judicial review under section 28.

However, Eldon Woolliams of Calgary North moved an amendment in committee that an appeal to the Federal Court should lie on questions of law, on questions of fact, and on mixed questions of law and fact, an amendment which would effectively have removed any legitimacy from tribunal decisions. His most cogently expressed reason was that:

*tribunals, administrative bodies tend to favour governments [...] I think it is very dangerous and I called it, in the last meeting, legal insanity if we go ahead and proceed without some form of appeal.*<sup>7</sup>

The motion was negated, 6-2.

One of the more recent judicial statements which indicate how far we have come since then is that of Wilson J. in *National Corn Growers v. Canada (Import Tribunal)*:

*Canadian courts have struggled over time to move away from the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state. Part of this process has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise.*

*Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which the agency must work.*<sup>8</sup>

It would seem from this statement that the legitimacy of the administrative process is now definitely established vis-à-vis the courts. The same lesson could, of course, have been drawn from the earlier decision of *Seneca College v. Bhaduria*.<sup>9</sup> This legitimacy is still, of course, open to attack from other quarters.

Human rights codes, for example, have recently been subjected to an assault from the social democratic viewpoint of advancing egalitarian values and outcomes. Professor Gavin W. Anderson has written, in an article about to be published in the *Osgoode Hall Law Journal* that "in the absence of significant mobilisation articulating a different political purpose for human rights — one that has at its centre the goal of remedying the

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6. *SCJLA*, 25-5-1877, 15:18.

7. *SCJLA*, 25-5-1977, 15:15.

8. [1990] 2 S.C.R. 1324 at 1336.

9. [1981] 2 S.C.R. 181 [hereinafter *Bhaduria*].

ongoing and widespread discrimination suffered as a result of inequalities in private social and economic power — the inability of rights discourse to deliver social democratic goals is all too evident".<sup>10</sup>

## II. ARE COURTS OR TRIBUNALS THE PROPER FORUM?

*Bhadauria* is a useful starting point for a discussion of the proper forum as between tribunals and courts. In that case, as you will recall, a woman of Indian origin with a Ph.D. in mathematics alleged that Seneca College had discriminated against her by not granting her an interview for a teaching position even though she possessed all of the required qualifications. Hence she alleged that the College had breached its common law duty not to discriminate against her, and, in addition had violated its statutory duty not to discriminate based on the *Ontario Human Rights Code*. She claimed damages for both the lost teaching opportunity and the mental stress, frustration, loss of self-esteem, dignity and time lost applying for the positions. However, her statement of claim was struck by Callaghan J. (as he then was) as disclosing no reasonable cause of action, in the face of the comprehensive scheme to deal with such complaints in the *Ontario Human Rights Code*.

Wilson J.A. (as she then was) made the case interesting by holding for the Ontario Court of Appeal<sup>11</sup> that Ontario's public policy was to be found in the preamble to the Code, viz., that "it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin", that such a right must be afforded a remedy, and that the Code did not impede the appropriate development of the common law. She concluded that it was unnecessary to determine whether the Code gave rise to a civil cause of action, since there was a cause of action at common law.

Chief Justice Laskin, writing for the Supreme Court, reversed the Ontario Court of Appeal, holding that the existence of the recourse in the Code foreclosed both a civil action based on a statutory breach and a common law action founded on an invocation of the public policy in the Code. He said:

*In the present case, the enforcement scheme under the Ontario Human Rights Code ranges from administrative enforcement through complaint and settlement procedures to adjudicative or quasi-adjudicative enforcement by boards of inquiry. The boards are invested with a wide range of remedial authority including the award of compensation (damages in effect), and to the full curial enforcement by wide rights of appeal which, potentially, could bring cases under the Code to this Court. [...] The Code itself has laid out the procedures for*

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10. G. W. Anderson, "Filling the 'Charter Gap': Human Rights Codes in the Private Sector" (1995) 33 *Osgoode Hall L.J.* 749.

11. *Bhadauria v. Board of Governors of Seneca College* (1979), 105 D.L.R. (3d) 707 at 715.

*vindication of [its] public policy, procedures which the plaintiff respondent did not see fit to use.*<sup>12</sup>

As a gloss, I would add that I do not read "the wide right of appeal" referred to above as material to the decision of this case. I think it is sufficient that rights of review exist, such as are found under the *Canadian Human Rights Act*.

Laskin C.J.'s decision may be read as restricting exclusive jurisdiction to commissions and tribunals only where there is no pre-existing right to a cause of action prior to the Code. For example, he remarked:

*The present case is not concerned with whether a remedy can be provided for an admitted right but with whether there is a right at all, that is, an interest which the law will recognize as deserving protection.*<sup>13</sup>

The courts have tempered *Bhadauria* where an actionable right already exists. For example, the issue of whether a court or a tribunal is the correct forum has arisen in wrongful dismissal actions. It seems clear that the choice is one for the injured party to make.<sup>14</sup> However, courts have sometimes stayed the legal action. McKinlay J. (as she then was) did so in *Ghosh v. Domglas Inc.*,<sup>15</sup> because she felt that dual proceedings might lead to different findings, different assessments of damages, and different awards. However, in *McKinley v. British Columbia Tel.*,<sup>16</sup> Drost J. dismissed an application for a stay of a wrongful dismissal action in similar circumstances, but where the human rights complaint was "at a standstill". It was "commonplace and permissible" for both criminal and civil actions based on identical facts to proceed, and here there was no possibility of prejudice, inconvenience, expense or duplicity of proceedings.

In *Canada Trust Co. v. Ontario Human Rights Commission*<sup>17</sup> a trustee made an application to the Court to determine, *inter alia*, whether the terms of a trust were

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12. *Bhadauria*, *supra* note 9 at 194-195.

13. *Ibid.* at 192.

14. See for example, *Alpaerts v. Obront* (1993), 46 C.C.E.L. 218 (Ont. Gen. Div.), where Mr. Justice Spence dismissed an application to strike a statement of claim on the ground that there was no reasonable cause of action and the claim should be taken up under the *Ontario Human Rights Code*. Spence J. noted that *Bhadauria* did not bar this action for constructive dismissal. This decision was referred to with approval by the Ontario Court of Appeal in *L'Attiboudeaire v. Royal Bank of Canada* (1996), 131 D.L.R. (4th) 445.

15. (1986), 34 D.L.R. (4th) 262 (Ont. H.C.J.) [hereinafter *Ghosh*].

16. [1996] B.C.J. No. 982 (B.C.S.C.).

17. (1990), 74 O.R. (2d) 481 (Ont. C.A.). These comments were no doubt encouraged by the fact that, after *Bhadauria*, the *Ontario Human Rights Code* was amended to remove the provision for exclusive jurisdiction. Such dialogue between courts and legislatures has also been a feature of the issue of sexual orientation as a prohibited ground of discrimination, see, e.g., *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, 580 (per La Forest J.); J.K. Adachi, "Title VII and State Courts: Divining Implicit Congressional Intent with Regard to State Court Jurisdiction" (1986), 28 B.C. L. Rev. 299.

unlawful as being against the public policy as expressed in the Code or were discriminatory. The Ontario Court of Appeal unanimously rejected the Commission's submission that the trial judge should have deferred to the Commission to exercise its jurisdiction. In his concurring opinion Tarnopolsky J.A. found that, unlike in *Bhadauria*, the Court had inherent jurisdiction over the administration of a charitable or public trust. He further found that a board of inquiry lacked the necessary remedial power to alter the terms of the trust or declare it void and that recourse to a court was necessary. Finally, he noted that the case raised a question only of law and did not require the fact-finding role of the Commission or board of inquiry.

It therefore seems to me that the courts have been of the view that *Bhadauria* should be read restrictively.

In the United States, where commissions typically play a role in processing discrimination complaints but adjudication of them is limited to courts, complaints may proceed in the courts if commissions have not processed them quickly enough. For example, in claiming against discrimination in employment under Title VII of the *Civil Rights Act, 1964*,<sup>18</sup> a claimant may first file a charge with the Equal Employment Opportunity Commission ("EEOC") or equivalent state agency, which may investigate and settle the claim, or file a lawsuit on behalf of the claimant. The claimant may also bring an action in federal or state court with a right-to-sue notice from the EEOC, but a Title VII claimant may also proceed directly to the courts if the EEOC has not processed the claim quickly enough. One hundred and eighty days from the filing of a charge with the EEOC, a complainant may commence an action in the District Court regardless of whether the EEOC has concluded its procedures.<sup>19</sup>

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18. This has been amended by the *Civil Rights Act, 1991*. For a further discussion on the United States, notably in the area of discrimination in employment, see: A.B. Morrison, ed., *Fundamentals of American Law* (New York: Oxford University Press, 1996) at 543-551; R. Hanner White, "The EEOC, The Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation" (1995) *Utah L. Rev.* 51.

19. S.P. Chotalia, "Human Rights Legislation — Does the Administrative Structure Enhance the Objectives of the Legislation?", 7 *C.J.A.L.P.* 67 at 81, citing A. Conte, *Sexual Harassment in the Workplace: Law and Practice* (New York and Toronto: Wiley Law Publications, 1990) at 148-149.

### III. THE COMPARATIVE EFFICACY OF COMMISSIONS AND COURTS

There is no doubt that the *Bhadoria* Court appreciated the advantages of the new administrative process established by legislation. Moreover, Laskin C.J. emphasized that the enforcement scheme of the Code embraced both administrative enforcement through complaint and settlement procedures and adjudicative enforcement through boards of inquiry.

I think there would be general agreement that the former, education and conciliation, is the primary goal of human rights commissions. Dr. Daniel Hill, former Director of the Ontario Human Rights Commission, has said:

*Modern day human rights legislation is predicated on the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the process of re-education, discussion, and the presentation of socio-scientific material that are used to challenge popular myths and stereotypes about people.*<sup>20</sup>

Professor Walter Tarnopolsky (as he then was) emphasized the educational value of "community vindication of the person discriminated against".<sup>21</sup>

Upon receiving a complaint, the Canadian Human Rights Commission (CHRC), which I take as typical, appoints an investigator who investigates and then submits a report. The CHRC will decide if the complaint is meritorious, and if so, whether to appoint a conciliator to try to bring about a settlement or to request the appointment of a tribunal to deal with the complaint. A settlement that has been agreed to by the parties requires approval by the Commission. Statistics suggest that the settlement rate of complaints is high. For example, in Alberta, for the two years following April 1, 1987, 485 complaints were received and only 16 boards of inquiry constituted.<sup>22</sup> In Ontario, more than half of all human rights complaints will settle before reaching the board of inquiry stage.<sup>23</sup>

The initiator of a complaint may be not only the victim of discrimination, but also the Commission itself, or any individual or group (though in this latter case, absent the victim's consent, the Commission has the right to refuse to deal with it). In any event, the carriage of the complaint would be by the Commission itself. The complainant is therefore spared the cost of pursuing the complaint. The Commission is not, however, in the position of counsel to the complainant but takes its position in the public interest. The

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20. Ontario Human Rights Commission, *Human Relations* (1965) 4.

21. W. Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" (1968), 46 Can. Bar Rev. 565 at 572.

22. S.P. Chotalia, "Human Rights Legislation — Does the Administrative Structure Enhance the Objectives of the Legislation?" (1993), 7 C.J.A.L.P. 66 at 74.

23. "Consider preliminary motions carefully, lawyers advised: Preparation, credibility key in human rights cases", *Lawyers Weekly* (28 June 1996) 19.

complainant accordingly has the option of retaining legal counsel. Initiation of complaints under human rights legislation must take place within a specified time: six months under the Ontario Code and one year under the *Canadian Human Rights Act*.

As Wilson J. noted in *National Corn Growers*, agencies may have the advantage of experts who have accumulated years of experience and a specialized understanding of the activities they supervise. This may sometimes occur through the membership of human rights commission, more often through their staff. It will rarely occur on tribunals, who tend to be neutrally-minded decision makers, frequently drawn from the legal profession.

The only real disadvantage for complainants at the pre-tribunal stage is the appalling delay in processing cases that seems to afflict many commissions. In *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*,<sup>24</sup> my colleague Décaré J.A. noted that some fifty months elapsed between the filing of the complaint and the CHRC's decision to invoke a tribunal. Of course, courts, too, have undue delays, though the movement for reform has begun. But the delays seem even worse with commissions, and I am not aware that the process of reform has begun. Perhaps my colleagues, who have both had experience with the CHRC, will have something to say on this.

Apart from delay, at the pre-tribunal stage the advantage is all with commissions over courts. Commissions have the capacity to educate, conciliate and heal. Courts could theoretically be given such a role if the proper resources were provided, but in my opinion it would denature them, since such a vast therapeutic role would be entirely contrary to their normal functioning and expertise. It would perhaps also violate the principle of the separation of the powers.<sup>25</sup> I can see no possible advantage in thus adding to the courts' role. On the contrary, it would require the addition of a different specialization for every administrative agency, since I do not suppose that such a hypothetical change would be introduced for the human rights area alone. It is far better to leave the initial handling of complaints to the relevant agencies.

#### IV. THE COMPARATIVE EFFICACY OF TRIBUNALS AND COURTS

However, tribunals, as opposed to commissions, are not so obviously superior to courts. Courts have, naturally enough, always displayed considerable capacity for judging, occasionally even to the detriment of claims to private property where human rights were at stake.

In *Somerset v. Stewart*, a return to a habeas corpus decided on June 22, 1772 relating to a slave brought to England by his master on his way to Jamaica, where slavery

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24. [1996] 1 F.C. 638 at 641.

25. See, for example, *R. v. Power*, [1994] 1 S.C.R. 601.

was legal, Lord Mansfield declared that the state of slavery was "so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged".<sup>26</sup>

A similar result followed in Upper Canada in *In the Matter of John Anderson*<sup>27</sup> in Upper Canada in 1860, a demand for extradition against a runaway slave who had killed a person who had attempted to prevent his escape but by a much less clear cut route. The writ of extradition was allowed by the Queen's Bench, but habeas corpus was subsequently granted by the Court of Common Pleas.

Everyone is familiar with the "Persons Case", delivered 66 years ago today, in which the Judicial Committee of the Privy Council reversed the Supreme Court of Canada, holding that women were persons who could be appointed to the Canadian Senate. Lord Sankey L.C. there put the matter this way:

*The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada [...].*

*Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation [...].*

*The word "person" [...] may include members of both sexes, and to those who ask why the word should include females the obvious answer is why should it not? In these circumstances the burden is upon those who deny that the word includes women to make out their case.*<sup>28</sup>

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26. (1772), 98 E.R. 499 at 510.

27. *In the Matter of John Anderson* (1860), 20 U.C.Q.B. 124 at 193 n. One can get the full flavour of the *Anderson* case only from reading P. Brode, *The Odyssey of John Anderson* (Toronto: The Osgoode Society, 1989). Between the decisions of the two Canadian courts, British supporters of Anderson had persuaded the English Court of Queen's Bench on January 15, 1861 to order the sheriff of Toronto to deliver Anderson to the Westminster Courts, which would decide whether he should be release. This raised the large question of whether an English writ of habeas corpus ran in Canada and the even larger question of Canadian independence, and Sheriff Fred Jarvis of Toronto refused to act without direction from the Canadian courts. (This matter was cleared up when, in March 1862, the British Government introduced a bill to prevent writs of habeas corpus from being issued to Canada). In the meantime, the Ontario Court of Common Pleas released Anderson on the ground that the warrant of extradition was inherently defective, since it used the term "kill" rather than "murder", only murder being an extraditable offence.

28. *Edwards v. A.G. Canada*, [1930] A.C. 124 (P.C.) at 136, 138.

More than a decade later, Mackay J. in *Re Drummond Wren*<sup>29</sup> held a racially offensive covenant void as contrary to public policy and for uncertainty. This holding was disapproved of by another trial judge<sup>30</sup> and by the Ontario Court of Appeal in a succeeding case,<sup>31</sup> but was effectively restored by the Supreme Court of Canada on the narrower grounds of a restraint on alienation which did not run with the land and of uncertainty.<sup>32</sup> In the absence of human rights codes no doubt there would have been many other decisions. In the words of Anthony Lester:

*During the past 30 years our [English] judges have discovered their self-confidence. From the early 1960s, led by Lord Reid, Lord Denning and Lord Wilberforce, they have breathed new life into English administrative law [...]. The judges have subtly altered the balance of power between the three branches of government, and the relationship of the courts to Government and Parliament.*<sup>33</sup>

No doubt the Laskin, Dickson and Lamer courts would have been equally venturesome if the English courts had not acted first.

But such decisions as there were more exceptional events which might be said to have pointed up the need for the human rights legislation which began to sprout in the aftermath of the Second World War. First came substantive legislation, though on a piecemeal basis, beginning with the *Racial Discrimination Act* in 1944 in Ontario, the Saskatchewan *Bill of Rights Act* in 1947, the *Fair Employment Practices Act* in Ontario in 1951, and a parade of similar legislation in the 50's and 60's. Ontario went further in 1962 with the *Ontario Human Rights Code*, which set a new pattern to be emulated by the other provinces<sup>34</sup> of a consolidation of all human rights legislation into an all-

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29. [1945] O.R. 778 (H. Ct.). The covenant in question was: "Land not to be sold to Jews or persons of objectionable nationality". When I was teaching law at the University of Toronto Law School in the 60's, it was common coin among the faculty members that Professor Bora Laskin, as he then was, had penned the reasons for decision in this case at the request of Mackay J. It is interesting to remark the comment of Laskin C.J. in *Bhadauria*, *supra* note 9 at 192: "I do not myself quarrel with the approach taken in *Re Drummond Wren*".

30. *Re Noble and Wolf*, [1948] O.R. 579 at 597, (H. Ct.) where Schroeder J. said that "it would in my view, constitute a radical departure from established principle to deduce therefrom [i.e., from the treaties and enactments cited by Mackay J.] any policy of the law which may be claimed to transcend the paramount public policy that one is not lightly to interfere with the freedom of contract".

31. *Ibid.* A minority of the five-judge Court distinguished *Re Drummond Wren*, but the majority felt it was wrongly decided.

32. *Noble v. Alley*, [1951] S.C.R. 64.

33. A. Lester, "English Judges as Law Makers", [1993] P.L. 269 at 278-279.

34. This legislation is summarized in Walter S. Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" (1968), 46 Can. Bar. Rev. 565 at 567-571. Tarnopolsky emphasized at 569 the seminal importance of the legislation introduced in New York State in 1945 in the fields of fair employment and fair

embracing code with the added feature of administrative enforcement of an independent commission.

No one, it seems to me, could question the need for substantive legislation to found limitations on property rights in order to protect fundamental human rights, nor, I have argued, could one reasonably question the efficacy of human rights commissions in investigation, conciliation and settlement. At the adjudicative stage, however, there is room for debate as to where the balance of efficacy lies, as the American practice illustrates.

Human rights tribunals have in their favour the carriage of the complaint by commissions before tribunals, thus reducing the costs for the complainant of pursuing a complaint,<sup>35</sup> as opposed to the bearing of sizeable court costs. This advantage would, of course, disappear where it mattered more to a complainant to control the course of the proceedings.

Tribunals are arguably more complainant-friendly than courts because of greater informality, though of course supervisory courts insist on their compliance with the rules of procedural fairness. Human rights tribunals' advantage can be easily overstated, however, as they are among the most judicial of quasi-judicial bodies.<sup>36</sup>

Probably the greatest advantage of human rights tribunals over the courts lies in the area of remedies. Parliament and the provincial legislatures have granted a full remedial arsenal to human rights tribunals. Indeed, tribunals have clearly been empowered to grant broader remedies than courts, including the power of reinstatement — except for courts' powers under section 24(1) of the *Canadian Charter of Rights and Freedoms*,<sup>37</sup> a matter to which I shall return in a moment. Tribunals' powers include even prospective remedies, such as affirmative action orders.

Over the years, tribunals' expertise has permitted them to tailor orders designed to remedy the discrimination and to prevent future discrimination. A salient example of this is the Canadian Human Rights Tribunal's order in *Canadian National Railway Co.*

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accommodation.

35. In, for example, *Pond v. Canada Post Corporation*, [1994] C.H.R.D. No. 9, the tribunal refused to award costs to the complainant where it found no conflict between the CHRC and the complainant, but in *Grover v. National Research Council of Canada*, [1992] C.H.R.D. No. 12, the tribunal did award the complainant costs on the ground that the purpose of remedies was to fully and adequately compensate a complainant for having suffered discriminatory practices. Of course, in a tribunal, as in a court, party-party costs are far from fully compensatory.
36. On this see the comments of Chair Rosalie A. Abella (as she then was), "Canadian Administrative Tribunals: Towards Judicialization or Dejudicialization" (1988-89), 2 C.J.A.L.P. 1.
37. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

v. *Canada (Canadian Human Rights Commission)*.<sup>38</sup> Having found that CN's recruitment, hiring and promotion policies prevented women from working in blue-collar jobs, the tribunal ordered, *inter alia*, that CN implement an affirmative action employment program and submit confirming data to the Commission. Among other things, the plan ordered that at least one woman be hired for every four non-traditional positions, and this was to be complied with until the objective of 13% of the non-traditional positions' being filled by women was achieved.

This order was upheld on appeal to the Supreme Court of Canada, whose decision was an important recognition both of the value of affirmative action programs in combatting systemic discrimination and of the particular tribunal's expertise in fashioning the remedy. Chief Justice Dickson, writing for the Court, noted that the tribunal had heard testimony from 50 witnesses during the 33 days of hearing and that its decision was 175 pages in length. He restored the tribunal's entire order, having found that it, was properly designed to prevent future discrimination, noting:

*In his dissenting opinion in the Federal Court of Appeal, MacGuigan J. accepted, as I do, that s. 41(2)(a) was designed to allow human rights tribunals to prevent future discrimination against identifiable groups, but he held that "prevention" is a broad term and that it is often necessary to refer to historical patterns of discrimination in order to design appropriate strategies for the future.*<sup>39</sup>

Accordingly, the Chief Justice found that the remedy ordered was within the tribunal's jurisdiction. However, Anderson points out<sup>40</sup> that in an era of downsizing, even the modest 13% target has been unreachable.

Another example of a creative remedy that has been fashioned by human rights tribunals is a "reporting order". For example, in *Morano v. Company Garden Centre*,<sup>41</sup> Chair McKechnie found that the complainant had been sexually harassed, and ordered, *inter alia*, that the Ontario Human Rights Commission be allowed to monitor the respondent's employment practices for two years. Other decisions have required the employer to provide to the Ontario Human Rights Commission, for a period of two years: the name, address, period of employment and employment record of every departed female employee.<sup>42</sup> Such orders, if properly administered, are likely to prevent future discrimination.

The greatest practical disadvantage of using the human rights process is the one I have already noted of delay. This applies not only to commissions, but also to tribunals.

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38. [1987] 1 S.C.R. 1114; on appeal from [1985] 1 F.C. 96.

39. *Ibid.* at 1141.

40. *Supra* note 10 at 774.

41. 9 C.H.R.R. D/4876.

42. See for example, *Bishop v. Hardy* (1987), 8 C.H.R.R. D/3868 and *Sharp v. Seasons Restaurant* (1987), 8 C.H.R.R. D/4133.

In *Large v. Stratford (City)*,<sup>43</sup> Sopinka J. pointed out that the total lapse of time between commission, tribunals, and reviewing courts was thirteen years, and commented wryly: "if it were necessary to consider the remedy of reinstatement in this case, we would be dealing with an applicant who is now 75 years of age". Unfortunately, as I have already noted, delay is not a factor from which courts on their own are free.

Another shortcoming of human rights tribunals lies in the quantum of damages that they have been empowered to order. The various enabling statutes provide for awards of damages for lost wages, alternative goods, services, facilities or accommodation. In addition, the various human rights codes have set statutory ceilings for compensation for suffering in respect of feelings or self-respect. For example, under the *Canadian Human Rights Act*, the maximum amount that may be awarded is \$5,000. In Ontario, the maximum is \$10,000. Conversely, if the claimant were able to bring a suit in the civil courts, in some cases damages for pain and suffering would be higher. It may be questioned whether a complainant before a tribunal may be adequately compensated for the discrimination suffered. In finding an economic tort of discrimination, Wilson J.A. referred<sup>44</sup> to the oft-cited passage from *Ashby v. White*,<sup>45</sup> where the plaintiff had been denied the right to vote:

*If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of a right and want of remedy are reciprocal.*

In claims as adjudicated in the courts in the United States awards for damages may be higher. Among the 1991 amendments to the *Civil Rights Act*, was the availability of compensatory damages for future economic loss as well as non-economic loss and punitive damages. Such damages are capped, based on the size of the defendant's workforce, at levels from \$50,000 to \$300,000.

I said I would return to Charter remedies under section 24(1). It has been established since *Mills v. The Queen*<sup>46</sup> in 1986 that the Supreme Court would employ a three-tiered test to determine the meaning of "court of competent jurisdiction" under that provision: jurisdiction over the person, jurisdiction over the subject matter, and jurisdiction to grant the remedy. But it was only by a 4-3 decision in *Weber v. Ontario Hydro*<sup>47</sup> in 1995 that administrative tribunals were definitively recognized as courts in that sense. McLachlin J. stated for the majority:

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43. [1995] 3 S.C.R. 733 at 753.

44. *Supra* note 11 at 712.

45. (1703), 2 Ld. Raym. 938 at 953, (per Chief Justice Holt).

46. [1986] 1 S.C.R. 863 at 890.

47. [1995] 2 S.C.R. 929 at 962-963.

*It is thus Parliament or the Legislature that determines if a court is a court of competent jurisdiction; as McIntyre J. [in Mills] puts it, the jurisdiction of the various courts of Canada is fixed by Parliament and the Legislatures, not by judges. Nor is there magic in labels; it is not the name of the tribunal that determines the matter, but its powers. (It may be noted that the French version of s. 24(1) uses "tribunals" rather than "cour"). The practical import of fitting Charter remedies into the existing system of tribunals, as McIntyre J. notes, is that litigants have "direct" access to Charter remedies in the tribunal charged with deciding their case.*

*It follows from Mills that statutory tribunals created by Parliament or the Legislatures may be courts of competent jurisdiction to grant Charter remedies, provided they have jurisdiction over the parties and the subject matter of the dispute and have the jurisdiction to make the orders sought.*

The Court has not yet considered whether a human rights tribunal has section 24(1) jurisdiction,<sup>48</sup> but my co-panellist Juriansz has previously argued that such tribunals "are competent and even required, to rule on constitutional issues which will determine the disposition of the complaint before them".<sup>49</sup>

It has, of course been established that the Charter applies only to governmental action.<sup>50</sup> It has often been asserted that human rights legislation fills the gap, but this is disputed by Anderson in that such legislation fails to implement a more social democratic vision of human rights.<sup>51</sup> For complainants with respect to government action, there may be an issue of choice of forum on the ground of infringement of Charter rights.

## CONCLUSION

In conclusion, I would say that human rights commissions have proved their worth over the years and that courts could not, without a complete change of character, compete with them in efficacy.

The balance of efficacy is a much more nearly-run thing between human rights tribunals and courts. Where complainants have a choice of forum, they may want to consider courts where the remedy sought is a matter of urgency, or is invoking broad Charter-based relief, particularly if they are able to bear the cost of going it alone, without

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48. In *Mooring v. Canada (National Parole Board)* [1996] 1 S.C.R. 75, the Court found that the National Parole Board was not a court of competent jurisdiction.

49. R.G. Juriansz, "Section 15 and the Human Rights Codes" in G.-A. Beaudoin, ed., *Your Clients and the Charter — Liberty and Equality* (Cowansville: Éditions Yvon Blais, 1988) 321 at 337.

50. *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

51. *Supra* note 11, *passim*.

carriage by a commission (or if there is an organization or a program under which they can find financial assistance).

However, apart from the exigencies of particular complainants, courts are far from being in competition with human rights tribunals. They have described human rights codes as "public and fundamental law",<sup>52</sup> as "not quite constitutional but certainly more than the ordinary",<sup>53</sup> as legislation "of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement".<sup>54</sup> They have also spoken of the curial deference owed to human rights tribunals "in fact-finding and adjudication in a human rights context" (though not in "general questions of law").<sup>55</sup> In short, courts have treated human rights tribunals not as competitors, but as compatriots in the ceaseless quest for human dignity.

Courts and tribunals are, in fact, engaged in a collaborative work of social engineering. I can do no better by way of finale than to quote the words of Robert Stanfield, uttered in 1992 in this, his native province.<sup>56</sup>

*[W]hat we consider a human right embodies as much our view of our community as our view of the individual as such [...]. Canadians believe certain human values should be respected. We have chosen to define [these values] as individual rights, but we could have defined them in terms of community obligations.*

In this sense human rights are at the same time individual and social values, worthy of common protection by commissions, tribunals and courts.

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52. Lamer J. (as he then was) in *Insurance Corporation of B.C. v. Heerspink*, [1982] 2 S.C.R. 145 at 158.

53. McIntyre J. in *Ontario Human Rights Commission and O'Malley v. Simpson-Sears*, [1985] 2 S.C.R. 536 at 547.

54. McIntyre J. in *The Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150 at 156.

55. The quotes are from La Forest J. in *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554 at 585. Lamer C.J.C. in *Mossop* (at 578) said that the "Court in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, at p. 338, found that such a board does not have the kind of expertise that should enjoy curial deference on matters other than findings of fact ...." In *University of British Columbia v. Berg*, [1995] 2 S.C.R. 353 at 369, Lamer C.J.C. cited the words from La Forest J. I set out in the text. However, in *Gould v. Yukon Order of Premiers*, [1996] 1 S.C.R. 571, Iacobucci J. for the majority of the Court, while accepting that human rights tribunals are normally to be deferred to on questions of fact, drew the line at extending deference to inferences to be drawn from agreed facts.

56. "25th Anniversary Launching Speech", B. Pachai ed., *Nova Scotia Human Rights Commission: 25th Anniversary* (1992) 33, quoted by L'Heureux-Dubé J. in an address on November 18, 1995 to the Canadian Judicial Council Conference, "Aspects of Equality: Rendering Justice".

