

# Tribunals and Courts — The Contemporary Terrain — Lessons from Human Rights Regimes

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|---|-----|
| INTRODUCTION .....  | 121 |
| I. <i>PERERA V. CANADA</i> .....  | 122 |
| II. CONTEXTUALIZING PARALLEL DISCRIMINATION<br>CLAIMS .....             | 130 |
| III. THE CASE FOR A CONSTITUTIONAL TORT<br>REGIME IN HUMAN RIGHTS ..... | 132 |

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A number of the ideas advanced in this paper have had a long gestation period and, along the way, I have profited from the thinking and writings of others which are not otherwise footnoted in the body of the paper.

My colleague, Stan Corbett along with Christine Tier (LL.B. (Queen's, 1997) worked with me on a project in which some of the issues explored in this paper were a central part. I have also been stimulated by the work of Gerald Heckman, an LL.M. student who is preparing a thesis under my direction on the gatekeeping functions of human rights tribunals and also by discussions with Rachel Cox, an LL.M. student at U.Q.A.M.. Two recent LL.B. student papers have also been a source of ideas, particularly Tamar Witelson, "Retort : Revisiting *Bhadauria* and the Supreme Court's Rejection of the Tort of Discrimination" (November 1997). Ms. Witelson advocates legislative reform of the *Canadian Human Rights Act* to provide an alternative avenue in tort and her assessment of the workings of the Canadian Human Rights Commission on which that recommendation is based is directly relevant to a lot of the material canvassed in the paper, while Chris Rootham, "Standards of Review of Labour Arbitrators" (April 1998) provided me with much needed background on the labour arbitration aspects of the discussion which follows. In their own way, each of these six deserves credit as a co-author of this paper. However, I cannot attribute to any of them acceptance of the constitutional argument which is one of the key arguments that I make.



The impetus for this morning's panel is the uncertainty that pervades many aspects of the law governing the allocation of adjudicative responsibilities not only as between the regular courts and the administrative justice system but also among various components of the administrative justice system. The doubts and the ambiguities exist at all levels from Constitutional Law through approaches to statutory and contractual interpretation to basic common law principles governing the resolution of jurisdictional disputes or problems. In recent times, they have been exacerbated by the seeming ambivalence of the Supreme Court of Canada on the role and capacities of at least some Canadian administrative tribunals. Also, while this factor is seldom<sup>1</sup> articulated explicitly in any of the jurisprudence, the resource and other organizational and remedial difficulties experienced by many administrative tribunals across the country is an underlying factor that simply cannot be ignored.

In this paper, I will start by considering a specific example of the problems that have surfaced in this domain : the issues raised by *Perera v. Canada*<sup>2</sup> and the attempt of the plaintiffs in that case to "circumvent" the complaint and adjudication mechanisms provided by the *Canadian Human Rights Act*.<sup>3</sup> Through this example, I hope to be able to highlight a number of the issues and the tensions that exist generally between administrative justice systems and the regular courts particularly when Charter rights and freedoms are at stake. I will then consider whether the courts should recognize a constitutional claim to sue civilly for discrimination notwithstanding the continuing jurisdiction over such matters of Human Rights Commissions and their companion tribunals. In doing so, I will also assess whether to do so would be inconsistent with the judgment of the Supreme Court of Canada in *Weber v. Ontario Hydro*.<sup>4</sup> There, the Court denied a right to sue civilly for Charter violations where the matters giving rise to the claim arose out of a collective agreement. In that context, I will also consider briefly the tensions that now exist in some jurisdictions between the jurisdiction of human rights commissions over complaints of discrimination and the incorporation into collective agreements of the standards and provisions of relevant Human Rights Codes.

## I. *PERERA V. CANADA*

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1. In the context of assessing whether proceedings before human rights commissions should be enjoined because of excessive delay, at least one Court of Appeal judge has identified "inadequacy of or limitations to its institutional resources" as a factor to be taken into account in mitigation of a failure to process complaints efficiently : see the partially dissenting (but not on this point) judgment of Bayda C.J.S. in *Kodellas v. Saskatchewan (Human Rights Commission)* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.) at 158-159.
  2. *Perera v. Canada*, [1997] F.C.J. No. 199 (Q.L.) (T.D.), aff'd in part and rev'd in part [1998] 3 F.C. 38 (C.A.).
  3. *Canadian Human Rights Act* R.S.C. 1985, c. H-6 (as amended).
  4. *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (and the other judgment on the same issue released on the same day : *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967).

In his September 1998 Report, the Auditor General of Canada condemned the Canadian Human Rights Commission for trying to do too many things and for taking too long to do them.<sup>5</sup> The Commission's response to these complaints was predictable and, indeed, almost certainly justified in large measure : If we have too much to do, blame Parliament and, if we are taking too long to fulfil our responsibilities, blame the federal government for failing to provide sufficient resources. However, irrespective of which interpretation of the current state of affairs is the better one, the fact remains that the time taken by this and many other commissions and companion adjudicative tribunals in resolving discrimination complaints certainly does not live up to any billing of speedy and efficient justice.

Moreover, it seems clear that the commissions and tribunals are becoming more and more preoccupied with complex and resource intensive systemic discrimination complaints (such as the controversial federal civil service pay equity adjudication now on appeal to the Federal Court of Appeal). This has led to growing concerns at the extent to which this is at the expense of effective servicing of complaints of individual or direct discrimination. Where choices have to be made at the gatekeeping stage by commissions on whether to secure the appointment of an adjudicative tribunal, to what extent are those choices being influenced either overtly or implicitly by resource considerations and a sense that systemic discrimination issues are more worthy of full consideration and adjudication?

Spurred on in part by considerations such as this<sup>6</sup> and also possibly by the prospect of potentially greater financial redress, Ranjit Perera and two other employees of CIDA commenced an action in the Federal Court, Trial Division seeking damages and other remedies for violation of their section 15 Charter rights. The foundation for the claim was an allegation that CIDA and various of its employees had engaged in both individual and systemic discrimination against the plaintiffs on the basis of race, national and ethnic origin, and colour.

Not surprisingly, in view of the fact that the allegations all involved matters coming within the jurisdiction of the Canadian Human Rights Commission under the *Canadian Human Rights Act*, the Crown moved to strike out the plaintiffs' cause of action on the ground that it disclosed no reasonable cause of action. The principal argument in

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5. For Internet access, [www.oag-bvg.gc.ca/domino/reports.nsf/html/98menu\\_e.html](http://www.oag-bvg.gc.ca/domino/reports.nsf/html/98menu_e.html). For commentary, see e.g. D. Leblanc, "Rights body labelled unwieldy," *Globe and Mail*, September 30, 1998 and K. May, "Report Slams Commission," *Kingston Whig-Standard*, September 30, 1998. See also J. Simpson, "Human Rights Commission mill grinds slowly," *Globe and Mail*, October 1<sup>st</sup>, 1998.

6. The Canadian Human Rights Commission had dismissed at the gatekeeping stage earlier complaints of discrimination made by Mr. Perera against CIDA i.e. it refused to request a tribunal to hear those complaints. That decision of the Commission withstood a subsequent application for judicial review : *Perera v. Canada (Canadian Human Rights Commission)* (1989), 89 C.L.L.C. para. 17,016 at 16125 (F.C.A.). Subsequently, however, Perera did succeed in maintaining allegations of discrimination contrary to the provisions of the *Canadian Human Rights Act* in the context of an appeal to Public Service Commission Appeal Board against a recommendation for his dismissal : *In re Perera*, November 22, 1994, File No. 91-IDA-0972R (P.S.C.A.B. — Cousineau, Chair).

support of this contention was that, in light of *Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria*,<sup>7</sup> the Federal Court, Trial Division had no jurisdiction to entertain an action in what in effect was the tort of discrimination. That territory was denied to the regular courts by the judgment of the Supreme Court of Canada in *Bhadauria* holding that the enactment of Human Rights Codes had occupied the field and precluded the evolution of a common law tort of discrimination.

In dismissing the motion to strike out the entire statement of claim, Cullen J. distinguished *Bhadauria* on the basis that the Ontario and federal Human Rights legislation were structured differently. More particularly, the *Ontario Act* made it abundantly clear that human rights boards of inquiry appointed under that *Act* were given exclusive jurisdiction to deal with discrimination complaints while there was no such provision in the federal act. At the very least, this distinction is questionable.

While Laskin C.J.C., delivering the judgment of the Court in *Bhadauria*, did indeed quote the provision in the *Ontario Code* conferring exclusive jurisdiction on boards of inquiry to determine matters coming before them, at no point did he rely specifically upon this provision as cementing the argument that the legislature intended to exclude the evolution of a common law tort of discrimination. Indeed, the normal object of such clauses is generally seen as the restriction of pre-emptive or subsequent judicial review of matters coming before a tribunal.

That said, however, Cullen J. seems on first impression to be on somewhat stronger ground when he asserts that *Bhadauria*, a pre-Charter judgment, should not be read as speaking to the availability of relief in the regular courts for Charter violations, including damages and other forms of compensatory or rectifying relief. The fact that *Bhadauria* might either in Ontario and perhaps other jurisdictions<sup>8</sup> preclude the emergence of a common law tort of discrimination does not necessarily say anything about the right to assert a claim to damages under section 24(1) of the Charter for violation of one's constitutional rights under section 15(1). Whether the Charter allows for the existence of a constitutional tort is arguably a matter quite distinct from whether provincial primary legislation has precluded the possibility of a new common law tort. This is not a matter of statutory interpretation but an issue of Constitutional Law.

However, notwithstanding Cullen J.'s confident proclamation of the existence of such a cause of action,<sup>9</sup> it is almost certain that this ruling will not go unchallenged if

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7. *Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181.

8. It should, of course, be noted that much of the discussion in this paper is not directly relevant to the province of Québec. The Québec human rights legislation provides for the taking of civil action in the regular courts for violation of the anti-discrimination prohibitions in that Act.

9. Cullen J.'s ruling that there was no basis for striking out the cause of action at this stage was affirmed by the Federal Court of Appeal without any indication from the Court of the extent to which it agreed with his reasoning. However, on one point, the Federal Court of Appeal disagreed with Cullen J. He was prepared to strike out the Statement of Claim to the extent that it sought remedies associated with human rights tribunals and not the regular courts — letters of apology and the implementation of special programmes. According to the Court of Appeal,

and when the case ever comes to trial. While there are a few examples of successful tort claims under the Charter, there has been no authoritative or detailed judicial examination of the nature and role of constitutional torts. Does the combination of the rights and freedoms protected by the Charter, the remedial provisions of section 24(1), and the constitutionally guaranteed role of the provincial superior courts over constitutional questions coalesce to support the existence of a protected entitlement to sue in constitutional tort in those provincial superior courts whenever there is an alleged violation of a Charter right or freedom?

In fact, *Weber v. Ontario Hydro*<sup>10</sup> represents a major problem for the kind of claim being advanced by *Perera* as long as the trial court judge sees an analogy between the tasks of grievance arbitrators when discrimination issues arise and those of human rights commissions and their companion tribunals. At first blush, the majority judgment of McLachlin J. clearly seems to support the proposition that the section 96 courts have no guaranteed role, at least at first instance, when there is a statutory tribunal with statutorily-conferred original and exclusive capacities to deal with the Charter claims at stake and to award Charter remedies. This is in stark contrast to the position taken by Abella J.A. in the Ontario Court of Appeal in which she was prepared to accept that there were parallel jurisdictions in such cases where constitutional claims were being advanced.<sup>11</sup>

However, given that there is no examination of the underlying constitutional issues in the McLachlin judgment,<sup>12</sup> it may still be possible to assert that it stands for a less restrictive proposition. While there is no right to seek relief in the regular courts, access remains a possibility in situations where the statutory regime does not provide ample protection or relief. In other words, the judgment of the Court might be read (perhaps less controversially)<sup>13</sup> as assisting a discretion, not a mandate to decline jurisdiction to deal with Charter issues and claims whenever there is such a statutory regime.<sup>14</sup> Some support

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the discretion accorded to courts of competent jurisdiction in section 24(1) to fashion appropriate remedies was broad enough to encompass the award of such forms of relief by the Federal Court.

10. *Supra* note 4.

11. (1992), 98 D.L.R. (4th) 32 (Ont. C.A.) at 45-46.

12. One might, of course, argue that the constitutional argument is there by implication to the extent that Abella J.A. based her judgment in favour of a right of access to the regular courts in Charter cases on the importance of citizens being able to vindicate constitutional values in the section 96 courts.

13. See the highly critical discussions of the apparent McLachlin position by D. Pothier, "Developments in Employment Law : The 1994-1995 Term" (1996), 7 Sup. Ct. Law Rev. (2d) 293 at pp. 323-325 and R. Brown and B. Etherington, "*Weber v. Ontario Hydro*": "A Denial of Access to Justice for the Organized Employee?" (1996), 4 C.L.E.L.J. 183 at 198-206.

14. I do not think anything can be made of the point that Human Rights Commissions and their associated tribunals do not explicitly deal with Charter claims but rather claims of discrimination proscribed by ordinary statute. After all, from *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 onwards, it has been the position of the Supreme Court of Canada that the anti-discrimination jurisdiction of human rights tribunals is parallel to that of

for this may be found (though it could be stretching the point) in that part of the judgment where she states that court jurisdiction to award injunctions in labour matters is not affected by this decision and remains part of the inherent powers of the court to act in aid of the labour relations process. This might be seen as suggesting a residual common law or equitable jurisdiction to give resource-starved statutory regimes a helping hand when they are not fulfilling their statutory mandate or the expectations of their constituencies.

In any event, the judgment has obvious ramifications for the role of human rights commissions and the claim being advanced in *Perera*. Moreover, as suggested above, despite McLachlin J.'s reliance in *Weber* on the exclusivity provision in the relevant statute, it is highly questionable whether the resolution of such an issue should be depend on whether the relevant human rights legislation includes the kind of "exclusive" jurisdiction clause as is contained in the *Ontario Code*.<sup>15</sup>

Nevertheless, to admit the existence of a constitutional tort of the kind asserted by Perera and his co-plaintiffs would be to introduce a perhaps unfortunate distinction into the law. To the extent that the Charter applies only to government,<sup>16</sup> the recognition of the right of plaintiffs to sue in constitutional tort for violations of section 15 and other Charter rights and freedoms would apply only as against the government and not private sector actors. Putting it another way, in many cases, victims of government discrimination would have the choice of two, perhaps even three<sup>17</sup> venues for making their claims — the human rights commission, the regular courts, and whatever domestic remedies are available to them as public servants — while similar victims of private sector discrimination would in a great many instances be confined to the human rights commission.

Of course, it is not without significance that such anomalies already exist in the domain of discriminatory conduct. Despite the apparent breadth of the *Bhadoria* ruling, it has been interpreted consistently to apply only against the assertion of new causes of action : ones not already recognized by the common law. Thus, in *Central Canada Trust*

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the section 15 Charter work of the section 96 courts.

15. See, however, Pothier's analysis of the McLachlin judgment which she sees as predicated on the terms of the primary legislation and its conferral of exclusive jurisdiction on arbitrators.
16. Of course, the *Eldridge* extension of the Charter's reach to cover the delivery of inherently governmental programmes would seem to have the capacity to have an impact on the matters I am considering in this paper : *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.
17. See, however, *Cadillac Fairview Corp. v. Saskatchewan (Human Rights Commission)* (1998), 162 Sask. R. 290 (Q.B.), applying *Weber* to prevent a complaint of discrimination proceeding before the Saskatchewan Human Rights Commission. The judgment makes no mention of *Bhadoria* and whether it has any implications for this issue. However, cf. *Mohammed v. Canada (Treasury Board)*, [1998] F.C.J. No. 845 (June 16, 1998) (Cullen J.) (T.D.), asserting the jurisdiction of the Canadian Human Rights Commission over that of an adjudicator under the *Public Service Staff Relations Act*. In the first case, the alternative forum's jurisdiction was expressed to be exclusive while in *Mohammed*, the adjudicator's authority was expressed to be subordinate to other recourses.

v. *Ontario (Ontario Human Rights Commission)*,<sup>18</sup> the Ontario Court of Appeal ruled that the judgment of *Bhadauria* was without prejudice to the long-recognized equitable jurisdiction of the Ontario High Court to invalidate or vary the terms of charitable trusts. This jurisdiction survived even where the specific basis for its invocation was a species of discrimination prohibited under the *Ontario Human Rights Code*.

More specifically, in an employment context, this also means the survival in non-unionized settings of wrongful dismissal claims even where the reasons for dismissal are based on proscribed species of discrimination and, in unionized workplaces, of the availability of grievance arbitration with respect to all manner of employer actions against employees based on impermissible species of discrimination.<sup>19</sup> Indeed, in the latter category particularly, resource-strapped commissions have declined jurisdiction in such cases on the basis that there is an available avenue of recourse open to the complainant.<sup>20</sup> In such a context, it may be asked what harm would be done by creating yet another exception to the exclusivity of human rights commission jurisdiction in the form of a constitutional tort available outside the framework of the human rights complaint process and available only as against government.

The answer to that question hinges in considerable measure on the extent to which it is appropriate not only to perpetuate but also to increase further the litigation discrepancies that already exist in this domain. Does there come a point at where there are legitimate concerns about parcelling out opportunities for access to justice so that some victims of discrimination have significantly greater opportunities for recourse than others? For example, is it sustainable to tell an applicant for a private sector position that the only recourse that he or she has in the case of a discriminatory denial of work is a complaint to the appropriate human rights commission whereas such a denial in the public sector might also generate a constitutional tort claim in the regular courts? Moreover, in the case of the discriminatory dismissal of a public sector worker, as noted already, there will probably be at least three potential avenues of recourse : the courts, grievance arbitration or an equivalent, and the Human Rights Commission. Is this level of discrimination and potential for forum shopping in the case of some employees or employment seekers sustainable on any soundly rooted policy?

To the extent that there is no ready answer to these questions at least in terms of existing authorities, and that *Weber* could actually preclude the kind of claim being advanced in *Perera*, my argument is that the only appropriate way of finessing these

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18. *Central Canada Trust v. Ontario (Ontario Human Rights Commission)* (1990), 69 D.L.R. (4th) 321 (C.A.).

19. Indeed, as already noted *supra* note 7, Perera himself had already grieved successfully before an appeal board established under the *Public Service Employment Act* against a recommendation for his dismissal. Among the grounds that the Appeal Board allowed him to assert was discrimination contrary to the provisions of the *Canadian Human Rights Act*. After *Weber*, such issues may also be pursued in the context of adjudications under other regimes regulating employment relationships such as employment standards and unfair dismissal legislation.

20. Indeed, if the judgment in *Cadillac Fairview*, *supra* note 17, is broadly applicable they may have no choice in the matter!



dilemmas is to reconceptualize the nature of the constitutional claims that should be advanced in such cases. For me, the more appropriate inquiry is to ask directly whether section 15 of the Charter condemns the inequities of such diverse regimes of access to justice. In other words, where allegations of section 15 inequality and discrimination are in issue, is there a constitutional imperative that there be not only adequate but also comparable means of having such complaints vindicated irrespective of the particular ground of complaint and the legal context in which the alleged discrimination has taken place?

That such an approach would not be without its pitfalls is fairly obvious. In the limited contexts in which section 15 challenges of this kind have been entertained by the Supreme Court of Canada to this point, they have been singularly unsuccessful. Thus, in *Reference re Workers' Compensation Act, 1983 (Newfoundland)*,<sup>21</sup> the Supreme Court of Canada refused to find that requiring those injured at work to pursue their claims for compensation through the provincial workers' compensation regime while allowing those injured in other contexts to have recourse to the regular courts and the torts system was not a species of inequality proscribed by section 15.<sup>22</sup> Such an outcome can be justified on at least three separate scores. First, those injured at work and seeking compensation do not come within one of the species of discrimination listed in section 15 or any analogous category. As a consequence, they are excluded at the threshold of section 15 established by the Supreme Court in *Andrews v. Law Society (British Columbia)*.<sup>23</sup> Secondly, even assuming such victims meet the requirements of that threshold, different forms of access to compensation do not necessarily amount to an inequality as proscribed by section 15. Overall, workers' compensation may provide as good a system of compensation as provided by the torts system. Thirdly, irrespective of whether some victims are worse off than they would be under the tort regime, the universality of workers' compensation coverage irrespective of employer fault as well as the greater good of the greater number are sufficient justifications in terms of section 1 of the Charter.

However, none of those arguments will necessarily work to secure the exclusivity of Human Rights Commission processes against assertions of section 15 violation. One potential overarching principle is that denying at least some victims of discrimination access to the regular courts for compensation can only be justified when there is a viable, well-funded, effectively working system of administrative justice. To the extent that Human Rights Commissions are falling far short of providing accessible access to relief, the system may be seen to be one that is fatally flawed — a species of government action that perpetuates inequality and discrimination rather than provides relief from those evils. Such a Charter challenge would, of course, depend on very strong empirical evidence of the failures of the current system to provide access to all or certain categories of section 15 violation.

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21. *Reference re Workers' Compensation Act, 1983 (Newfoundland)*, (1981) 30 D.L.R. (3d) 161.

22. See also *Rudolph Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695 (statutory requirement that suits against the Crown be commenced in the Federal Court while allowing Crown actions against citizens to be taken in either the Federal Court or the provincial courts was not an inequality that engaged section 15).

23. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

What is, however, clear in the case of this argument is that it is not precluded by *Andrews*. The makers of the claim are the very beneficiaries of section 15. That assertion also holds true in the case of an attack based on the differences in legal recourse as between the victims of discrimination and other species of legal wrong and perhaps even as among various categories of discrimination victims. As far as the second argument in the Workers' Compensation setting is concerned, once again strong empirical evidence of the system's failings in comparison with tort claims in the regular courts or the various other recourses available to some categories of discrimination victim may be sufficient to overcome that hurdle. Also, the section 1 collective good, universal coverage argument is one that would be very difficult to sustain in the face of the greater rights possessed by some discrimination victims and the overall operational defects of the current system.

Indeed, recent jurisprudence also potentially opens up the possibility of a similar argument being made through the agency of section 7.<sup>24</sup> In *Blencoe v. British Columbia (Human Rights Commission)*,<sup>25</sup> the British Columbia Court of Appeal held that undue delay in the prosecution of a human rights complaint could and, on the facts of the case, did deprive a respondent of his section 7 right to "security of the person." The extended and public nature of the proceedings on the complaint, which the Court described as akin to an allegation of sexual assault, resulted in a "loss of privacy and dignity" of such a magnitude as to amount to a deprivation of the respondent's "security of the person." The Supreme Court of Canada has granted leave to appeal from this judgment.<sup>26</sup> However, should it hold up on appeal, it would not take too much for a later court to turn the proposition around and see the privacy and dignity of victims of discrimination as being threatened by exposure to a process that is simply taking too long to respond to their complaints of degrading treatment. Moreover, a possible remedial response to such a situation would be to allow a constitutional tort action outside the scheme of the relevant human rights legislation.

I am not, of course, predicting that such an attack based on either section 15 or section 7 would necessarily be successful. However, as opposed to the *Perera* approach (which, as already noted, would create just another species of exception and perpetuate inequality of access), it at least has the merit of attacking the problem frontally. Its recognition would also ensure access to the regular courts for those victims of discrimination whose only recourse at the moment is a complaint to a human rights commission. This right of access would exist either universally or, perhaps preferably, at least until such time as governments actually provided sufficient resources to make their particular human rights, anti-discrimination regime an accessible, efficient and effective

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24. This particular argument was suggested to me by Tamar Witelson in the course of an Administrative Law class in the Fall 1998 Term.

25. *Blencoe v. British Columbia (Human Rights Commission)* (1998), 160 D.L.R. (4th) 303 (B.C.C.A.).

26. On October 8, 1998. See [1998] S.C.C.A. No.366 (Q.L.).

vindicator of the values of both their human rights legislation and section 15 of the Charter or a true equivalent to the regular courts.<sup>27</sup>

Such an outcome would, however, raise the issue of why access to the regular courts should then be restricted to after the event judicial review for those victims of discrimination to whom other avenues of recourse are already available. Indeed, at first blush, it seems somewhat anomalous to move to a situation where, under the *Weber* rules, grievance arbitrators have a greater claim to exclusivity in the first instance determination of human rights complaints within their particular domain than would human rights commissions and their adjudicative branches.

One perhaps could justify this simply by reference to the Supreme Court's apparent willingness to concede jurisdiction, indeed initial exclusivity, to labour arbitrators' first instance determination of Charter issues that arise out of a collective agreement. This might be seen as standing in stark contrast to the Court's determination in *Cooper v. Canada (Human Rights Commission)*<sup>28</sup> that neither the Canadian Human Rights Commission nor the Canadian Human Rights Tribunal had jurisdiction to consider a Charter challenge to the validity of provisions in the *Canadian Human Rights Act*.

However, this is clearly not an adequate justification. Excluding human rights commissions and companion adjudicative tribunals from considering Charter challenges to the validity of their empowering legislation does not really speak in any way to the capacities of such bodies to perform the tasks they have been allocated by their empowering legislation. To the extent that those tasks involve assessing and adjudicating complaints of discrimination which also involve Charter violations, there is no ready distinction to be made between their role and that of an arbitrator in responding to allegations of Charter violations and claims for Charter remedies.

In truth, notwithstanding the general reluctance of the Supreme Court of Canada to concede any degree of deference to human rights tribunals, there seems no reason to believe that these adjudicators are generally any less competent to resolve complaints of inequality and discrimination within the framework of the existing scope of their empowering legislation than grievance arbitrators are to decide those similar issues by reference to either section 15 of the Charter or the proscriptions of the relevant Human Rights Code within the framework of the relevant collective agreement. In a workplace setting, there are probably offsetting advantages as between the two fora. Human rights tribunals will commonly know more about the general dictates of equality and the scope of proscriptions on discrimination than labour arbitrators. However, labour arbitrators will have greater familiarity with the workplace context.

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27. I am omitting from consideration at this stage the possibility of a mandatory order directing a government to provide adequate resources to ensure that existing human rights complaint mechanisms actually work. However, it is another possible, if remote alternative.

28. *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854.

This means that, if there is any justification for a different outcome in a human rights setting than was the case in *Weber* in a labour arbitration setting, it would have to be found in the comparative efficiency of and effectiveness of access to the two processes. One can understand the exclusivity of labour arbitrators over the initial determination of such complaints only in terms of the initiation and arbitration of such grievances being conducted much more expeditiously and effectively than is the case with overall human rights commissions' management of their intake of complaints. Whether this is supportable empirically is not something on which I am qualified to speak. Indeed, presumably, to make any such comparison one would also have to assess the respective roles of unions as gatekeepers to grievance arbitrations and human rights commissions as gatekeepers to the adjudication of human rights complaints. Unless all of these data produce a profile of human rights adjudication that compares unfavourably to the system of grievance arbitration, the overall argument may be doomed to failure simply on the authority of *Weber*. This general issue is one to which I will return in the final section of this paper.

## II. CONTEXTUALIZING PARALLEL DISCRIMINATION CLAIMS

At first blush, to advocate constitutional recognition of a guaranteed cause of action in discrimination in the regular courts would seem to conflict with the generally strong policy of the current Supreme Court of Canada to accord significant deference to the administrative process.

Intervention in judicial review proceedings is commonly restricted to decisions or actions which are patently unreasonable. Indeed, even in the context of a statutory appeal to the courts, the so-called "pragmatic and functional analysis" is now applied to limit the exercise of the courts' powers on appeal to cases where the decision is unreasonable rather than simply incorrect in the court's view. Nowhere is the extent of this restraint better exemplified than in the 1997 judgment of the Court in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*.<sup>29</sup> Here, the Court held that the relevant privative clauses extended to protect from correctness review the Board's determination of whether and to what extent the *Act* modified or extinguished the possibility of common law causes of action outside the workers' compensation regime. Only where such a determination was patently unreasonable was intervention justified.

Moreover, this deference is not simply characterized by the Supreme Court's jurisprudence on the standards of scrutiny or grounds for intervention to be applied in the conduct of judicial review and statutory appeal powers. It extends to the important, adjectival question of the timeliness of judicial review. Even in situations where the standard of review is correctness rather than patent unreasonableness or reasonableness, such as in the domain of true jurisdiction-conferring provisions, Charter questions, and the determination of questions of law by Human Rights Tribunals, the Court has insisted that judicial intervention generally await the termination of the administrative proceedings; that there be no pre-emptive strikes by way of judicial review applications seeking relief in the nature of prohibition or an injunction.

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29. *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890.

Typical in this regard is the judgment featured in Professor Des Rosiers' paper,<sup>30</sup> *Canadian Pacific Ltd. v. Matsqui Indian Band*.<sup>31</sup> Here, a majority of the Court accepted the first instance judge's determination that it was appropriate to suspend judicial intervention on a true jurisdictional question until such time as the relevant tribunal had had an opportunity to deal with the issue. Moreover, while there was not a majority in that case one way or the other on the timeliness of judicial intervention when a tribunal's independence is in issue, subsequent jurisprudence has made it clear that, at times anyway, it will be necessary to have evidence of the tribunal in action before considering such claims.<sup>32</sup>

A number of factors which inform the Court's position on the timeliness of judicial review. To countenance pre-emptive judicial review as a regular event is to provide encouragement to those who seek to frustrate and delay tribunal proceedings. More generally, there are efficiencies to be achieved by avoiding the bifurcation of tribunal proceedings. It is simply better to have all relevant judicial review and appeal issues dealt with by the court at the one time with that time in most instances being at the conclusion of the tribunal's proceedings and, indeed, after the exercise of any internal statutory appeal rights. Even where a case raises constitutional (including Charter) issues, the normal posture of the Canadian courts has been to avoid dealing with those issues if possible.<sup>33</sup> That philosophy also extends to allowing tribunals the opportunity to resolve the matters in dispute by reference to other non-constitutional issues including the simple factual merits of the case.

Allowing the tribunal first crack at the determination of issues is also regarded as having a number of positive virtues. The court's judicial review or appellate role may be better informed by an appreciation of the views of the tribunal operating daily in the relevant field. Indeed, on matters where the standard of review is patent unreasonableness or even unreasonableness, this is a logical imperative. However, it may also frequently be the case where the issue is one on which the standard of review is correctness. Just because the tribunal is required to be correct does not mean that it will not assist the court's understanding of the relevant issue. Also, putting together the relevant factual record may be done more cheaply and efficiently by the tribunal. Indeed, given the restraints on the introduction of evidence in some judicial review proceedings, the only way in which a reviewing or appeal court will obtain a full evidential record is by allowing room for it to be compiled by the tribunal.

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30. "Toward an Administrative Model of Independence and Accountability for Statutory Tribunals."

31. *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.

32. See *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405; *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919.

33. See e.g. the judgment of Wilson J. in *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177 at 188-189.

Another dimension of this judicial concern with protecting the integrity of administrative processes can be seen in the Supreme Court's judgment in *Weber*. In earlier jurisprudence, the Court had determined not only that tribunals generally have no entitlement to judicial deference when they are considering Charter issues but also that labour arbitrators were among the category of decision-maker who had a lesser claim to deference the moment they moved away from issues strictly involving the interpretation of the relevant collective agreement and started dealing with questions of external or general law. Nonetheless, as we all know, the outcome in *Weber* was concession to labour arbitrators of an initial jurisdiction (to the exclusion at that stage of the regular courts and, possibly also, human rights commissions) to deal with claims to relief in all disputes arising out of the collective agreement, including the adjudication of issues of discrimination and inequality and the seeking of compensation for Charter and possibly *Human Rights Code* violations.

While the scope of this arbitral jurisdiction has provoked much subsequent litigation and academic controversy, what is clear is that the Court was not simply parsing literally the conferral on arbitrators of exclusive jurisdiction to resolve disputes arising out of the collective agreement. It was also reflecting a policy of one-store shopping for the initial determination of disputes between employers and unions representing employees. Neither party to the collective agreement should be able to avoid the normal dispute resolution forum by invoking the Charter and the jurisdiction of the regular courts (and perhaps also other statutory fora).

### III. THE CASE FOR A CONSTITUTIONAL TORT REGIME IN HUMAN RIGHTS

Against this more general background, I return to the basic question. Is it consistent with general, widely dispersed principles of judicial respect for administrative processes and, more specifically, with *Weber* and the general exclusivity of arbitrator original jurisdiction over disputes arising out of the collective agreement to advocate the availability of parallel fora (human rights commissions and the courts) in the case of complaints of discrimination and inequality? To the extent that violations of section 15 of the Charter parallel the anti-discrimination jurisdiction created by *Human Rights Codes*, should victims have such a choice?

One response might be to the effect that the Supreme Court has shown even less deference or respect for human rights commissions and tribunals than it has for labour arbitrators. Not only have they been subjected to full curial scrutiny (save on straight questions of fact) in subsequent judicial review and appeal proceedings but the integrity of their jurisdiction has never attracted the same degree of exclusivity protection as has arbitrators. As mentioned before, this is most evident in the subsequent interpretation of *Bhadauria* as not applying to situations where there was an existing common law cause of action. Indeed, the commissions themselves seem to have ceded to other fora such as labour arbitrators an entitlement to deal with *Human Rights Code* issues or complaints arising within their regular domain. Finally, as noted earlier, in *Cooper*, the Court also withdrew from human rights commissions and tribunals the capacity to engage in even tentative consideration of whether their empowering statute in any way infringed the protections accorded by the Charter. Given all these indicators, accepting a

constitutionally derived entitlement to seek relief for discriminatory conduct in the regular courts might be seen as simply a further manifestation of an already accepted bifurcation of jurisdiction over discriminatory conduct. At a formal level, this would not be inconsistent with *Weber*.

However, to simply justify such a situation on the basis of those distinguishing features is perhaps to accept too readily that the judicial attitude which has produced these differences was an appropriate one. The Court's assertion for judicial review and statutory appeal purposes of equal or superior competence to that of human rights tribunals on legal issues of discrimination has always been controversial. As a matter of policy, it is not completely self-evident that the Ontario Court of Appeal was correct in *Canada Trust* when it ruled both that it had a continuing jurisdiction to deal with all aspects of charitable trusts and that it should not yield or defer to the already invoked jurisdiction of the Ontario Human Rights Commission in the case of the allegedly discriminatory terms of a charitable trust deed. Moreover, the denial of the entitlement of the Canadian Human Rights Commission and the Canadian Human Rights Tribunal to consider challenges to the validity of their empowering legislation not only produced two strong dissents but also has generated much subsequent controversy. More generally, a case can be made for one store shopping in the case of human rights violations. Indeed, given the inaccessibility of the regular civil courts to most victims of discrimination, the creation here of a parallel system has even greater potential than in most other spheres of administrative justice to create a two tier system of justice where only the richer or public interest group supported victim will be able to afford the luxury of the regular court processes.

There are, however, other insights that might be gained from both *Cooper* and *Weber*. Underlying *Cooper's* denial to human rights commissions and their companion tribunals the capacity to consider challenges to their own empowering legislation may have been at least some sense that opening this door would tax even further the already stretched resources of these institutions. Given also the inevitability of an application for judicial review of or a statutory appeal from any such successful challenge, perhaps there are overall efficiencies to be achieved in having such cases start in the section 96 courts in the first place by way of action.<sup>34</sup>

In the case of *Weber*, it is also interesting to observe the extent to which this judgment has produced controversy in the labour law community.<sup>35</sup> In many quarters, there appears to be considerable scepticism about the merits of the mandated role that it confers on labour arbitrators. Given the extent to which many in the labour law

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34. It should also be noted that the Supreme Court has recently played a role in trying to effectuate the effective exercise of its mandate by the Canadian Human Rights Commission. In *Canada (Canadian Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, it held that the Federal Court had statutory-based jurisdiction to issue injunctive relief at the suit of the Commission in order to deal with certain species of alleged discrimination while those matters were under consideration by the Commission and a tribunal.

35. See e.g. Brown and Etherington, *supra* note 15, at 207 particularly, D.D. Carter, "The Arbitrator as Human Rights Adjudicator — The Lessons of *Soldiers Memorial Hospital*," to be published in Labour Arbitration yearbook, and also the paper which preceded this one at the Conference : S. Greckol, "The Jurisdiction of Labour Arbitrators : the Debate Continues."

community have always been anxious to preserve the integrity of labour board and labour arbitration jurisdiction against the interventionist tendencies of the courts and the more general advocacy of an hermitically sealed regime for labour relations or unionized workplace dispute resolution, this is surprising. However, the fact that we are witnessing it may bespeak some concern with the capacity of the existing regime of labour arbitration to handle this "new" jurisdiction effectively. Will arbitrators have the necessary expertise? Will the complexity of such disputes compromise the reputation of the arbitral system for efficient, effective resolution of certain species of workplace disputes? Will involvement in such issues and the imperative for fashioning different kinds of remedies change the face of grievance arbitration in undesirable ways?

In the case of human rights commissions and their companion tribunals, these concerns about the capacity of administrative justice regimes to do a good job bring me back to the central theme of the constitutional argument I have advanced in this paper. Clearly, the best solution would be to strength the existing processes of human rights commissions and their companion tribunals through the provision of more resources of all kinds. Unfortunately, in an era where allocation of even barely adequate resources is beyond either political will or ability, other less ideal alternatives may have to be explored. One of those is judicial recognition of a constitutional entitlement to sue civilly in the regular courts for violation of equality rights.

However, the constitutional entitlement almost certainly is not one that should be viewed as absolute. Rather, any such right should be seen as contingent only. It survives only so long as the state fails to provide an adequate alternative to the vindication of rights to equality. Once the state does sufficiently support such a regime, the constitutional imperative will have been met and access by way of tort action in the regular courts will once again no longer be needed either practically or under the Charter.