

Taking Remedies Seriously: An Introduction

Kent ROACH* and Robert J. SHARPE**

Remedies often seem to receive less attention than they deserve. The title of this collection of essays, as well as the annual conference of the Canadian Institute for the Administration of Justice that led to this book, is borrowed from Professor Ronald Dworkin's justly famous book *Taking Rights Seriously*.¹ We hope that this collection of essays will inspire litigators, judges, administrative tribunal members and academics to spend more time thinking and writing about remedies.

The CIAJ was especially fortunate that Chief Justice McLachlin agreed to deliver the keynote address at the conference. Her essay, included at the start of the book, provides a sage assessment of the practical nature of remedies. The Chief Justice reminds us that remedies are vitally important to ordinary people seeking justice before the courts and that all of us involved in the law neglect remedies at our peril. She also observes that the subject of remedies is an important but often under-explored area for academic study. Chief Justice McLachlin's view of remedies as being interwoven with rights in a single fabric we call "justice" provides us with an appropriately lofty theme for this book.

The idea that there is no right without an adequate remedy is a fundamental principle of our legal system. It requires us to focus on the practical side of what constitutes an adequate and meaningful remedy, that is to say relief that is both fair to all concerned and appropriate for a court or tribunal to award. Remedies remain an intensely practical but important subject for litigants and all those concerned with the administration of justice.

Although remedies have great practical importance, they also frequently give rise to theoretical issues as complex and intriguing as those which involve rights. Although remedies derive much of their

* Professor, Prichard-Wilson Chair of Law and Public Policy, University of Toronto, Toronto, Ontario.

** Justice, Court of Appeal for Ontario, Toronto, Ontario.

¹ (Cambridge: Harvard University Press, 1977).

content from rights, they also influence how rights themselves are recognized or ignored in the legal system. For instance, there may be an unwillingness to recognize rights if the remedy sought is perceived to be extravagant or impossible to manage. At the same time, a lack of effective remedy may cast doubt as to whether the right truly is recognized by the legal system.

The theoretical richness of remedies is revealed by the lack of agreement about the purposes of remedies. Most would agree that compensation for the violation of rights should play some role, but there are differences about how compensation is measured. There is no consensus about whether regulatory, deterrent or even punitive concerns should animate remedies.

Remedies often raise complicated and contested institutional issues. The Supreme Court's landmark 2003 decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*² features a range of views about the limits of judicial competence and legitimacy when crafting constitutional remedies. Because remedies interact with the outside world, they require courts and tribunals to think about the limits of their institutional role when crafting remedies.

Much of the existing scholarship and doctrine on remedies is based on a separation between remedies at private and civil law, on one hand, and public law remedies, on the other. In this collection, we hope to break down some of the barriers between private and public law remedies by including contributions from both fields. Public law remedies have traditionally been the junior partner to private law remedies and have attracted less attention. However, over the last twenty-five years, under the influence of the *Canadian Charter of Rights and Freedoms* and various human rights codes, public law remedies have come of age.

Public and private law remedies can mutually benefit from shared experience. For example, a pressing question remains the extent to which damages under either the *Charter* or the human rights codes should follow or diverge from the structure of damage claims found under private law. Cases like *Doucet-Boudreau* suggest that extensive private law experience in enforcing a variety of injunctions can be relevant when crafting such remedies under s. 24(1) of the *Charter*. Indeed, there are

² [2003] 3 S.C.R. 3.

many opportunities for cross-fertilization and mutual learning between private law and public remedies.

We are fortunate to feature essays which encourage debates within private law, namely between the pragmatic and case-by-case development of remedies at common law and the more systemic and conceptual approach taken to remedies under the *Civil Code of Québec*. This also raises the question of the degree to which different legal traditions and influences should be reflected in the crafting of remedies, including those found in indigenous and international law and in the work of administrative agencies. Restorative justice and alternative dispute resolution also provide flexible and new ways to think about the ability of the affected parties and communities to devise remedies that are both meaningful and effective for them.

Another cross-cutting issue in remedies is the degree of deference that appellate courts should afford to the judge or tribunal who issued the remedy in the first place. There is wide agreement that some deference to the decision-maker who is closest to the ground and most aware of the factual context should be favoured but, beyond that initial principle, consensus can break down. This raises the issue of to what extent can private law and constitutional law learn from administrative law where issues of deference have been central not only to the review of remedial but also substantive decisions.

I. PRIVATE LAW REMEDIES

The first part of this book focuses on the relationship between rights and remedies in the realm of private law and considers the remedial issues likely to be confronted in the future with respect to contractual, tortious and restitutionary rights.

Professor Stephen Smith of McGill University's Faculty of Law addresses the fundamental theoretical issue of the relationship between rights and remedies in the common law. Are they discrete and distinct elements to be determined sequentially or are they inextricably bound? Professor Smith argues that there is no easy or straightforward answer to that question. Remedies sometimes directly replicate rights; sometimes they transform a right into a near substitute; sometimes remedies create entirely new rights; sometimes remedies are given where plaintiffs have no rights; and some rights are not protected by remedies at all. By carefully exploring and elaborating examples of this five-part taxonomy of

remedial orders, Professor Smith demonstrates the richness and the complexity of the rights-remedies relationship.

Smith rejects both the formalist view that rights exist independently of available remedies and the realist view that a right is defined by the remedy a court will actually grant. He identifies three kinds of rights: “private rights” as between the parties that exist prior to any court order; “action rights” that entitle a plaintiff to an order once certain facts are proved; and “court-ordered rights” that come into being once the court makes its order. These distinctions account for the fact that court-ordered remedies do not always precisely replicate private rights.

By viewing the law of court orders as a branch of public law, shaped by factors other than the contours of private law rights, Smith explains the various ways remedies relate to the private rights they protect, by replicating or transforming private rights and sometimes creating new rights, while other times giving remedies when no rights exist or declining to protect rights at all.

Professor Helge Dedek of McGill University’s Faculty of Law provides a comparative perspective on the relationship between rights and remedies. He points out that the discourse of the civilian tradition focuses upon abstract rights and does not recognize “remedies” as forming a distinct or discrete category. The common law tradition, on the other hand, with its pride in pragmatism and its evolution through various forms of action and procedure, emphasizes concrete remedies over abstract rights. However, recent common law scholarship has engaged in a more rigorous consideration of the relationship between rights and remedies and, of course, the civil law must equally provide for the actual realization of abstract rights. While the common law’s preference for damages over specific performance as a remedy for breach of contract suggests the primacy of remedies over rights under that tradition, Professor Dedek cites Smith’s theory of remedies, which construes available forms of redress as public law rights citizens hold against courts as a means of preserving the integrity of the private law right to contractual performance. By according primacy to specific performance, the civil law reflects a rights-based approach that circumvents the right-remedy debate. In the civilian tradition, a judicial decision does not create a new legal situation but rather reflects the pre-existing legal relationship between the parties, revealing civilian legal discourse as being at odds with the common law’s rights/wrongs/remedies taxonomy.

Dedek offers several explanations for these differences between the two traditions. The influence of academic writing on the civil law favours a rights-orientation over the common law's attachment to pragmatism and results. Civilian scholarship traditionally focused on the subjective rights of the individual, endowed with both metaphysical and ontological significance, and the strict separation of substance from procedure. Another important influence is the traditional view that the civilian judge simply finds the law and implements it, a view closely connected with the idea of the court sanctioning pre-existing rights. This may be contrasted with the common law tradition of judge-made law and the corresponding tendency to perceive courts as creating rights through granting remedies.

Professor Rosalie Jukier provides further comparative insight with her analysis of the availability of specific performance under both major legal traditions. Her study focuses on the post-1980 emergence of specific performance as a significant presumptive remedy under Quebec's civil law regime. Professor Jukier argues that according specific performance presumptive status is appropriate both from a doctrinal and from a theoretical perspective. It is the will of contracting parties that the contract be performed. They acquire a right to insist upon performance which the court should enforce. Specific performance properly emphasizes the plight of an innocent party who has been the victim of a contract breach rather than the interests of the breaching party. Specific performance, she argues, is the morally superior remedy that best advances the goals of encouraging contractual performance and protecting interactional expectations. Jukier argues that specific performance also offers practical advantages. When that remedy is engaged, the cost and uncertainty of proving and measuring damages is avoided, as is the risk of under-compensating the innocent party.

Moreover, Professor Jukier defends against the arguments as to the alleged shortcomings of specific performance. In particular, she resists the proposition that specific performance unduly invades personal liberty. In her view, the dichotomy between negative and positive obligations is both false and impossible to maintain. She concedes that purely personal obligations—the opera singer's contract to sing, for example—should not be specifically enforced, but that most contractual obligations are not purely personal. Professor Jukier rejects the theory of efficient breach as incompatible with the will of the parties and, in event, questionable even from the perspective of economic analysis. While supervision of court orders is a relevant factor, courts routinely supervise

complex orders in other areas and civilian courts have been appropriately skeptical of this supposed barrier to specific performance.

Professor Jukier concludes with a comparison of the treatment of long-term commercial leases. In common law jurisdictions, judicial reluctance to require a defaulting party to assume the “hardship” of performance and to undertake the supervision of a long-term obligation has prompted the courts to decline specific performance of a long-term lease against an anchor tenant in a shopping centre.³ In Quebec, courts have been unsympathetic to the plea of “hardship” and obligations of this nature have been specifically enforced.⁴ Cases of true hardship can be dealt with under the civilian concepts of good faith and abuse of rights or by a clearly drafted “damages only” clause. In the end, while making specific performance the presumptive remedy is preferable from both a theoretical and practical perspective, “presumptive” is not synonymous with “always.” Specific relief should be favoured, but it may be inappropriate for a variety of reasons, including personal liberty concerns, abuse of rights or the parties’ own bargained intention to prioritize the remedy of damages.

Professor Elizabeth Adjin-Tettey of the University of Victoria’s Faculty of Law offers the first of two chapters dealing with damages for personal injuries. Professor Adjin-Tettey’s central thesis is that the assessment of personal injury damages should seek to improve therapeutic outcomes for victims and minimize the potentially harmful effects of engagement with the legal system that may result from focusing on social identity. Compensation rests upon the formal legal principle of *restitutio in integrum*—restoring the plaintiff to her *status quo ante* as far as money can do—but the reluctance to infuse broader policy considerations into compensation for tangible interests in ways that promote social justice, fairness and the equal moral worth of all plaintiffs can reinforce historical patterns of discrimination. Remedies for personal injury can reinforce and exacerbate the vulnerability and devaluation of members of marginalized groups. The *restitutio* principle can have a regressive effect on marginalized claimants by creating and reinforcing systemic inequalities on the basis of social identity, such as gender, race, ethnicity, (dis)ability and class, while constructing victims’ original positions and

³ *Co-operative Insurance Society v. Argyll Stores (Holdings) Ltd.*, [1998] A.C. 1.

⁴ *Construction Belcourt Ltée v. Golden Griddle Pancake House Ltd.*, [1988] R.J.Q. 716 (C.S.).

losses in such a way as to promote wealth redistribution from marginalized to privileged members of society.

While tort law is generally informed by the purely corrective justice model, corrective justice assumes a starting point of equality between the parties. If account is not taken of socially constructed differences and disadvantages, an overly formal application of the *restitutio in integrum* principle may reinforce and exacerbate those pre-existing disadvantages. This is incompatible with the *Charter*-based value of equality and fails to meet the corrective justice objective of full and fair compensation. Damages for cost of long-term care should not perpetuate inequality by devaluing services provided by family members and thereby further marginalize women, low-income earners and the economically disadvantaged. Compensation for impaired working capacity should equally avoid assumptions based on race, gender, disability and socio-economic status. The risk of further marginalization is especially acute in the cases of both young plaintiffs with no earning record and women whose contributions are often undervalued on grounds of gender discrimination. The analysis of the plaintiff's alleged original position, and hence the value of her loss, should be infused with egalitarian considerations to ensure the promotion of therapeutic outcomes and social change.

Professor Adjin-Tettey rejects the contention that tort law can be explained by the theory of corrective justice alone. Elements of existing tort law—the cap on pain and suffering damages and punitive damages, for instance—reflect concerns external to those of corrective justice. She argues for a more pluralist and instrumental theory that accommodates concerns of distributional and social justice. Tort law should ensure that the assessment of damages promotes the well-being of tort victims rather than reinforcing and perpetuating the marginalization of disadvantaged groups.

Professor Jeffrey Berryman of the University of Windsor's Faculty of Law asks whether three fundamental issues of personal injury compensation need to be reconsidered: (1) fault-based personal injury damages; (2) the cap on non-pecuniary damages; and (3) lump-sum awards.

Berryman provides a comprehensive review of academic writing and law reform studies, as well as the experience of worker's compensation schemes and New Zealand's comprehensive regime. All of these provide overwhelming evidence that no-fault compensation schemes

are fairer and more efficient without undermining the objective of deterring harmful behavior. Despite the strong case for no-fault compensation, Berryman considers reform to be unlikely because of a lack of public interest in the issue and the likelihood that concerted lobbying from groups interested in maintaining the status quo would stifle any move towards reform.

Berryman considers the principles and policies that drove the Supreme Court of Canada's decision to impose a cap on non-pecuniary personal injury damages. The incommensurability of such losses means that any damages award must be either *ipso facto* arbitrary or conventional. Both correctional justice and economic analysis theorists argue against such damages. On the other hand, public opinion strongly favours some monetary compensation, a factor accommodated by capping rather than eliminating such awards. The need to ensure that all awards must be fair and reasonable was met by the functional approach of limiting—not “capping”—damages to the amount needed to provide the victim with solace, as measured by what reasonable alternatives could be deployed to substitute for the loss in enjoyment and amenities. Finally, by giving paramountcy to pecuniary awards for cost of care, the Supreme Court felt that it was entitled to consider other social policy factors with respect to non-pecuniary damages, in particular, the economic burden large awards impose on society and insurance costs. Berryman dissects the formal and conceptual difficulties inherent in limiting non-pecuniary damages, argues that the model can be improved, but concludes that it would be wrong to abandon the limit absent the adoption of a comprehensive no-fault scheme. As for lump-sum awards, Berryman observes that the case for periodic payments that avoid the risks of over- and under-compensation is strong but that there are practical impediments in the way of adoption.

Gordon Cameron examines the issue of awarding damages measured by the benefit to the defendant. Outside the law of unjust enrichment, the law typically does not concern itself with how much the defendant has benefited from a tort or breach of contract. Damages are ordinarily assessed on the basis of the loss suffered by the plaintiff rather than any gain the defendant has realized from the wrong. Yet, awards reflecting the defendant's gain sometimes are made and accord with our sense of justice. Cameron attempts to provide a justification for such awards that is compatible with the law's usual focus on the loss suffered by the plaintiff.

Cameron argues that most tort and contract cases awarding damages measured by the benefit to the defendant involve a breach of the plaintiff's right to prohibit absolutely the defendant's conduct. Such cases involve a right for which the law accords a "property right" protection, enforceable by way of injunction or specific performance. Where specific relief is not available—usually because the breach has already occurred—the plaintiff has suffered a loss, namely the defendant has taken something for which the plaintiff could have required payment under threat of an injunction. The court therefore makes the defendant pay the amount he or she ought to have paid had the defendant sought permission to perform the act. As the defendant has proceeded without asking for permission, the law assesses the value of the plaintiff's lost opportunity to bargain for that permission at an amount virtually equivalent to the amount the defendant gained from the breach. Such an award avoids the risk of under-compensating the plaintiff for the breach and encouraging defendants to chance a breach without first asking for the plaintiff's permission.

Punitive damages are another area where the law focuses on gains made by the defendant. Punitive damages may eliminate the benefit achieved by the defendant who commits a calculated wrong by transferring that benefit to the plaintiff. Cameron argues that, as punitive damages are motivated by policy concerns external to the parties, it would be preferable to treat such cases as violations of a property right for which the plaintiff is entitled to compensation for loss of opportunity to bargain. Similarly, Cameron contends that tort cases involving an accounting of profits are appropriately embraced and explained by the "breach of a property right—loss of opportunity to bargain" analysis.

Professor Stephen Waddams of the University of Toronto's Faculty of Law explores recent developments pertaining to the limits on contract damages based on the principles of foreseeability and remoteness. From the mid-nineteenth century onward, the law purported to make damages for breach of contract predicable by limiting such awards to recovery for losses within the actual or reasonable contemplation of the parties at the time they contracted. However, the foreseeability principle has not always been followed. Waddams considers recent decisions of Canadian and English courts dealing with the foreseeability principle and concludes that, in Canadian law, the level of uncertainty has increased.

In a recent decision,⁵ the House of Lords limited damages for breach of a time charter on the ground that, although the owner's loss of a "follow-on" contract was foreseeable, the amount flowing from that loss was unpredictable and unquantifiable. This decision limits foreseeable but unquantifiable damages in the interest of predictability. By way of contrast, the Supreme Court of Canada recently affirmed the traditional foreseeability approach and found it justified damages for mental distress for breach of contract in certain cases, a decision that suggests an expansive and potentially unpredictable view of liability.⁶

Waddams argues that the idea that it is beneficial to enable the parties to make the cost of breach predictable at the time of contract formation necessarily implies that breach of contract cannot be treated as equivalent, in all respects, to other legal wrongs. Breaches of contract are inevitable and, in many contexts, tolerated in light of both business and legal considerations upon payment of monetary compensation. Predicting the amount of money compensation payable on breach of contract depends not only on the rules relating to remoteness, but on several other legal questions, in relation to which the level of uncertainty has increased recently in Canadian law. Among these are the availability of punitive damages for breach of contract, the availability of damages for mental distress, the failure of the appellate courts to set any predictable money limit on awards for intangible losses, the increasing use of jury trials in contract cases combined with repeated statements from the appellate courts that the assessment of damages is a proper and desirable function of the jury, the growth of class actions, and uncertainty about the extent of the ability of parties to exclude or limit damages, even by express agreement.

II. PUBLIC LAW REMEDIES

The second part of the book contains eleven essays devoted to the role and scope of remedies available in public law. The first five chapters in this part focus on various remedies available for violations of the *Charter*, two chapters focus both on *Charter* and administrative remedies, while the remaining four chapters deal with various issues concerning remedies in the administrative process.

⁵ *Transfield Shipping Inc v. Mercator Shipping Inc (The Achilles)*, [2009] 1 A.C. 61.

⁶ *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3.

A. REMEDIES AND THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

Professor Gary Gildin of Penn State's Dickinson School of Law examines the role of *Charter* damages in light of the extensive American experience with constitutional torts. He urges Canadian courts to look at the American experience as a cautionary tale and to take a more holistic approach to a person's entitlement to a remedy. He demonstrates how American constitutional law doctrine has evolved into three distinct silos relating to the immunities of individual officials, entity liability for damages, and standards for issuance of equitable and declaratory relief. He traces how the immunities enjoyed by individual officials who are sued in the United States have expanded over the years because of concerns about potential over-deterrence of officials. He argues that little thought has been given in American law to the effect of such expanding immunities on the ability of aggrieved individuals to obtain remedies.

The immunities enjoyed by individual officials in the United States are critical because individual states are protected from constitutional tort suits under the 11th Amendment, and the federal government has also been absolved from direct liability for constitutional torts. The effective result is that municipalities are the only level of government that can be sued for constitutional torts, as opposed to individual officials. In light of this, the courts have restricted municipal liability to cases where municipal policies clearly violate the constitution in contrast to the Canadian common law approach where policy decisions are generally exempt from liability, but operational decisions are not.⁷ In Professor Gildin's view, the result of all these restrictions is clearly less than optimal in either compensating or deterring constitutional violations. He also finds that restrictions on the availability of declaratory and injunctive relief in the United States fail to compensate for the restrictive nature of constitutional torts. With reference to the *Ward v. Vancouver (City)*⁸ case, pending decision in the Supreme Court of Canada, Professor Gildin makes a strong argument that Canadian courts should avoid the problems that have plagued American jurisprudence by adopting a more holistic and integrated approach to the questions of immunities, the choice

⁷ See e.g. *Just v. British Columbia*, [1989] 2 S.C.R. 1228.

⁸ 89 B.C.L.R. (4th) 217 (B.C.C.A.), leave to appeal to S.C.C. granted, [2009] S.C.C.A. No. 125.

between individual or governmental liability and the adequacy of alternative remedies to damages.

Professor Ghislain Otis of the University of Ottawa's Civil Law Section examines the range of remedies available for violations of Aboriginal rights by focusing on the decisions of the Inter-American Court of Human Rights. His essay, like Professor Gildin's, illustrates the utility of a comparative approach in expanding the range of experience and imagination in the crafting of remedies. This is especially true in areas, such as remedies for violations of Aboriginal rights, where the Canadian experience remains under-developed. Otis also highlights the increased tendency of Canadian courts to make reference to international and regional law in its judgments.

Professor Otis explores how the traditional remedial goals of full restitution, or *restitutio in integrum*, and compensation when restitution is not possible have both been recognized under article 63 of the *American Convention on Human Rights*⁹ and adapted to the unique context of collective Aboriginal rights. He examines a range of restitution remedies, including the return of land into the public domain, the more complex and difficult issue of return of land now held privately, and the revision of publicly provided extraction rights. Professor Otis then investigates a range of compensatory remedies in those cases where restitution is not possible. Compensatory remedies canvassed by the author include damages for pecuniary loss, material and moral damages, damages for non-pecuniary harms, including ceremonial or symbolic damages, and supervisory orders where the court retains jurisdiction. He concludes by suggesting that the experience of the Inter-American Court of Human Rights provides several lessons for Canadian courts, such as the willingness to undertake the difficult task of formulating remedies for violations of Aboriginal rights and a willingness to provide remedies for historical injustices without creating unnecessary new injustices.

Professor Martha Jackman of the University of Ottawa's Common Law Section begins her contribution with a discussion on the remedies available for violations of socio-economic rights from a comparative

⁹ Section 63(1) of this *Convention* provides as follows: "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

perspective, more specifically by arguing that Canadian courts have been conservative compared to courts in many other countries when fashioning such remedies. Indeed, the main remedy ordered in the socio-economic context was the Supreme Court of Canada's suspended declaration, in the 1997 case of *Eldridge v. British Columbia (Attorney General)*,¹⁰ of an entitlement to sign language interpretation when provided with medically required treatment.

Jackman recognizes the close connection between rights and remedies—a theme that runs throughout many of the papers in this collection—by arguing that the Canadian judicial approach to socio-economic rights has been impoverished by viewing such entitlements as “positive” as opposed to “negative” rights. She relates this conceptualization of negative rights to the declaration of invalidity in the *Chaoulli*¹¹ health care case, as well as to the invalidation of a Victoria by-law against setting up temporary structures in public parks.¹² She suggests that a more promising way forward is to focus on the need to provide remedies for violations of equality rights. Such an approach could build on cases such as *Vriend v. Alberta*,¹³ where the Supreme Court extended under-inclusive benefits, and cases such as *Doucet-Boudreau*,¹⁴ where it fashioned more complex relief to benefit minority language communities and stakeholders.

The Supreme Court's landmark 2003 decision in *Doucet-Boudreau*¹⁵ is the focus of the next two essays in this collection. Befitting the fact that the Supreme Court was closely divided at 5:4 on the appropriateness of the reporting back remedy used in that minority language education case, the two chapters on *Doucet-Boudreau* take differing perspectives.

Janet Minor and James Wilson are self-proclaimed skeptics about the kind of supervisory order formulated in *Doucet-Boudreau* and argue that supervisory jurisdiction is neither appropriate nor necessary in Canada. In particular, supervisory orders are unnecessary in Canada for policy reasons relating to the tradition of governmental compliance with

¹⁰ [1997] 3 S.C.R. 624.

¹¹ *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791.

¹² *Victoria (City) v. Adams*, 2008 BCSC 1363.

¹³ [1998] 1 S.C.R. 493.

¹⁴ *Supra* note 2.

¹⁵ *Ibid.*

court declarations. In their view, governmental resistance to *Charter* claims before a final decision is issued should not be confused with the compliance that Canadian governments usually provide after a final judicial decision is handed down. Minor and Wilson ultimately conclude that supervisory orders are not an appropriate or necessary form of dialogue between courts and governments in Canada.

Minor and Wilson also warn that supervisory orders may produce many practical problems. They will require successful *Charter* applicants, governments and courts to devote resources and time to the task of supervision. They note that, subsequent to *Doucet-Boudreau*, the Supreme Court has recognized that supervision imposes a “burden on the judicial system.”¹⁶ They also argue that the supervisory order in *Doucet-Boudreau* caused practical difficulties because of its lack of clarity. At first, there were concerns that the trial judge had retained jurisdiction in order to make further orders similar to those seen in American busing and other cases. In the end, however, it became clear that the trial judge had not retained jurisdiction for such purposes, but only to provide a forum for reporting on the province’s progress in complying with minority language school rights. They characterize this reframing of the remedy as a “mediation order.” They conclude that such an approach confuses the roles of courts and governments. They further warn that supervision imposes costs on all concerned and is an adversarial and unnecessary process, ill-suited to producing optimal policies.

Justice Paul Rouleau and Linsey Sherman characterize the remedy in *Doucet-Boudreau* as one based on flexible as opposed to detailed mandatory orders, coupled with supervisory jurisdiction. They argue that, in the appropriate circumstances, such orders can facilitate a respectful and productive dialogue between courts and governments. They provide a thorough description of the case, which stresses the systemic delays in complying with French language school rights in Nova Scotia. They also note the divided scholarly response to the case with some critics of the decision characterizing it as an unprecedented act of judicial activism, while others perceive it to be a flexible remedy that is consistent with precedents issued not only in Canada but in other democracies such as India, South Africa and the United States.

Justice Rouleau and Sherman emphasize the flexibility of the remedy in *Doucet-Boudreau* and contrast it with the more intrusive and

¹⁶ *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612, at para. 24.

detailed order that the trial judge would have had to make had the mandatory order been enforced by contempt. This characterization of the remedy suggests that the course apparently preferred by the minority of the Court in *Doucet-Boudreau*—namely the issuance of an injunction that could, if necessary, be enforced through contempt proceedings—might have resulted in more judicial activism in setting standards as well as the possibility of strained relations between courts and government. Justice Rouleau and Sherman helpfully conclude their essay by examining a range of factors that may help decide when a court should retain jurisdiction. These factors include the degree of governmental recalcitrance, the urgency of the matter, the expected length and degree of controversy over the implementation process, whether the supervision is directed to the legislature or the executive, and the nature of the right violated.

B. THE *CHARTER* AND ADMINISTRATIVE REMEDIES

The next two essays serve as a transition from *Charter* remedies to administrative remedies by dealing with both forms of redress. Justice David Stratas examines three separate but interrelated areas of law, namely actions for abuse of public office, for *Charter* damages and for negligence liability. In all three areas, he suggests that courts are concerned with both elements of justice and governance. Justice-based concerns relate to the need to provide aggrieved individuals with remedies and to ensure accountability for unlawful administrative behavior. Governance-related concerns pertain to the need to ensure that administrative bodies have discretion to act in the public interest.

Justice Stratas explores how courts have reconciled competing justice and governance concerns. With respect to actions for abuse of public office, he suggests that requirements for deliberate conduct or knowledge may give too much weight to justice as opposed to governance concerns. He argues that such “*mens rea*” requirements can be present in benign circumstances and may not effectively limit liability, especially when lawyers put administrative authorities on notice of their grievances. With respect to *Charter* damages, he outlines the qualified immunities that protect governments when they act under laws subsequently found to be invalid, as opposed to the unclear legal framework governing liability, causation and the determination of damages when officials violate *Charter* rights without statutory authorization. Finally, he suggests that the Supreme Court’s recent decision in *Hill v. Hamilton-Wentworth*

*Regional Police Services Board*¹⁷ may expand negligence liability by finding a duty of care and reasonable proximity when the police conduct an investigation. At the same time, there may be various policy factors and immunities relating to governance concerns that may serve as an effective defense to negligence liability claims. Like Professor Gildin, Justice Stratas suggests that there may be a case for a more holistic approach to governmental liability. Unlike Professor Gildin, however, he suggests that Canadian courts may have much to learn from the American experience relating to doctrines of qualified immunities.

Professor Kent Roach of the University of Toronto's Faculty of Law delves into the availability of remedies for discriminatory profiling. He examines both *Charter* remedies and those available in the administrative process. Roach starts with a discussion of remedial choice and outlines the twin dangers of asking for extravagant remedies that courts may be unwilling to order, or modest remedies that will provide litigants with only a hollow victory. He then explores the range of remedies that are potentially available from courts for proven violations of equality rights in the form of discriminatory profiling or detention of an individual on prohibited grounds of discrimination. He observes how criminal remedies such as exclusion of evidence, stays of proceedings and sentence reductions can only benefit a minority of victims of discriminatory profiling, namely those who are factually guilty. Like Professor Gildin, Roach predicts that the Supreme Court of Canada's forthcoming decision in *Ward v. Vancouver* will be important in determining the role of fault or qualified immunity when damages are only sought under s. 24(1) of the *Charter*. At the same time, Roach also warns that the quantum of damages awarded in *Ward* and other *Charter* cases, combined with the costs of litigation and the threat of adverse cost awards, will deter much litigation of discriminatory profiling claims. He also considers the costs and benefits of declaratory and injunctive relief and predicts that courts will be cautious about issuing complex injunctions despite the favourable precedent formulated in *Doucet-Boudreau*.

In the remaining parts of his essay, Roach outlines a wide range of non-judicial remedies for discriminatory profiling in an attempt to broaden remedial imagination. He examines remedies that have been ordered by administrative tribunals, including damage awards and complex relief ordered by human rights tribunals. He further tackles

¹⁷ [2007] 3 S.C.R. 129.

some of the challenges of addressing profiling claims in the national security context, where review agencies such as the Commission for Public Complaints Against the RCMP only have jurisdiction over one agency, while the RCMP often operates in the national security context in an integrated manner with customs, immigration, transport and security intelligence officials. Finally, Professor Roach explores a variety of potential legislative remedies for discriminatory profiling such as anti-discrimination clauses and laws defining and prohibiting profiling.

C. ADMINISTRATIVE REMEDIES

The remaining chapters focus on administrative law remedies. Professor David Mullan of Queen's Faculty of Law outlines and rationalizes the various grounds on which courts exercise their discretion not to provide remedies on judicial review applications. He assesses the presumption that courts will not interfere with preliminary decisions made by administrative tribunals. He notes that there may be some departures from this presumption in cases where the alleged error may involve matters of jurisdiction or allegations of bias. He then outlines how courts will decline to intervene if an appeal is available and suggests that this has evolved into a firm practice that is closer to a rule than a presumption, one that applies even in the face of allegations of jurisdictional error or bias. He likewise suggests that the presumption against collateral attacks on decisions has rule-like qualities. Nevertheless, it is not absolute especially in cases where there may be limits on the remedies available through direct attacks on administrative actions.

Professor Mullan posits that, in all these areas, courts have appropriately refused to grant remedies when doing so would compromise either effective administration or legislative choices about the appropriate decision-maker. One partial exception highlighted by the author is a general reluctance by courts to deny relief in cases of procedural unfairness, even in cases where the substantive decision on the merits might have been the same had the applicant been treated fairly.

Professor France Houle of the University of Montreal examines the use of policies, directives and guidelines by administrative agencies and the implications of the Supreme Court's recent decision in *Greater Vancouver Transportation Authority v. Canadian Federation of Students—British Columbia Component*.¹⁸ By recognizing that

¹⁸ [2009] 2 S.C.R. 295.

administrative bodies such as the British Columbia and Vancouver transit authorities have the capacity to create binding regulatory policies having force of law, the *Greater Vancouver* case marks an important step in Canadian administrative law. The Supreme Court accepted that general policies developed by the transit authorities under legislative authority constitute laws, and are therefore capable of placing reasonable limits that are “prescribed by law” as required under s. 1 of the *Charter*. Although the policies restricting advertising with political content were not justified in this case, other administrative bodies will have an incentive to create and then justify policies and directives that may place limit on a range of *Charter* rights. The recognition of the legal quality of such policies has significant implications for the exercise and review of administrative powers generally.

Professor Houle then canvasses the experience of directives under French administrative law as an indicative source of how administrative authorities, and subsequently courts, may exercise and evaluate the powers to place and justify limits on rights. This chapter, like those of Professors Dedek, Jukier, Gildin and Otis, underlines the increased interest by many remedial scholars and practitioners in matters of comparative law. It also provides an apt transition from an examination of remedies in courts to the formulation of remedies in the administrative process.

The remaining two articles on public law remedies focus on the remedies available from administrative tribunals, as opposed to those accessible through the courts. Heather MacNaughton and Jessica Connell examine remedies that are available from human rights tribunals. They start by exploring how the remedial and non-punitive nature of human rights legislation affects remedial decisions and supports the remedial goals of compensation and systemic compliance. With specific attention to *British Columbia’s Human Rights Code* and the principle that all remedies under human rights legislation must derive from statutory authority, they examine the availability of damage remedies in this context. Although the purposes of damages remain compensatory, the authors trace the increasing quantum in damage awards awarded by human rights tribunals. The quantum of such awards could be compared to the generally modest quantum of *Charter* damage awards canvassed by Professor Roach’s chapter. MacNaughton and Connell also suggest that the trend towards higher quantum of damages may increase now that the

Supreme Court, in *Honda Canada Inc. v. Keays*,¹⁹ has made clear that compensation for hurt feelings or discrimination may not be available in wrongful dismissal suits brought in the civil courts. This demonstrates, as does Professor Mullan's essay, that the remedies available before one tribunal may influence the remedies available before another tribunal dealing with the same dispute.

MacNaughton and Connell note that there has been some cross-pollination between civil and human rights cases with respect to wrongful dismissal claims. Nevertheless, they also conclude that the basis for awarding damages under contractual and human rights law remains fundamentally different, with the latter being governed by the principle that the complainant should be put in the position that he or she would have occupied had the discrimination not occurred. The authors conclude with a very useful survey of systemic remedies ordered and supervised by various human rights tribunals, along with a discussion of the important role played by alternative dispute resolution in the human rights context.

Dean Lorne Sossin of Osgoode Hall Law School, York University, and Professor Steven Hoffman of McMaster University examine criteria for evaluating remedial efficacy in the context of adjudicative tribunals in the health sector. They highlight both the dearth of empirical evaluation of the effectiveness of remedies provided by administrative tribunals and the difficulties of measuring success when tribunals have dual mandates to conduct fair processes and achieve outcomes in the public interest. Sossin and Hoffman note how the vast majority of governmental and academic examinations of the effectiveness of various administrative tribunals focus on the internal efficiency of the body, as opposed to its external impact. The focus on the internal workings of tribunals is also supported by legal factors that focus on procedural fairness and bias issues, as opposed to how judicial review relates to broader public interest outcomes of the system under review. The nature of legal scholarship also has favoured doctrinal research over empirically-based research into outcomes.

Despite all the challenges that they have identified, Sossin and Hoffman are, in the end, optimistic about the viability of empirical examinations of the remedial efficacy of administrative tribunals in the health field. They note increasing interest in empirical assessments of health law as well as the demands by stakeholders for effectiveness

¹⁹ [2008] 2 S.C.R. 362.

evaluations. They suggest several potential measures of effectiveness in the health care field, including better health services, public confidence in the health system, public and professional awareness of the tribunal's work and perceived legitimacy, fairness and satisfaction with adjudicative services and better decisions by primary health decision-makers.

CONCLUSION

We thank the authors who have put so much work, care and creativity into their papers. We are grateful to the Canadian Institute for the Administration of Justice for making this book possible by devoting its 2009 annual conference to the subject of remedies. In particular, we wish to thank our conference co-chair Janice Payne, CIAJ President Justice Anne McTavish, Justice Joel Fichaud and Professor Patrick Molinari who worked with us to plan the conference that produced this collection. We also thank the CIAJ's Executive Director, Christine Robertson, and her colleagues at the CIAJ for their dedication, help and advice throughout. Finally, we owe an enormous thanks to Danny Auron and Vincent-Joël Proulx, Law Clerks at the Court of Appeal for Ontario, who bore the brunt of editing the conference papers for publication.

We hope that this collection will inspire all those in the legal community to take remedies seriously both as a vital part of the law and an important subject for scholarship.