Ontario Human Rights Code

THE TWILIGHT OF THE *ANCIEN REGIME*

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THE LAST DAYS OF THE *ANCIEN REGIME* *

A. INTRODUCTION

In a well known paper published in 1979 Harry Arthurs argued against a traditional "Dicean Rule of Law" model which saw administrative tribunals as inherently inferior to courts[1]. Arthurs gave sophisticated voice to a view which has become dominant that administrative tribunals fill a role which is impossible for courts. This position in grounded in a distinction between traditional law, in which private rights conflict, and "public law", where private rights clash with public interest. Arthurs observes:

> There is substantial support for the proposition that common law judges are ill-equipped or unwilling to interpret legislation sympathetically or knowledgably.[2]

According to this view, a tribunal's superiority begins with a decision maker who is not constrained by all the cumbersome rules of the common law which are inherently hostile to the public interest. Furthermore, while the adjudicator may not be a lawyer, he or she is a specialist in the area in which she adjudicates. The administrative forum itself is also said to be superior to a traditional court because it is more informal, "results oriented", and focused on policy issues of public interest of higher importance than the dispute between the parties.

This paper is drawn from many sources, *inter alia*, a series of cases and problems involving human rights jurisdiction issues which we have prepared and argued, or perhaps merely analyzed and abandoned. Regarding issues we have argued, I have attempted not to reargue the matter here out of deference to the adjudicator, though it has been necessary to restate some of those issues with minimal comment as proved necessary to deal with the more comprehensive subject matter of this paper.

The author wishes to thank Jeremy Dolgin, student-at-law, for his prodigious efforts pulling together and updating scattered bits of research and incomplete essay notes from numerous active and inactive client and subject files.

The author would also like to pay tribute and give thanks to Bruce Porter of the Centre for Equal Rights in Accomodation. He would not necessarily agree with the ultimate conclusion offered here but his experience and insight have been critical in thinking through the complex issues raised here.

1 "Rethinking Administrative Law: A Slightly Dicey Business" in Osgoode Hall Law Journal, volume 17 No 1, April 1979.

2 ibid. p.30

A few years after this article was published Arthurs' mentor Bora Laskin wrote the majority judgment in the well known case of *Seneca College v Bhadauria*[3] which is generally taken to have entrenched human rights commissions and tribunals with the exclusive jurisdiction to grant remedies for claims arising under the *Human Rights Code* because it declared that no civil cause of action existed for *Human Rights Code* violations. While this decision did not refer specifically to Professor Arthurs' article it reflected its values as applied to the most vaunted of legal subjects - human rights.

The notion that a specialized human rights tribunal is better qualified to decide human rights cases has strong advocates. It is said that such a tribunal with specialized knowledge and appropriate sympathy for equality seekers is to be preferred to the courts. The structure of human rights enforcement in the *Code* summarized below can be seen as an attempt to create an exclusive jurisdiction regarding human rights matters for a specialized tribunal. Whether this idea is fundamentally sound at least bears discussion. It is as much a matter of political as legal judgment. In the conclusion some brief comments on this issue will be attempted. While the underlying theory of *Bhadauria* may have been persuasive in 1981, fifteen years of experience have indicated, to this author at least, that confining human rights issues to administrative tribunals is becoming untenable. Whether the underlying rationale of the Arthurs/*Bhadauria* position - that specialized tribunals give better justice - is true in the area of human rights is a large and difficult question. It is as much a matter of political as legal judgment. In the conclusion some brief comments on this issue will be attempted. While the underlying theory of *Bhadauria* may have been persuasive in 1981, fifteen years of experience have indicated, to this author at least, that confining human rights issues to administrative tribunals is becoming untenable. Human rights issues indeed do emerge in many ways and forms that are inseparable from traditional civil causes of action. Is it even advisable to try to insulate human rights principles from the general development of the common law?

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3 17 C.C.L.T. 106; [1981] 2 S.C.R. 181

But whatever the policy answer might be the fact is that in practice the exclusive jurisdiction which *Bhadauria*[4] symbolizes is now eroding. In some cases civil courts have agreed to hear claims arising from alleged *Code* infringements if they arise within the framework of the action and are not the cause of action *per se*[5]. For want of better terminology we will refer to this as vicarious jurisdiction. In Ontario, statutory amendment has deliberately created jurisdiction for labour arbitrators to enforce the *Human Rights Code* on their decisions. This has given rise to numerous procedural problems within unions where the decision whether to proceed with a grievance was gravely difficult before this new burden of being the main enforcement mechanism for *Code* violations. *Code* enforcement, vicarious civil litigation enforcement and arbitration enforcement have small but important differences that play out especially in the remedies available. With this tangle of overlapping jurisdiction a host of problems follow, problems which are perhaps opportunities for clever litigants but opportunities that are never less than complex and expensive. Also we note that all human rights codes in Canada have been written without privative clauses and the appeal courts have had only slight hesitation in taking a supervisor role in reviewing tribunal decisions[6]. Added to these jurisdictional problems is the well known and egregious underfunding of the commissions which undermines the most important premise of exclusive enforcement jurisdiction - that the commissions can and will enforce human rights. In short, *Code* enforcement has fallen into debilitating confusion, a downward spiral of contradictions tending to collapse. From the point of view of rights litigants, this confusion is most unsatisfactory. The fact that it is intriguing and challenging to the lawyers is no consolation.

There is another subset of jurisdictional cases of exceeding complexity and a life of its own. In some circumstances it is argued that the *Human Rights Code* violates the *Charter of Rights and Freedoms.* The earliest example of this was *Blanney* on sexual discrimination in sports which was not protected

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4 along with *Syndicat des Employes de Production et de l'Acadie v. Canadian Human Rights Commission, [1989] 2 S.C.R. 879*

5 see Part G - Case Allowing Court Jurisdiction for *Code* Related Matters

6 see Part C - Court Supervision

by the *Code* until the court ruled that that exclusion violated the *Charter*. More recently a similar ruling was made in xxx. This issue is currently before the Supreme Court of Canada in *Vriend.* In *Cooper* the Supreme Court ruled that the Commission and the tribunal taking power by virtue of a Commission appointment were not courts "of competent jurisdiction" to rule on the applicability of the *Charter* to the *Code*. Thus in cases, particularly concerning lesbian and gay right, where there is an argument about how far the *Code* might be stretched to protect rights in light of government inability to amend the *Code* it is necessary to litigate in court first to determine the meaning of the *Code* and then to make the application to the Commission for enforcement of rights. In this highly contested terrain it is possible that there might be seven hearings before rights are finally determined and enforced.

B. THE SCHEME OF THE ONTARIO HUMAN RIGHTS CODE

The basic scheme of the Ontario *Code* is well known. Part I sets out a catalog of prohibited forms of discrimination, in services, accommodation, contracts, employment, association and sexual harassment. Part II sets out certain important canons of interpretation and exemptions. Part III establishes the Human Rights Commission with responsibility for investigation advocacy of human rights cases, mediation of disputes and enforcement. The specific powers of enforcement are outlined in Part IV.

The first step in the process is the preparation and drafting of the complaint by the complainant often with the assistance of the commission staff. The respondent is given the right to reply. Section 33 says the Commission "shall" investigate. The investigative process which follows is entirely controlled by the Commission staff and in recent years has been subject to extraordinary delays due to insufficient funding. Staff may interview witnesses and require production of documentation, or might simply review the written positions of the parties. The staff investigation results in a report and recommendation which goes to the legal branch of the Commission for comment and

recommendation. The final report of the legal branch to the Commission itself on the question whether to appoint a board of inquiry is made available to the parties who are allowed to comment on the summary of the evidence and recommendation to the Commission. There is no hearing at this stage or before the Commission. If the case involves complexities, the parties' counsel, if they have same, are well advised to exercise the right to comment on the issues, but the internal advice of the Commission's legal staff will usually prevail.

Commission staff may "change hats" at any stage in the investigation process and suggest a settlement. Sometimes their initiatives may seem to the parties to be taking the opponent's side. But as noted above, they have a statutory responsibility "to endeavour to effect a settlement"[7].

There is no statutory appeal or judicial control over how the Commission might consider the case or over the substance of the Commission's decision whether to appoint[8]. The Commission has discretion under s.34 not to deal with a complaint.

> 34.(1) Where it appears to the Commission that,
>
> a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;
>
> b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;
>
> c) the complaint is not within the jurisdiction of the Commission; or
>
> d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,
>
> the Commission may, in its discretion, decide to not deal with the complaint.

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[7] *Code*, 1990 H.19

[8] See Part C - Court Supervision

The Commission's discretion whether to send complaints forward or not for reasons other than those enumerated in s.34 is found in s.36.

> 36.(1) Where the Commission fails to effect a settlement of the complaint and it appears to the Commission that the procedure is appropriate and the evidence warrants an inquiry, the Commission may request the Minister to appoint a board of inquiry and refer the subject-matter of the complaint to the Board.

The number of cases disallowed by the Ontario Commission under this section increased dramatically in 1995 and the interpretation of the section is emerging as a significant issue.

Whether this discretion includes a discretion to make a decision based on the credibility of witnesses is a matter of contention. How, it is asked, can, or should, Commissions decide the inappropriateness of evidence for want of credibility if they do not see or hear those witnesses? But the most contentious aspect of s.36 is the effect of the word "appropriate". As discussed below, it has been interpretted to give the Commission complete control over the determination which cases go forward to a board of inquiry.

In summary, the Commission has, and exercises, all the powers necessary to be the controlling gatekeeper of all *Code* enforcement.

If the Commission requests the Minister of Citizenship to appoint a Board of Inquiry this must be done (s.38). Once appointed, a Board of Inquiry shall hold hearings to determine the relevant matters (s.39), and decide whether and what remedial order under shall be made under s.41. At the Board of Inquiry hearing, counsel for the Commission has carriage of the action although counsel for the complainant is entitled to participate s.39(2). In practice, hearings are so protracted that no individual complainants could afford separate representation and therefore must rely on Commission counsel. This scheme gives the Commission great power over complainants.

It is noteworthy that there is no power in the Commission to grant interim relief prior to a finding by a Board of Inquiry that the *Code* has been infringed[9]. Recent amendments have given Boards of Inquiry the power to grant interim relief[10].

C. COURT SUPERVISION

(a) On Appeals from Board of Inquiry Decisions

After a tribunal decision the court's power on appeal and review is broad. Section 42(3) provides for an appeal in the Divisional Court on any question of fact or law. The trend of the case law is that on appeal it would appear that a court will show the usual curial deference to the trier of fact, a board decision when the question is one of "fact", but not when it concerns "law". [11]

This distinction was made recently by the majority of the Supreme Court of Canada in *Canada v. Mossop*[12]. Here, the Court was called on to decide if the tribunal's interpretation of "family status" under the Canadian Human Rights Code to include lesbian and gay couples could stand. While the court decided 4-3 that it did not, six of the seven judges agreed that the question of interpretation of the statute was properly reviewable. The majority recognized that Courts have shown curial deference towards certain specialized tribunals when a tribunal has superior expertise and that "the superior expertise of a human rights tribunal related to fact finding". However, the majority ruled that "such deference will not apply to findings of law in which the tribunal has no particular expertise"[13].

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9 See *Code*, 1990 H. 19, sections 33, 34, 36, and **[get reference from 78]**

10 Statute Law Amendment Act (Gov't Management & Services) S.O. 1994 c.27 amending *Statutory Powers Procedures Act* 1990 R.S.O. S.22 s.16(1)

11 See *Zurich Insurance Co. v Ontario,* [1992] 2SCR 321. This is the first of several cases on the nature of the courts supervisory role.

12 [1993] 1 S.C.R. 554

13 p.578

Thus, the crucial final word in statutory interpretation is reserved to the courts. In another relatively recent Supreme Court of Canada judgment, *University of British Columbia v. Berg*[14], the majority once again articulated the view that deference should be shown to a tribunal's finding of fact. The majority refer to Justice LaForest's majority judgment in *Mossop*.

However, *Zurich, Mossop, and Berg* seem to be at odds with another Supreme Court of Canada judgment, *Dickason v. Universty of Alberta.*[15] In that case, the majority began by recognizing a common law principle of curial deference to findings of fact by courts of first instance. In particular, the majority referred to *Bell Canada v. Canada*[16] where it is found that curial deference must be shown to findings made within a field of specialized knowledge of an administrative decision maker. However, the majority in *Dickason* go on to recognize that the Alberta human rights legislation, like the Ontario equivalent[17], explicitly provides for an appeal on a question of fact or law. Consequently, deference need not be shown even on factual matters.[18]

IS THERE A DIFFERENCE - CURIAL DEFFERENCE AND DEFFERENCE TO TRIER OF FACT?

In a recent Ontario Court of Appeal decision, *Re Large & Corporation of the City of Stratford et al*[19], the Court found that the Divisional Court did not err in law when it deferrd to a decision of an Ontario Human Rights Tribunal. After considering all of the Supreme Court of Canada decisions discussed above, the Court of Appeal concludes:

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14 [1993] 2 S.C.R. 353

15 [1992] 2 S.C.R. 1103

16 [1989] 1 S.C.R. 1722

17 s.42(3) of the Ontario *Human Rights Code* provides for an appeal on any question of fact or law

18 at pg. 1124

19 [1993] 16 O.R. (3d) 385

> In other words it appears to us that deference which the courts should give to findings of fact of human rights tribunals is based chiefly on their function and role as tribunal of first instance which sees and hears the witnesses, both law and expert.[20]

An appeal of this case was heard by the Supreme Court of Canada on February 27, 1995 but the decision has not yet been released. The question before the court was precisely whether the Divisional Court judge erred in law when he showed deference.

The case of *Cooper v* xxx can be seen in this light. The Supreme Court held that the Human rights Commission does not have the power to determine the impact of the *Charter* on the *Code*. The courts will rule on this legal issue, never the Commission or its tribunals.

Ultimately I have no quarrel with the Supreme Court's desire to retain a final say on the meaning of human rights codes. What court would or should yield by curial deference jurisdiction that is potentially quite broad and concerns legal interpretations of central and fundamental importance.

(b) Over Decisions Whether to Appoint a Board

But while the majority of the Supreme Court seems set on retaining the power to be the final voice on the interpretation of the *Code* after a tribunal decision it also seems determined that the

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20 at pg. 389

Commission should decide more or less without supervision which cases should go forward to a tribunal hearing. In *Syndicat des Employes de Production du Quebec et de L'Acadie v. Canadian Human Rights Commission*[21], the Supreme Court of Canada considered a situation in which a complaint was lodged to the Canadian Human Rights Commission, an investigation was carried out, and a decision was reached not to appoint a tribunal to hear the case. The majority found that the decision whether to appoint a tribunal was not one which a court could review. The majority's judgment was based on s.28 of the *Federal Court Act* which gives the Federal Court power to review administrative decisions made on a "judicial or quasi-judicial" basis. The majority ruled that:

> It is not intended that this [the decision whether to appoint a tribunal] be a determination where the evidence is weighted as in a judicial proceeding ... Rather the process moves from the investigatory stage to the judicial or quasi-judicial stage if [a tribunal is appointed]. Accordingly, I conclude from the foregoing that, in view of the nature of the commission's function and giving effect to the statutory provision referred to, it was not intended that the commission comply with the rules of natural justice.[22]

Syndicat therefore stands for the proposition that while some decisions of Commissions may be reviewable by courts, the exercise of discretion by a commission whether to appoint a board is not reviewable as it is not "judicial" in nature. This is significant as it gives commissions relatively free reign in determining which cases should proceed[23]. The only hope for the dissatisfied complainant is that some clear error of law appears in the Commission's reason that might give substance to a judicial review.

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21 [1989] 2 S.C.R. 879 at 899

22 at p. 899

23 The decision parallels *Dagg v. Ontario Human Rights Commission*, (1979) 26 O.R. (2nd) 100 D.C., leave to appeal denied, which upheld the absolute discretion of the Ontario Commission. *Syndicat* appears to overrule two previous decisions of the S.C.C. in which it required the federal Commission to appoint Boards. See: *Radulescfo* 84-85, and *Cashin* 88-89.

This begs the question whether reason are given, or given in sufficient detail, by the Commission that errors of law might emerge. Indeed the Commissions reasons are notoriously short and in the opinion of many hide reasons that are in fact interpretations of the *Code* that ought to be articulated and open to challenge. Would the Supreme Court which sees itself as the final interpretter of the *Code* be so protective of the Commission's discretion if it saw interpretations of law in the decision to reject a complaint?

In a recent case, *** , it was argued that the Ontario Human Rights Commission erred in interpretting the *Code* in deciding not to appiont a Board of Inquiry

[summarize and comment]

The law as it stands now, and the administrative practices at the Commission, pose many questions:

- settlement
- credibility
- Reasons
- errors of law

(c) THE "GATEKEEPER" FUNCTION AND THE APPLICABILITY OF THE CHARTER OF RIGHTS AND FREEDOMS

In addition to all of the jurisdictional confusion regarding rights enforcement is the as yet untested argument that the gatekeeper function of the Ontario Human Rights Commission offends S.7 and 15 of the Charter of Rights and Freedoms.

The powers of the Commission to determine which cases go forward to a Board of Inquiry are probably unique in administrative law. An appointed commission determines whether or not the alleged infringement of someone's statutory rights will be adjudicated. This is done by an administrative proceeding in which the applicant and respondent can do nothing but make written

submissions. Further, the decision of the Commission is not a decision on the merits of the complaint, but rather based on apparently unfettered discretion which cases proceed. In all other administrative law schemes wherein legislation purports to create rights, the individual has at least the right to appear at a tribunal to argue their own case on the merits. Even those administrative schemes where there is a loss of, or procedural restrictions on, the rights of individuals to enforce their rights are not so restrictive as the Commissioner's gatekeeper function. In Workers' Compensation schemes, for example, there is a loss of the right to sue but it is accompanied by a benefit to the worker under the Act and a procedure which allows the applicant a right to a hearing where his or her benefits will be decided. Similarly in professional discipline schemes, there may be control by the professional body on which cases go on to a discipline hearing but these schemes do not deprive a complainant of their alternate right to take the offending professional to court. In summary no administrative scheme which confers "rights" on the citizenry, let alone quasi constitutional rights, simultaneously takes away the citizen's ability to enforce his rights.

Section 7 of the Charter guarantees that citizens will not be deprived of security of the person without "fundamental justice".

Do *Code* violations and the problems of *Code* enforcement raise issues of "security of the person"? Section 7 is usually considered in the criminal law context where the prospect of jail is acknowledged to be a threat to the security of the person.

In *Singh* deportation was accepted as a threat to security of the person. And in *Reference re: CC s.193 and s.195.1*[24] (the "Prostitution Reference") Chief Justice Lamer specifically left open the question whether security of the person might be invoked regarding administrative law schemes[25].

Does it matter specifically which *Doce* rights are allegedly violated? Discrimination in housing and medical services might be accepted most readily as raising issues of "security of the person". Can it be argued that the entire set of human rights in the *Code* as quasi-constitutional rights are taken together the very essence of security of the person in the non-criminal context? These difficult qustions have yet to be seriously litigated[26].

Assuming "security of the person" is potentially infringed, does the *Code* enforcement mechanism provide "fundamental justice"? Can there be "fundamental justice" when the citizen does not have the power to enforce his or her rights? The meaning of "fundamental justice" is as yet largely undeveloped in Canadian case law. It is considered in *Singh v. MEI*[27] where the court laid down a general standard of "procedural fairness". In that particular administrative scheme the court held that *viva voce* hearings with a right to cross-examine on credibility issues was essential. Surely a good

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[24] S.C.R., at pp.43, 44 & 45

[25] See also *Morgenthaler et al. v. The Queen*, 31 C.R.R. 1, at pp.25-26, to the same effect.

[26] Note delays in processing human rights complaints have been accepted as infringing security of the person in *Kodellas* and rejected in *Nisbett*, supra fn 82.

[27] *Singh*, 1985 12 Admin. L.R. 137, see p.189.

argument can be made that the gatekeeping powers of the Human Rights Commission offend "fundamental justice".

Does the *Code* enforcement apparatus offend s.15? The *Code* is obviously designed to assist certain groups who suffer the effects of discrimination. Surely these are the same groups whom the *Charter* intends to protect in s.15. Is there unequal treatment that these groups have limited access to the tribunal that might enforce their rights compared to other citizens who have unlimited access to the courts to enforce their essential rights?

These are complex issues worthy of a separate paper. In this context they represent just one more substantial threat to the shaky effice of right enforcement as presently constituted.

D. *BHADAURIA* AND CIVIL JURISDICTION

i) The logic of *Bhadauria*

In *Seneca College v. Bhadauria*[28] Chief Justice Laskin said that the "legislature's purpose [was to] encompass, under the *Code* alone, the enforcement of its substantive prescriptions"[29], and thus no civil course of action could be litigated based on alleged violation of the *Code*. Part of his reasoning is reflected in the following passage:

> What we have here, if the Court of Appeal is correct in its conclusion ...
>
> **[get quote of MacTavish ... p. 376]**

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[28] (1981) 17 C.C.L.T. 106

[29] p. 120

Chief Justice Laskin also reviewed the problem from a procedural perspective. He surveyed the *Code* as it was then drafted and described it as "comprehensive"[30]. He went on to consider the possibility of summary conviction for contravention of the *Code*[31]. Laskin C.J.C. relied on the "elaborate enforcement machinery"[32] to conclude that this legislation was not intended to create a separate foundation in tort. Further, Chief Justice Laskin relied on s.14(b) which provided that a Board of Inquiry had "exclusive jurisdiction to determine any question of fact or law..."[33].

Under the wording of the statute at the time, the appointment of a Board was discretionary by the Minister of Citizenship after a recommendation by the Human Rights Commission[34]. Wilson J.A., speaking for the Ontario Court of Appeal in the reasons under appeal had relied on the entirely discretionary nature of the remedy available to a complainant under the *Code* as justification for upholding a common law right of action. But Laskin, C.J.C. overruled her saying "it is unnecessary to consider here how far the minister's discretion is untrammelled."[35] Laskin concluded:

> For the foregoing reasons, I would hold that not only does the Code foreclose any civil action based directly upon breach thereof but it also excludes any common law action based on an invocation of the public policy expresses in the code. The Code itself has laid out the procedures for vindication of that public policy procedures which plaintiff respondent did not see fit to use.[36]

[Check Quote]

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30 p. 114

31 The equivalent section of the current legislation is s.44 which provides for a summary conviction penalty for violation of a tribunal order.

32 1974 S.O. c.73 s.5 p.115

33 The current wording is different. S.37, 38, Code 1981 which merely provides that the Board "shall hold a hearing ... to determine whether a right ... has been infringed".

34 See (1980) R.S.O., c.340, s.17. But under current legislation appointment is mandatory. See (1981) S.O., c.53, s.73 (as amended (1984) S.O., c.58, s.37 and (1986) S.O., c.64 s.18).

35 *Bhadauria* p.120

36 p.120

ii) *Bhadauria* applied

The apparent logic of *Bhadauria* has been followed in some cases to prevent human rights issues from being added to other civil causes of action, but by in large the trend of the case has run against this earlier approach. What we have at the moment is something perilously close to concurrent jurisdiction. It is also clear that the courts have not yet worked through the implications of this as much as most of the cases deal with matter of stay applications - which case should proceed - not at the stage of conflicting results or remedies.

Ghosh v. Domglas Inc.[37] is the leading case for the proposition that a civil action should be stayed until a rights Tribunal determines the human rights issues. In this wrongful dismissal case the employee sued and subsequently launched a complaint to the Human Rights Commission. Justice McKinlay stayed the civil action on the grounds that the factual issues to be determined in the civil proceedings overlapped with the **Code** issues. McKinlay J. referred to an earlier decision of Justice Cory in *Benet v. GEC Canada Ltd.*[38] determined under the earlier legislation. In that case, Cory J. granted a stay of a civil case for wrongful dismissal where a Board of Inquiry was considering discrimination arising from the same facts. McKinlay J. noted that the ratio of *Benet* was indeed the statutory provision of exclusivity, but she went on to grant a stay under the new legislation notwithstanding the fact that exclusivity had been removed[39].

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[37] (1986) 57 O.R. (2d) 170

[38] 31 OR (2d) 49

[39] See 1980 R.S.O. c.340, *Ontario Human Rights Code*, s.18(6):

> 18(6). Subject to appeal under section 20, the board of inquiry has *exclusive*

McKinlay J. summarily analyzed the possibility of overlapping factual issues and conflicting findings of fact. She noted that some differnces did exist in available remedies in tha thte court would not award reinstatement that might be available after a Board of Inquiry. But she also seems to suggest that discrimination related to disability might be relevant to damage in the civil action. McKinlay concluded by quoting from the Supreme Court decision in *Seneca College v. Bhadauria.*

> ... not only does the Code foreclose any civil action based directly upon a breach thereof, but it also excludes any common law action based on an invocation of a public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy....

> *jurisdiction and authority* to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision.
>
> This section was first enacted in S.O. 1971, c.50, s.63.

Note, however, that the appeal section (s.20) referred to was also enacted at the same time. The exact wording was retained in the *Human Rights Code, 1981*, as s.41:

> (1) Any party to a proceeding before a board of inquiry may appeal from a decision or order of the board to the Divisional Court in accordance with the rules of court.
>
> (3) An appeal under this section may be made on questions of law or fact or both and the court may affirm or reverse the decision or order of the board of inquiry or direct the board to make any decision or order that the board is authorized to make under this Act and the court may substitute its opinion for that of the board.

This provision is still in effect in R.S.O. 1990, c.H.19, s.42.

Prior to 1981, there was a clause giving a board of inquiry "exclusive jurisdiction and authority", and that this disappeared in the 1981 amendments. But there was never a formal privative clause, and, according to the statute, appeals to Divisional Court have always lain on questions of both law and fact, not simply law.

> While the court could not award damages directly as a result of any discretionary acts of the defendants, there is no doubt that if the court were to find that placing Mr. Ghosh on long-term disability constituted constructive dismissal, the court would then have to make the additional determination of whether or not that dismissal was wrongful, and therefore compensable. In so doing, a court would be looking at similar facts to those which would of necessity be considered by a board of inquiry under the Code. However, the court would be without power to order reinstatement of the plaintiff, to order alterations to the workplace to make his function in his former position possible, or to award monetary compensation for mental anguish resulting from a breach of the provisions of the Code. All of these things can now be done by a board of inquiry.
>
> If proceedings before the court and under the Code were to proceed in tandem, it is conceivable that different findings of fact might be made by the board and the court; that different assessments of damages might be made with respect to similar areas of compensation; and also that awards may be made by both tribunals. Counsel for the plaintiff clearly stated that were two awards to be made, his position would be that no award by the court would be an award of damages for wrongful dismissal and any award made by the board would constitute double recovery under some heads of compensations is almost inevitable.[40]

Ghosh is therefore considerably wider in its prohibitory effect than *Bhadauria* and, it is respectfully submitted, an erroneous extension. *Ghosh's* case was well founded in the common law of wrongful dismissal and its traditional remedies. *Ghosh* had a contract which had been, allegedly, breached, unlike Bhadauria who had not yet been employed. The action by Ghosh was not based on statute or "an implication of the public policy expressed in the *Code*"[41]. It is respectfully submitted that the logic of Laskin C.J.C. in *Bhadauria* only goes so far as to assert that the common law recognized no remedy to the refusal to enter into the contract. It would have been more sensible in *Ghosh* to allow the civil action to proceed and to stay the tribunal hearings. In the civil action, the propriety of the employer's termination could be evaluated, applying in part, the statutory standards against discrimination as set out in the *Code*. The limited remedies traditionally available in civil proceedings

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40 *Benet.* A similar result was reached in a Manitoba Court of Appeal case, *Tenant v. Government of Manitoba* 25 Manitoba Reports (2d) 179. The Court revised a high court Order striking out a Statement of Claim in a wrongful dismissal action. The plaintiff's complaint to the Commission had been rejected while her civil complaint was partly based on alleged violations of the *Code*. The Court varied the Order to strike out only those paragraphs that referred to the *Code*.

41 *Seneca College v. Bhadauria*, op cit, p.120

ought to be supplemented by the more expansive remedies for Code violations (e.g., reinstatement).

A more recent case, *Meiklem Bot Quebec*[42], arose from similar facts to those in *Ghosh*. The plaintiff, Meiklem, brought an action for damages for wrongful dismissal and for assault and battery. She alleged that sexual harassment forced her to leave her employment. Meanwhile, Meiklem had also complained to the Human Rights Commission. Somers J. of the Ontario Court (General Division) stayed the action pending the disposition of the human rights complaint. He stated that the action must be stayed in order to avoid double recovery, duplication, and the possibility of inconsistent judgments.

The allegations in *Ghosh* and *Meiklem* are common in many employment termination situations. It is often impossible to separate *Code* issues of gender, race and sexual preference discrimination from traditional termination criteria of competence and insubordination. If the *Ghosh* approach is followed, the aggrieved employee may be effectively denied one portion of his complaint and perhaps remedies depending on which forum is chosen.

iii) ***Bhaduaria*** evaded

Notwithstanding *Ghosh*, Ontario courts have agreed to hear issues touching on alleged *Human Rights Code* violations in housing disputes, wrongful employment claims, and a number of other areas.

(a) Housing

In *Re Min-A-Mart Ltd.* and *506382 Ontario Inc.*[43], Justice O'Driscoll interpreted the meaning of "family status" and its application to the facts of the case. The District Court judge had stayed a landlord's application for an order for possession against a commercial tenant in s.119 of the Courts of Justice Act[44]. It was alleged by the tenant that the landlord was refusing to renew to the numbered

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[42] 41 C.C.E.L. 51
[43] (1988) 61 O.R. (2d) 1.
[44] (1984) S.O. c.11, s.119

company because the principles behind the company are the parents of someone who was involved in another dispute with the landlord/franchised and the landlord was punishing them because of their family relationship.

O'Driscoll J. ruled that "the order in appeal confuses and intermixes the identities of the contracting parties." He applied *Salomon v. A. Salomon*[45], refused to pierce the corporate veil and concluded that the complaint to the Commission "fails to allege or disclose a ground of discrimination within the meaning of S.3".

In *Metropolitan Condominium Corp. No. 624 v. George Ramdial, Nilufar Ramdial and Lana Salmon*[46], Judge Hudson interpreted the meaning of s.2 and s.9 to determine whether the condominium's by-laws prohibiting occupation by persons under 18 offended the *Code* provisions on age and discrimination in accommodation. The case arose by the injunction application of the corporation against the vendor, Ramdial. Lana Salmon did not appear in the District Court proceedings. Judge Hudson heard arguments on affidavit evidence and ruled that there is no discrimination on the basis of age as the complainant is only 13 while the *Human Rights Code* defines age as eighteen years or more. Furthermore, there is no discrimination on the basis of family status as the child is not prohibited from living in the building because of her familial situation, but her age.[47]

Salmon then filed a Human Rights complaint which was quickly joined to another similar case before a Board of Inquiry on "adults only restrictions". That inquiry heard lengthy evidence and argument on the issues and eventually ruled in favour of the complainants that the restrictive by-laws violated

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45 [1987] A.C. 22

46 Unreported, District Court, Judge Hudson, January 29, 1988. This case should be compared to York Condominium Corporation 216 v. Borsadi et al, 42 O.R. (2nd) 99, which came to a similar conclusion based on different statutory language

47 Salmon launched an appeal to the Court of Appeal. That court ruled that they would not hear Salmon's appeal. Although she had standing, she sought to raise issues that were not raised in the court below including *Charter* as well as *Code* issues [unreported, June 16, 1988].

the *Code*[48]. That decision was appealed and reversed in part.[49] In that case, Davidson J. found that the board of inquiry was right to rule that the *Code* was violated, but it erred in identifying which section was contravened. Davidson J. also found that the board of inquiry erred in its determination of a damage award. We are left then, with contrary decisions of the court on the same issue between the same parties, although on entirely different evidence.

Problems like Lana Salmon's often arise in landlord/tenant issues where it is alleged that termination of tenancy, for example, is in violation of the *Code*. Should the court in this circumstance hear factual or legal argument that might defeat an eviction? As with the employee terminated for reasons allegedly in violation of the *Code*, this raises difficult questions of overlapping jurisdiction.

In *Mercedes Homes Inc. v. Grace*[50], a simple application was made for an order declaring a tenancy agreement terminated for non-payment of rent. One month later, the tenants brought an application for an abatement of the rent. The tenants alleged that they had been harassed by other tenants and the superintendent of the building on the basis of their sexual orientation. They claimed that the landlord's failure to stop this harassment amounted to a failure to provide quiet enjoyment of the premises. The tenants had also made a claim under the *Human Rights Code*.

Sutherland J., of the Ontario Court (General Division) distinguished this case from *Bhadauria*. He began by stating what he considers to be the rule in *Bhadauria*:

> A civil action cannot be based **solely** upon a breach of the anti-discrimination provisions of the Code where the acts or omissions in question did not also constitute an actionable wrong apart from the Code. Today one may question whether it was intended to halt the evolution of the common law in these areas.[51]

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[48] unreported, June 20, 1990
[49] *Re York Condominium Corp. No.216 et al. and Dudnik et al.* 3 O.R. (3d) 360
[50] unreported, November 3, 1993
[51] Ibid. pp.26-27

Justice Sutherland concluded that since the claim in the application did not rest solely upon an alleged contravention of the *Code*, "but upon allegations of conduct actionable in this court" the case can be distinguished from *Bhadauria*. However, Sutherland is quick to recognize that getting out "of the Bhadauria frying pan does not get us out of the Ghosh-Meiklem fire." Sutherland is referring to the jurisprudence which discourages claims in civil court which are being concurrently considered by a Human Rights Commission. Sutherland finds that while the rule in *Ghosh* would suggest that the action be stayed, the particular circumstances of the case require that the court hear the matter. The "particular circumstances" considered relevant by Justice Sutherland are the fact that it is a landlord tenant matter concerning a small amount of money and that the tenants were in rapidly deteriorating health as a result of HIV.

(b) Employment

A number of claims have recently been brought to civil courts for damages arising out of sexual harassment in the employment context. While in most of these cases, the defendant has brought a motion that the action be stayed or struck out on the basis of *Bhadauria* and the evil twins *Ghosh* and *Meiklem*, Courts have dismissed these motions in a number of cases.

In *Alpaerts v. Obront*[52], the defendant sought to have a claim of constructive dismissal arising out of sexual harassment struck out. In a short oral judgement, Spence J, for the Ontario Court General Division, dismissed the application. He found that while in *Bhadauria* the cause of action relied exclusively on the *Code*, in this case the claim is for constructive dismissal which is a cause of action independent of the *Code*. The case is therefore distinguished from *Bhadauria*.

Lehman v. Davis[53] similarly involved a claim for constructive dismissal arising out of alleged sexual harassment. In this case, the plaintiff was demoted after bringing a claim to the human rights commission. She brought an action in civil court for constructive dismissal to which the defendant responded with a motion to dismiss, or stay the action pending resolution of the human rights

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[52] unreported, March 25, 1993

[53] 16 O.R. (3d) 338

complaint. As in *Alpaerts*, the Court finds that the case can be distinguished from *Bhadauria* as the action "is founded not on an alleged breach of the [Code] *per se*, but on the demotion"[54]. The court recognizes the problems of overlapping jurisdiction as set out in cases like *Ghosh*, but it finds that since the action was based on the demotion, it did not duplicate the human rights complaint.[55]

(c) Miscellaneous

In *Re London Life Insurance Co. and Ontario Human Rights Commission et al.*[56] Justice Steele interpreted the *Code* on a declaration application under Rule 14.05(3)(d) in order to determine whether the terms of a group insurance contravene the *Code*. The issue concerned pregnancy and discrimination by reason of gender. Counsel for the Commission appeared and objected to the motion. Steele J. considered the issue in some detail. He noted that there were no facts in dispute. He ruled as follows:

> While the court should pay deference to an administrative tribunal so as not to interfere unduly with its duties, this does not preclude applications otherwise properly brought to the court. Section 41 of the Code permits an appeal to the Divisional Court from a decision of a board of inquiry. However, there is nothing in the Code prohibiting the court from adjudicating upon relevant issues of law. Many statutes establishing administrative tribunals contain privative clauses (see workers compensation Act, R.S.O.1980, c.539, s.75), or give the tribunal express power to determine all questions of law or fact (see Ontario Municipal Board Act, R.S.O. 1980, c.347, ss. 34 and 35). Some statutes, like the Ontario Municipal Board Act, give power to the board to state a case to the divisional court for an opinion as to the law, and also provide for appeals to that court on a question of jurisdiction or law. It appears that the principal function of the Commission, under the Code, is to educate, conciliate and, where necessary, order compliance with the terms of the Code. Its

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54 Ibid. p.345.

55 The confusion Bhadauria has created is highlighted by comparing the two cases just discussed to the more recent cases of *Allen v. C.F.P.L. Broadcasting* (unreported, October 31, 1994) and *Townsend v. Canada*, 74 F.T.D. 21. Both of these cases, where the plaintiff claim damages arising out of sexual harassment, are struck out on the bases of Bhadauria reasoning. While the result may be understandable in *Allen* where the plaintiff's claim is for damages because of the sexual assault, in *Townsend* the claim is identical to that in *Lehman* and *Alpaerts* for constructive dismissal.

56 50 O.R. (2d) 748.

> main function is not to interpret laws of general application, although in exercising its duties it may be called upon to do so from time to time. If access to the court is to be interfered with, the legislature must clearly say so and, in my opinion, it has not done so in the Code.
>
> I conclude that there is nothing in the Code that precludes the present application. In fact, a decision by this court on the law relating to the undisputed facts interpreting the sections in question should be of considerable assistance to the Commission in exercising its duty under s.32 of the Code. A decision of the court does not interfere with the jurisdiction of the Commission, or in any way preclude that commission from investigating the complaint. A decision of the court may only help the Commission in resolving the dispute.[57]

Mr. Justice Davison of the Nova Scotia Supreme Court recently considered a similar problem in *Hines v. Registrar of Motor Vehicles*[58]. He agreed to proceed with a motion in Supreme Court by the Plaintiff complaining of the registrar's refusal to provide him with a driver's license based on his insulin-dependent diabetic condition. The applicant alleged that this violated the Charter of Rights s.7 and 15. The Nova Scotia Human Rights Commission sought to stay the application on the basis that a complaint should proceed under the Nova Scotia Human Rights Act. The commission argued that it had the requisite expertise, that its procedures would be quicker and cheaper, that other case before the commission raised similar issues, and that forum shopping should not be encouraged. Justice Davison dismissed the argument by the Commission. He ruled that the applicant should have a choice as to how he sought to enforce his rights and that the Commission should not accommodate Charter or administrative law issues raised.

In *Re Canada Trust Co. and Ontario Human Rights Commission*[59], the Ontario Court of Appeal overruled an interpretation of the *Code* by Justice McKeown and held that a scholarship trust administered by Canada Trust offended the *Code*. In this case, the Commission initiated a complaint regarding the terms of the trust. Subsequent to this, the trustee applied to the court for directions

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57 50 O.R. (2d) 748.

58 Lawyers Weekly, October 19, 1990, p.18

59 (1988) 61 O.R. (2nd) 75 (Ont. H.C.)

under s.69 of the Trustee Act R.S.O. 1980, c.512 and Rule 14.05(2) and (3). The Commission argued that the Court ought not to consider the issue because it was before the Commission.

Justice Tarnopolsky, speaking for the Court on this issue, quoted from Dubin J.A. in *Blainey*[60] quoting *Bhadauria* on the exclusive nature of the Commission/Board jurisdiction. Nevertheless, he ruled that the court below had proceeded correctly by interpreting the *Code*, although he goes on the reverse McKeown J. on the substance of his interpretation.

Justice Tarnoplosky gives three reasons for the distinction. First, he comments that the application is merely to interpret a trust deed not proposing "to advance the common law" by the creation of a new tort as in *Bhadauria*. Second, he observes that there is "serious doubt whether a board could grant an adequate remedy" because "the remedial powers under s.40 do not appear to give the board the power to alter the terms of the trust or declare it void." Third, he relies on the legal as opposed to factual nature of the issue.[61] Tarnopolsky J.A., to his credit, gives as much clarity to muddled problems as may be possible in light of the strong language of *Bhadauria*. But the law is hardly left in a satisfactory state.

(iv) Labour Arbitration

Not only are courts increasingly willing to consider claims arising out of human rights violations, but labour arbitrators are now given statutory and jurisprudential authority to apply human rights legislation. For example, the Ontario Labour Relations Act was amended to gives arbitrators the power to "interpret and apply the requirements of human rights and other employment related statutes."[62]

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60 op cit

61 at pp.62-63

62 s.45(8)(3) R.S.O. 1990

The application of human rights legislation to the arbitration context was given a boost in *Ontario v. Etobicoke*[63] where McIntyre J. ruled that parties to a labour contract could not contract out of the *Human Rights Code*.

The next major case extending the importance of human rights legislation in arbitration was *Yorkton Union Hospital v. Saskatchewan Union of Nurses*[64]. In that case, neither party brought up the issue of human rights in the context of a grievance and the arbitrator did not consider the matter. On appeal, it was ruled that an arbitrator is under a duty to consider human rights legislation regardless of whether it is argued.

Jurisdiction of labour tribunals to apply and determine *Code* issues is obviously helpful as long as the issue reaches the labour arbitrator. If the union denies and refuses to present the griever's view of this, or is accused or implicated itself, then the complainant faces the problem of two respondents in *Code* proceedings and an uphill battle to get the case launched through the investigation process at the Commission.

(v) Confusion Yet to Unfold - Remedies

No civil cases where rights violations have been accepted as an aspect of the claim have confronted the problem of this creeping overlap of jurisdiction at the level of remedies. The *Human Rights Code* has very limited remedies in some categories, $10,000.00 for "mental anguish"[65] as well as very broad remedial powers, eg. reinstatement. If the rights violation is relied on as part of the civil case, or as part of the argument for eg. aggravated damages, are the statutory limits on damages relevant?

In an appeal from a Human Rights Board of Inquiry, the Divisional Court had occasion to compare *Code* and civil litigation approaches to damages.

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63 (1982) 132 D.L.R. (3d) 14

64 [1993] 7 W.W.R. 129

65 s.41(1)(b)

Another area of possible friction is the question of consequential damages. The civil courts have a well developed jurisprudence of causation and damages and rationales why different types of damages might be awarded[66].

In *Re York Condominium Corp. No. 216 et al. and Dudnik et al.*[67] the court considers the scope of s.41 of the Act, the section which provides for damage awards. Davidson J. recognizes that, considering the rule in *Bhadauria* which prohibits claims in civil court for *Code* violations, an inquiry should not view human rights remedies as identical to civil law remedies. In other words, civil and *Code* remedies should be seen as completely separate things[68]. Based on this reasoning, Davidson J. overturns a Board of Inquiry's award to the Plaintiff of $25,000 which the Board called "special damages" for "significant opportunity loss". In that case, the Respondent, Lana Salmon, had been unable to purchase a condominium because she had a child. The "special damages" were said to compensate the plaintiff for economic loss as a result of this code violation. Davidson J. recognizes that this award may be appropriate in a civil context, but he finds that it is not appropriate for a human rights claim. The human rights violation, according to Davidson J. did not itself lead to financial loss, it merely barred the plaintiff from "living in the residence of her choice with her child". For this, the plaintiff is awarded $1500.00. In sum, the same facts in the context of a civil action would have provided a significantly different remedy. The fact is, however, that Salmon has no civil remedy, so more generous notions of damages are unhelpful to her.

After considering these "special damages", Davidson J. goes on to dismiss summarily the possibility of punitive damages being awarded by a Board of Inquiry[69]. He cites an earlier Supreme Court decision in which McIntyre J. finds that punitive damages "are not intended to be compensatory in

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66 *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193.

67 3 O.R. (3d) 360

68 at p.371

69 Leave to appeal the Divisional Court decision was applied for by the Ontario Human Rights Commission but the application was never proceeded with.

nature". Meanwhile, according to Davidson J., the *Code* only provides for compensatory damages[70].

(vi) Injunctions

A third area of potential confusion is that of injunctive relief[71]. As noted above, until recently the *Code* makes no provision for interim relief. It appears there are no remedial powers prior to the appointment of a tribunal. Civil litigators and others well understand the proposition that control of the disputed property or funds during the course of typically lengthy court proceedings is often decisive to the outcome of the case. Whether injunctions would of equivalent importance for victims of *Code* violations is an interesting question. Someone evicted from their apartment or terminated from employment because of disability (e.g., AIDS), who has to wait four years for the enforcement of their rights through the *Code* has been effectively denied their rights. A single mother on welfare in Toronto who loses accommodation for *Code* violations has great, perhaps insuperable, difficulties finding alternative space. But if *Code* violations are truly worth nominal damages which are typical after a successful tribunal decision what justification is there for an injunction which traditionally is based on irreparable harm?

In *Stevenson v. Air Canada et al*, Henry J. granted an interim injunction continuing the employment of a pilot who was being forced into retirement at age sixty allegedly in contravention of the *Canada Human Rights Act*.[72] This was subsequently reversed by the Divisional Court[73]. Virtually identical facts were before Griffith J. in *Lamont v. Air Canada et al*[74]. Griffith J. disagreed with Henry J. and was subsequently relied upon with approval by the Divisional Court when they overruled Henry J.

Griffith gives a number of reasons for denying interim relief without clearly stating which, if any, is decisive. He notes that the plaintiff's civil claim is impossible because of *Bhadauria*, therefore no

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70 Ibid. at p.175
71 New legislation extends the power to grant injunctions; op cit from 11.
72 1976-77 (Can.) c.33
73 Henry J., 126 D.L.R. (3d) 242, rev'd 35 O.R. (2d) 68
74 34 O.R. (2d) 194

interim relief is in order. Further he says that the court has "no authority ... to issue an injunction to preserve the status quo while the plaintiff pursues his remedy before a statutory body over which the court has no control."[75]

In commenting on these words the Divisional Court in Stevenson said:

> Griffiths J. thought that the remedy if any was exclusively for determination by the Human Rights Commission and that it seemed at least preferable that if any injunctive relief were to be available it should be provided by the Federal court, the judicial body with exclusive jurisdiction to review the actions of the Human Rights Commission.[76]

The Court goes on to comment on a British Columbia case in which that Justice Domm concluded in a similar case that the court did have jurisdiction to consider interim relief.[77] Justice Domm ruled however, as had Griffiths J. that on the merits no interim relief should be granted. Griffiths J., Domm J., and the Divisional Court in *Stevenson* all felt that on a balance of convenience the injunction should be rejected. Domm J. and the Divisional Court mention that financial compensation under the *Code* is sufficient.

If this leaves one with the impression that there is jurisdiction to consider interim relief note the words of Griffiths J. in *Lamont*:

> I go further and suggest that if an applicant under the Human Rights Commission legislation will be prejudiced by extensive delay, then it is for parliament to recognize that contingency, and to change its legislation and give the Human Rights Commission authority to provide some interim protection and relief to the applicants.

This language is adopted without comment by the Divisional Court.[78]

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[75] p.200
[76] op cit p.73
[77] p.74
[78] p.76

By virtue of recent amendments once a Board of Inquiry is appointed it has power to grant interim relief[79].

E. *BHADAURIA* REVISITED

In his reasons in *Bhadauria* Chief Justice Laskin seemed to assume that all worthy human rights cases would proceed under the comprehensive procedures laid down in the *Code*. He brushed aside Wilson J.A. ratio in the Court of Appeal that appointment of a board was discretionary. Laskin's position has been bolstered in one sense because of changes in the wording of the legislation which now provide that appointment by the Minister of Labour (now Citizenship) is mandatory rather than discretionary as was implied by the prior wording once a request is made by the Commission.

But at the Commission level the legal developments since 1981 surely have confirmed the Wilson J.A. objection. The *Syndicat*[80] case noted above has now made clear the Commission has virtually complete protection from court review in its determination of the facts and on the issue whether a case should go forward. No complainant can be said to have control of his or her case. The comments of Wilson J.A. that human rights complaints are subject to discretion before the possibility of enforcement are even more powerful than they were in 1981. It seems implausible the Supreme Court could today sustain the logic of *Bhadauria* that the *Code* enforcement mechanism is a complete remedial scheme while simultaneously saying the enforcement of rights is subject to a total bureaucratic discretion which cases go forward as determined in *Syndicat*.

Further in his reasons Laskin C.J. relies on the elaborate machinery of enforcement put in place by the legislation. He did not foresee the contemporary reality that that machinery no longer works. Though some would dispute it, a strong case can be made that:

> * Lengthy delays at the investigation, the Commission decision making, and Tribunal stage are endemic. These delays are grounds for respondents to apply for dismissal

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79 See Statute Law Amendment Act (Gov't Man. & Services) S.O. 1994 c.27 amending s.22 of *Statutory Procedures Act*.

80 supra, footnote 11

based on prejudice[81]. The delays are also highly prejudicial in many situations to the complainants' cases where, for example, witnesses disappear.

* Commission decision which cases go forward are likely influenced by the financial resources of the Commission. This affects both the number of cases going forward and the Commission's willingness to take on difficult cases[82].

* Commission decisions which cases go forward are likely influenced by Commission strategies and priorities which favour those cases which make good demonstration cases and establish precedents. Small routine matters may simply be deemed unworthy of limited fiscal resources although that reason is disguised in formal decisions of the Commission.

The delay/dismissal scenario is particularly vexing to complainants who have no control over the pace of investigation by the Commission.

In summary it seems that the enforcement machinery of the *Code* no longer guarantees universal enforcement of human rights. Not the least reasons for this is lack of financial resources to do the job. These simple facts undermine the rational of *Bhadauria*. It is questionable if the case were reargued today that the decision could be sustained.

If *Bhadauria* is overturned by judicial decision the way would be open to adjudication of rights claims in the civil courts concurrent with enforcement under the *Code*.

Duel jurisdiction would address in a perverse way the problem of the lack of resources of the Commission by allowing those who the Commission chooses not to represent to be able to carry their

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[81] *Latif v. Ontario Human Rights Commission*, 17 C.H.R.R. D/198

Kodellas v. Saskatchewan (Human Rights Commission), 1989 60 D.L.R. (4th) 143 (Sask. C.A.)

Nisbett v. Manitoba Human Rights Commission, 1993 4 W.W.R. 420 (Man. C.A.)

[82] For example, the appointment of Boards of Inquiry dropped dramatically from 1994 to 1995.

case forward if not before a tribunal at least before the courts, provided they had access to sufficient resources. The complexity of duel jurisdiction would be worse than the existing situation. Which forum would have priority? Would the case law on stay of proceedings change? How would stays be determined? How long would this preliminary question delay the real issue? How much would it cost? Once determination moves into the courts what would be the proper measure of damages? Would interim injunctions in court be available? How would the court's approach to these problems compare to *Code* tribunals?

We note in passing that a statutory amendment to s.34 articulating a clear discretion for commission staff whether to proceed with an investigation (by changing "shall" to "may") would also, clearly, upset the assumptions of Chief Justice Laskin in *Bhadauria*.

F. SECTION 96

Section 96 of the Constitution prohibits the establishment of tribunals that may encroach on the regular powers of the civil courts. That case law was most recently summarized by the Supreme Court of Canada in *Re Residential Tenancies Act of Ontario*[83] as follows:

1. Is the power broadly conformable to the jurisdiction formerly exercised by s.96 courts? If not, the law is intra vires. If the power is identical or analogous to a power exercised by a s.96 court at confederation, one should proceed to step 2.

2. Can the function still be considered a "judicial" one when viewed within the institutional setting in which it appears? If not, the law is intra vires. If so, one should proceed to the third step.

3. If the power or jurisdiction is exercised in a judicial manner, is that power merely subsidiary or ancillary to the general administrative function of the tribunal or necessarily incidental to the achievements of a broader policy goal of the legislature, in which case it will be valid, or is it the sole or central function of the tribunal, in which case it will be held to be invalid.

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[83] 1981 1 S.C.R. 714.

The application of these principles to human rights tribunals was considered by LaForest, J., in *Re Scowby and Glendinning*[84] in a dissenting opinion[85]. The particular portions of that opinion on jurisdiction were not in dispute, nor commented on, by the majority. He opined that the Saskatchewan Commission, which has a jurisdiction similar to Ontario, was not a s.96 court. Justice LaForest placed great weight on the different objectives and procedures of human rights cases and of civil litigation. The former, he thought, had as its primary objective public education, with compensation as a secondary matter[86]. This writer believes this is a correct characterization of the "intentions" of many of those who conceived the legislation, but this conservative view is not supported by the wording of the *Code*, nor, these days, by the expectations of the public. It may reflect how the *Code* is actually enforced at the current time, but it does not reflect how equality seeker would like to see the *Code* enforced. As the enforcement of *Code* becomes something more than token. Many human rights advocates believe that all human rights violations that are proved should be remedied. If this were the case would Justice LaForest see a busy and vigorous Commission and its Tribunals as a section 96 court? This issue has never been seriously litigated.

There are other intriguing questions to be asked once we open the door and consider section 96. Typical human rights issues may seem modern, unique and unlike the subject matter of our courts of general jurisdiction, eg., failure to serve at a restaurant based on a prohibited ground, but more complex applications of the *Code* may not seem so. Sec. 11 of the *Code*, for example, prohibits

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84 1986 2 S.C.R. 226 (S.C.C.)

85 The particular portions of that opinion on jurisdiction were not in dispute, nor commented on, by the majority.

86 Current reforms in Quebec ate of considerable interest in this regard. A superior court judge will sit with two "assessors" as a tribunal with a right of appeal to the Court of Appeal

constructive discrimination. The applications of this doctrine may in the fulness of time have a much broader effect.

MAKE ALL THIS A FOOTNOTE - get refernce from fn 86

With the abolition of employment equity legislation[87], the pressure will again be on s.11 as a vehicle to attack faciallly neutral actions which have discriminatory impact.

Sophisticated rights litigation in this area focusses on the difficult task of analyzing and presently social science evidence on discriminatory impact. Many facially neutral rules impact indirectly on disadvantaged groups and require an analysis of "undue hardship". In the opinion of the author, an aggressive approach to s.11 has significant potential applications.[88] Our point here is that the steady expansion of constructive discrimination into many, if not all, areas of commercial endeavour that were once thought "safe" because of facial netruality pushes rights litigation deep into the every day territory of s.96 courts.

If the principle of constructive discrimination flourishes, the impact of human rights legislation will become broader still.

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87 Repeal Employment Equity

88 See, for example:

- "Note: Racially Disproportionate Impace of Faciallly Neutral Practices", (1977) Duke L.J. 1267
- Jacobs, L.A. "Equal Opportunity and Gender Disadvantage", (1994) 7 Can. J. of Jurisprudence 61

G. OBSERVATIONS AND CONCLUSIONS

There are three pillars of conservative control of human rights litigation. Most fundamental is the prohibition from bringing applications for *Code* remedies in court. Second is the Commission's exclusive right to determine which cases go forward. Third is the court power to determine on appeal what the *Code* means.

The activist perspective is rooted in the belief that a specialized commission and tribunal is likely to be more sympathetic to human rights issues than the courts. Therefore, they would deny the right to bring actions in court for rights violations and assert strong curial deference when rights cases come up on appeal. However, they chafe at the Commission's exclusive power to determine which cases go forward to a board of inquiry.

It is interesting to note that both human rights activists and conservatives tend to support Professor Arthur's preference for tribunals over courts though for quite different reasons. On the question whether *Code* rights should be enforceable in court by civil action, most activists and conservatives support the position in *Bhadauria* that there should be no civil remedy for human rights violations. Activists generally do not trust lawyers and judges to give human rights cases sympathetic treatment. The specially appointed tribunals are thought to be more sympathetic. Conservatives support the exclusive right of the human rights commission to pick and choose those cases which go forward to a tribunal. They see exclusive Commission/tribunal jurisdiction as a bulwark against a flood of claimant-controlled civil litigation in the courts where the remedies might be much more than the typical token tribunal awards. The Supreme Court has reinforced this in *Syndicat*. Some rights activists would prefer to give freer reign to rights claimants to litigate their complaints before a

tribunal where the Commission is slow, or refuses, to take a case forward. But activists do not seek to abolish the Commission and its power, responsibility - and budget - to carry forward test cases. At the tribunal stage activists would assert judicial deference by the courts to tribunal decisions both on matters of fact and law while conservatives see the need for judicial supervision of tribunal decisions that may go "too far". As noted, the Supreme Court in *Mossop* has taken the position by a 6-1 majority that it owes no deference on issues of statutory interpretation.

It should be noted that both conservatives and activists presume that the courts are tougher and less sympathetic on rights issues than board members appointed by the provincial government. This assumption is questionable. Younger judges coming from law practices where human rights issues are common are more attuned, more knowledgeable and certainly more sympathetic than an older generation. Tribunal chairs appointed from panels chosen by provincial administrations of ever shifting political approaches may or may not continue to be the more sympathetic to equality seekers than modern judges.

Activists assume board procedures are quicker, cheaper and generally advantageous for complainants. Whether that continues to be so is also uncertain. In the opinion of the author, it has rarely been true for large, complex or novel cases.

Professor Arthurs observed that courts specialize in common law litigation between individuals and not the formulation enforcement of public policy which is supposedly the forte of tribunals. The original "red tory" notion of human rights, which gave rise to the scheme of the current legislation's tends toward that view. Justice LaForest spoke for this perspective. Human rights are seen as a discreet set of policy-oriented problems to be segregated from other areas of the law. The cases which go forward are chosen by experts for public educational purposes. This view of human rights downplays the issues between the parties in favour of the public policy issues. Whether this is truly the meaning of the *Code* is debatable. Regardless, that view of human rights is not the public's view of their "rights". "Rights" are rights against another party, not a discretionary occasion for an educational exercise. Human rights are more like the traditional notion of the common law, issues between individuals. Enforcement of human rights, procedurally and substantively, should not be a burden borne by government. The offending party should pay the cost, not the public purse. Human rights are not discreet and specialized, but rather surface in, and suffuse, many if not most areas of human endeavour. As noted above, sophisticated notions of constructive discrimination give great potential to apply human rights in areas and in ways previously not developed. To conceive of human rights as a public policy exercise is to deny the breadth and depth of its modern principles. The point of these observations is this. Assuming Arthurs' basic observation about the nature and benefit of tribunals to determine public policy issues is correct, it is now difficult, inappropriate and probably unwise to try to apply it to human rights cases. Rights cases should be decided in the courts of general jurisdiction. The rationale of a specialized tribunal exists no longer. In the long term strategies to preserve a Commission/tribunal system are likely to fail, and represent an unwise fetter on the logical and broad development of human rights.

The Commission/tribunal system is in imminent danger of collapse because of the cumulative effect because of underfunding which limits the number of cases that are brought forward to a hearing and the jurisdictional confusion surrounding human rights and civil remedies. The current system frustrates claimants and respondents and serves no sensible purpose for activist or conservative. These are not easy problems for either side. Doing nothing about the funding issue prefigures a court challenge to *Bhaduauria* that the human rights system does not and cannot enforce human rights.

Vastly increased resources to the Commission would likely postpone this challenge by allowing the Commission to prosecute every plausible case and thus excising the fundamental complaint of the activists that the Commission does not enforce. But proper funding would defeat the conservative objective of holding in check the number of complaints. An alternate conservative strategy of changing the legislation to give the Commission an explicit discretion, removing the assumption that all human rights will be enforced, whether to take a case forward opens the door very wide to a court challenge to overthrow *Bhadauria* and permit court enforcement of human rights. Again this frustrates the conservative agenda of reducing the absolute amount of human rights legislation.

Usually activists say nothing less than a permanent tribunal with access for all would-be complaints is acceptable. With easy access and court-like proceedings before the tribunal how long will the expanded system last before Section 96 problems threaten the new jurisdictional apparatus?

In short, the jurisdictional problems of *Code* enforcement are unlikely to be cured to everyone's satisfaction by any combination of legislative reform and additional funding. In the author's opinion,

the only long term answer is to recognize the jurisdiction of the court in the *Code* matters. There may be an intermediate term strategy to preserve a more open Commission/tribunal system, but it should be seen as simply that - a scheme which in the long term will fail. It seems to this author there is no satisfactory long term answer to this conflation of funding, jurisdictional and enforcement problems except placing human rights enforcement in the courts. Furthermore it is desirable from a long term perspective that we place human rights in the main stream of legal decision making.