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## Discrimination, the Right to Seek Redress and the Common Law: A Century-Old Debate

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I. *Introduction*

Does discrimination law have anything in common with the common law? This question, which may have been reworded from time to time in deference to the age in which it was raised, is one which has recurred with remarkable tenacity throughout most of this century. It is also a question which continues, despite initial impressions, to be relevant to the manner in which adjudicators interpret and apply anti-discrimination legislation today.

During the first half of the century, it was the very existence of a right to obtain civil redress for discrimination that was in question. Since anti-discrimination legislation tended at the time to place emphasis on penal sanctions rather than on providing adequate compensation for victims of discrimination, plaintiffs turned to the common law or the civil law of Quebec in the hope of finding a means of redress through the courts. Although it has been said that "in none of these early cases did the court question the cause of action *per se*",<sup>1</sup> in practical terms, it is more accurate to say that the plaintiff's right to sue for discrimination was a hollow right for these actions almost always met with failure. Where on rare occasions a court was sympathetic to the plaintiff's plight, the opinion "turned out to be a lone voice crying in a judicial wilderness".<sup>2</sup> Thus it is generally agreed that the common law did little during this period to protect egalitarian values and that, with but a few exceptions, the courts were unresponsive to claims for injury based on discrimination. According to one commentator, "by 1940, it was clear that Canadian courts regarded racial discrimination as neither immoral nor illegal, and apart from a tenuous claim to breach of contract in special circumstances, the victim of discrimination could obtain no redress, however flagrant the discriminatory act."<sup>3</sup>

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\* This article is a revised version of a paper that was presented at the Canadian Institute For the Administration of Justice, October 11-14, 1989, Kananaskis Village, Alberta.

1. I. A. Hunter, "Civil Actions for Discrimination", [1977] 55 *Can. Bar Rev.* 106, p. 111.

2. I.A. Hunter, "Human Rights Legislation in Canada: Its Origin, Development and Interpretation" (1976), 15 *U.W.O.L.Rev.* 21, p. 23. The reference is to the 1899 decision in *Johnson v. Sparrow*, [1899] S.C. 104.

3. *Ibid.*, p. 24.

In reaction to the failure of the common law to provide adequate remedies for wrongs resulting from discrimination, legislatures began during the 1960s and 1970s to enact human rights laws as we know them today.<sup>4</sup> By 1977 every jurisdiction in Canada, including the ten provinces, the federal Parliament, the Northwest Territories and the Yukon,<sup>5</sup> had introduced anti-discrimination legislation prohibiting discrimination in areas such as housing, employment, and services customarily offered to the public. These laws also provided specific enforcement mechanisms enabling victims of discrimination to obtain a civil remedy for the injury that they had suffered. Of particular interest is the fact that, in every jurisdiction but Quebec, the enforcement of human rights legislation in first instance<sup>6</sup> was confided to specialized tribunals or boards of inquiry, and not to the courts.

But the legislation remained unclear as to whether individuals could choose, if they so desired, to exercise a private right of action instead of following the enforcement mechanism created by statute. In the late 1970s, a woman of East Indian origin decided to bypass the administrative and quasi-judicial procedures established under the *Ontario Human Rights Code* and to take a court action against a college,<sup>7</sup> alleging that its hiring practices were tainted by racial discrimination. The case revived certain issues left dormant by the enactment of human rights legislation. The debate now focussed on whether private civil actions for discrimination could co-exist with the enforcement scheme provided by the *Ontario Human Rights Code*.

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4. For a description of the legislative history of anti-discrimination legislation in Canada, see W. S. Tarnopolsky and W. F. Pentney, *Discrimination Law in Canada* (Toronto: Richard DeBoo Ltd., revised ed., 1985).

5. The *Canadian Human Rights Act*, R.S.C. 1985, c. H-6; the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22; Northwest Territories *Fair Practices Act*, R.S.N.W.T. 1974, c. F-2; the Yukon Territory *Human Rights Act*, S.Y. 1987, c. 3; The Alberta Individual's Rights Protection Act, R.S.A. 1980, c. I-2, S.A. 1985; the Saskatchewan Human Rights Code, R.S.S. 1978, c. S-24.1; the Manitoba "Human Rights Code," R.S.M. 1987, c. H175; the Ontario *Human Rights Code*, 1981, S.O. 1981, c. 53; the Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12; the New Brunswick *Human Rights Code*, R.S.N.B. 1973, c. H-11; the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214; the Prince Edward Island Human Rights Act, S.P.E.I. 1988, c. H-12; the Newfoundland Human Rights Code, 1981, S.N. 1988, c. 62.

6. In some cases the law provides a right of appeal before the ordinary courts: e.g. B.C., s. 17(4); Alta., s. 33; Sask., s. 32(1); Ont., s. 41; N.S., s. 36(1); Nfld., s. 31; N.W.T., s. 8.

7. *Bhadauria v. Board of Governors of Seneca of Applied Arts and Technology* (1980), 270 R.R. 141 (Ont. S.C.).

At first, this option appeared to have some judicial support. The Ontario Court of Appeal chose, in *Bhadauria v. Board of Governors of Seneca college of Applied Arts and Technology*,<sup>8</sup> to recognize the plaintiff's right to sue for discrimination. Madam Justice Bertha Wilson did "not regard the Code as in any way impeding the appropriate development of the common law in this important area",<sup>9</sup> and concluded that discrimination did indeed give rise to a cause of action at common law. But this parallel right of action did not survive beyond the appeal. Largely influenced by the comprehensive procedural scheme laid out under the *Ontario Human Rights Code*,<sup>10</sup> the Supreme Court of Canada unanimously rejected<sup>11</sup> this "bold" attempt to "advance the common law."<sup>12</sup> Speaking for the Court, Chief Justice Laskin declared:

[N]ot 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 the public policy expressed in the Code.<sup>13</sup>

As a result of the Court's refusal to recognize a common law tort of discrimination and also the right to sue upon a breach of the *Ontario Human Rights Code*, the debate regarding the existence of a private civil action for discrimination quickly lost its fervour.

Still, the decision leaves us in a quandary as to some issues and, while *Bhadauria* has its supporters, the decision has also become the target of criticism. For instance, while those who opposed the Court of Appeal decision found it "very difficult to perceive why [it would be] appropriate to establish a co-existent common law right and remedy alongside a statutory Code",<sup>14</sup> others protested against the Supreme Court of Canada's "judicial shortsightedness" in reversing the lower court ruling and

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8. 105 D.L.R. (3d) 707.

9. *Ibid.*, p.715.

10. The *Ontario Human Rights Code* sets out a mechanism for the investigation and settlement of complaints. The government is further given the discretionary authority to decide whether it will proceed with the complaint before a board of inquiry for adjudication.

11. (1981), 124 D.L.R. (3d) 193.

12. Per Laskin, C.J., *ibid.*, p. 194.

13. *Ibid.*, p. 195.

14. P.S.A. Lamek, Canadian Bar Association (Ontario), *Fifth Annual Institute of Continuing Education*, April 1980, as quoted in I.B. McKenna, "A Common Law Action for Discrimination in Job Applications" (1982), 60 *Can. Bar Rev.* 122, p. 125. See also, D. J. Mullan, "Developments in Administrative Law: the 1980-81 Term" (1982), 3 *Sup. Ct. L. Rev.* 1.

denying the availability of a civil right of action.<sup>15</sup> Lamenting “the trouble with *Bhadauria*”,<sup>16</sup> another commentator has recommended that the right to sue before the courts be considered as a means of improving existing human rights legislation. The proposals for legislative reform which have followed *Bhadauria* may indeed serve to rekindle a new debate: “Why not now simply amend the Code to provide a tort remedy at the appropriate stage...?”<sup>17</sup>

If we are to avoid the risk of confusion, it is necessary at this stage of the debate to distinguish between two separate issues raised by *Bhadauria* and the various commentaries that were written in response to it. The first, of a substantive nature, concerns the degree to which the common law can reasonably be expected to enhance and contribute to the effective development of the right to nondiscrimination. Recent developments in discrimination law suggest that there are important distinctions to be made between the approach to discrimination law and the traditional approach of the common law on an ever-growing list of issues. For instance, there are marked differences in the manner in which discrimination law and the common law respectively deal with public policy, the concept of fault, commercial freedom, and issues relating to remedies such as the right to seek reinstatement in employment. These differences merit attention not only in assessing the desirability of having a legislatively created tort for discrimination, as some authors have recommended, but also in order to achieve a better understanding of the relationship between these two areas of law and to establish whether their respective principles are necessarily interchangeable. The issue is also worth addressing because of the tendency of adjudicators, and especially the courts, to resort to common law principles when interpreting and applying human rights legislation without considering whether they are in fact relevant to the legislation and whether they can or should be transplanted into a case involving discrimination.

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15. I. A. Hunter, “The Stillborn Tort of Discrimination” (1982), 14 *Ottawa L. Rev.* 219, p. 226. See also, M. E. Baird, “Pushpa Bhadauria v. the Board of Governors of The Seneca College of Applied Arts and Technology: A Case Comment” (1981), 39 *Tor. Fac. L. Rev.* 96; D. Gibson, “The New Tort of Discrimination: A Blessed Event for the Great Grandmother of Torts” (1979), 11 *C.C.L.T.* 141; H. Kopyto, “The Bhadauria Case: The Denial of the Right to Sue for Discrimination” (1982), 7 *Queen’s L. J.* 144, and McKenna, *ibid.* Also, see Aziz v. Adamson (1979), 11 *C.C.L.T.* 134 (Ont.S.Ct.) (Linden J.), and A. M. Linden, *Canadian Tort Law*, (Toronto: Butterworths, 4th ed., 1988), pp. 300-301.

16. Ken Norman, “Problems in Human Rights Legislation and Administration”, in S. L. Martin and K. E. Mahoney, eds., *Equality and Judicial Neutrality*, (Toronto: Carswell Co., 1987), p. 398 ff. Also, see *Equality Now: Report of The Special Committee on Visible Minorities in Canadian Society*, March 1984, p. 138. According to Recommendation 43, complainants should have the option of instituting a civil action against a discriminator if they do not wish to go through the complaint procedure available at the Canadian Human Rights Commission.

17. Hunter, *supra* note 15.

The second point concerns the procedural consequences of *Bhadauria*, which confirmed the exclusive jurisdiction of the Ontario Human Rights Commission to decide, on a discretionary basis, whether a complaint should be taken before a board of inquiry for adjudication when parties fail to settle. Since complainants are not entitled to pursue the matter without the support and approval of the Human Rights Commission, this enforcement system is one which, to put it simply, makes the right to seek redress in cases of discrimination dependent on government authorization. It may be asked whether such an approach to the enforcement of human rights legislation, which is applicable everywhere in Canada but Quebec, is still justified today, particularly in light of the Supreme Court of Canada decision in *Syndicat des employés de production du Québec et de l'Acadie v. Canadian Human Rights Commission*,<sup>18</sup> which recognized that while human rights commissions may have the duty to act fairly, they are not required to provide parties with a full right to be heard according to the rules of natural justice.

I do not propose to find a complete and definite solution to a debate that has captured the attention of experts in the area for so long. Nor is it the purpose of this commentary to test the potential of the common law as a possible vehicle for the enforcement of the right to nondiscrimination at some future date – a topic which will be left for others to explore; the objective here is simply to consider the effective and coherent development of existing anti-discrimination legislation. What I intend, therefore, is to take a bird's-eye view of developments in discrimination law and to comment them in light of certain well-established principles of the common law in the hope of shedding some light on the relationship between the two areas of law as they stand today. This part of the commentary will then be followed by a brief look at the vexing question of the exclusive jurisdiction that human rights commissions and tribunals now have, except in Quebec, with respect to complaints of discrimination.

The experience in Quebec, which is quite different from that of other Canadian jurisdictions, merits a few words before embarking on this analysis. A fundamental difference between the two approaches is best understood by noting that *Bhadauria* has been rejected by Quebec law. In *Blanchette c. La Compagnie d'Assurance du Canada sur la Vie*,<sup>19</sup> the Quebec Superior Court simply declared that: “[i]l n'est pas possible de transposer cette solution au Québec.”<sup>20</sup> This 1984 decision confirmed a

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18. [1989] 2 S.C.R. 879.

19. [1984] C.S. 1240 (Qué.C.S.)

20. *Ibid.*, p.1242.

widely held view in the province that discrimination is a delict under the *Civil Code of Lower Canada*. Although legal commentators are no longer unanimous on this point and some have begun to challenge the soundness of this premise,<sup>21</sup> the courts have not yet revised their position on the matter. The idea that discrimination is a delict under Quebec law continues, therefore, to exert considerable influence on the interpretation and the application of the law of nondiscrimination in this province.

The procedural approach is also quite different. Under the *Charter of Human Rights and Freedoms* of 1975, the enforcement of the law was left in the hands of the ordinary courts,<sup>22</sup> and it was only in 1989 that the Quebec National Assembly decided to create a specialized Human Rights Tribunal.<sup>23</sup> Also, the Quebec Human Rights Commission does not have the exclusive jurisdiction to deal with human rights complaints, as will later be seen. Far from being irrelevant, these distinctive characteristics of the law in Quebec will provide a useful basis for comparison in the pages that follow.

## II. *Equality Rights, the Common Law and the Civil Law of Quebec: A Matter of Irreconcilable Differences?*

### 1. *Public policy*

During a large part of the century, discrimination was not regarded as contrary to public policy under the common law. The case of *Re Drummond Wren*,<sup>24</sup> which gave support to egalitarian values on the grounds of public policy, was the "solitary beacon"<sup>25</sup> which failed to

21. This is especially noticeable in commentaries dealing with constitutional principles and litigation: see, for example, René Dussault and Louis Borgeat, *Traité de droit administratif* (Québec: Les Presses de l'Université Laval, 2nd ed. vol. III, 1989), pp.740 and 750 note 143; Didier Lluellas and Pierre Trudel, "L'application de la Charte canadienne des droits et libertés aux rapports de droit privé", *La Charte canadienne des droits et libertés: Concepts et impacts* (1984), 18 *Revue juridique Thémis* 219, p. 249, and Ghislain Otis, "Le spectre d'une marginalisation des voies de recours découlant de la Charte québécoise" (1991), 51 *Revue du Barreau* 561, p.567.

Contra: M. Caron, "Le droit à l'égalité dans le Code civil et dans la Charte québécoise des droits et libertés", (1985) 45 *Revue du Barreau* 345, p. 352; P.-G. Jobin, "La violation d'une loi ou d'un règlement entraîne-t-elle la responsabilité civile ?", (1984) 44 *Revue du Barreau* 222, 223-224; K. Delwade, "Les articles 49 et 52 de la Charte québécoise des droits et libertés: recours et sanctions à l'encontre d'une violation des droits et libertés garantis par la Charte québécoise", in *Application des Chartes des droits et libertés en matière civile*, 1988, p. 122, H. Wolde-Giorghis, "Le fardeau de la preuve en matière de discrimination" (1987), 21 *Revue Juridique Thémis* 169, p. 185.

22. 1975 S.Q. c. 6, assented to June 27, 1975, and promulgated June 28, 1976: ss. 49 and 83.

23. S. 100 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, as amended by 1989 S.Q. c. 51, s.16.

24. [1945] O.R. 778.

25. Mullan, *supra*, note 15, p. 7, note 25.

affect the prevailing view that “[t]he sanctity of contract is a matter of public policy which we should strive to maintain.”<sup>26</sup>

It has been suggested that with time the civil law of Quebec became more receptive to the idea that discrimination violated public order and good morals.<sup>27</sup> However, the 1963 case of *Whitfield v. Canadian Marconi Co.*,<sup>28</sup> involving an individual who was dismissed from his position as an electrician after having broken company policy prohibiting “fraternization” with the native population in surrounding villages, illustrates the high level of tolerance for discrimination under this system as well. Rejecting the argument that the employment contract should be annulled as contrary to public order, the Quebec Court of Appeal in *Marconi* declared:

In my opinion the private agreement between Whitfield and Canadian Marconi Company providing that, as a general rule, Whitfield would not go to the neighbouring Indian or Eskimo villages and would not associate with the native population does not contravene any laws of public order or good morals.<sup>29</sup>

Indeed, one is more likely to find instances where public order was used by the courts to uphold discriminatory practices, as can be seen from case of *Langstaff* concerning the refusal to admit women to the Quebec Bar in the early part of this century: “to admit a woman and more particularly a married woman as a barrister [. . .] would be nothing short of a direct infringement upon public order”.<sup>30</sup>

Be that as it may, under existing human rights legislation, the law has evolved considerably and it is generally agreed that anti-discrimination legislation is clearly a matter of public policy. In *Ontario Human Rights Commission v. Etobicoke*,<sup>31</sup> the Supreme Court of Canada declared that parties cannot opt out of human rights legislation by means of a private contract, including collective agreements. The “quasi-constitutional” or “special nature” of human rights legislation gives it primacy over other legislation<sup>32</sup> and, at the very least, “clear legislative pronouncement” is required where the legislature wishes to alter, amend, repeal or otherwise introduce exceptions to such laws.<sup>33</sup>

26. *Re Noble and Wolf*, [1949] 4 D.L.R. 375, p. 390.

27. *Gooding v. Edlow*, [1966] C.S. 436, and *John Murdock Limitée v. La Commission de Relations ouvrières de la province de Québec*, [1956] C.S. 30.

28. [1968] B.R. 92.

29. *Ibid.*, p. 95.

30. *Langstaff v. The Bar of the Province of Quebec* (1915), 47 C.S. 131, p.137.

31. [1982] 1 S.C.R. 202.

32. In most jurisdictions the legislature has expressly recognized the paramountcy of human rights legislation: B.C., s. 22(2); Alta., s. 1; Sask., s.44; Man., s. 58; Ont., s. 46(2); Que., s.52; P.E.I., s. 1(2); Nfld., s.6.

33. *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, p. 156.



Developments such as these led at least one commentator to suggest that the earlier rulings were a thing of the past and that “social and judicial attitudes about discrimination have radically changed with the passing years”.<sup>34</sup>

However, contrary to such expectations, the common law has been slow to react to changes in the law of discrimination. The decision in first instance in *Canada Trust Co. v. Ontario Human Rights Commission*,<sup>35</sup> involving a restrictive covenant in a scholarship trust document serves to illustrate this point. In issue was whether the covenant, written in 1923, which excluded from the management of the trust as well as its benefits “all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage. . .”, was contrary to public policy under the common law.<sup>36</sup> Reluctant to disturb the principle of testamentary freedom on the basis of a “vague and unsatisfactory term” such as public policy, the Supreme Court of Ontario upheld the trust document in its entirety. It rejected public policy arguments on the grounds that this was “a doctrine to be invoked only in a clear case in which the harm to the public is substantially incontestable, and does not depend upon the ‘idiosyncratic inferences of a few judicial minds’”<sup>37</sup> The Ontario Court of Appeal disagreed. In determining whether or not the trust was in violation of public policy, the Court relied in part on an assessment of “values commonly agreed upon in society”:

The widespread criticism of the Foundation by human rights bodies, the press, the clergy, the university community, and the general community serves to demonstrate how far out of keeping the trust now is with prevailing ideas and standards of racial and religious tolerance and equality and, indeed, how offensive its terms are to fair-minded citizens.<sup>38</sup>

This part of the test based on public outrage, which seems to give much weight to social attitudes, raises an interesting issue. If the need to demonstrate “widespread criticism” is to be the basis on which a violation of public policy is found, the test may be unduly restrictive and unreliable. Even if one admits that social attitudes have evolved and that most individuals now recognize that racial and religious discrimination constitute reprehensible forms of behaviour, experience teaches us that

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34. Hunter, *supra*, note 1, p. 110.

35. (1988), 9 C.H.R.R. D/4506 (S.Ct. Ont.)

36. It was found that the matter had properly been brought before the ordinary courts rather than before the Ontario Human Rights Commission, because it involved “the administration of a trust, over which superior courts have had inherent jurisdiction for centuries and, in particular, with respect to charitable or public trusts.” (1990), 12 C.H.R.R. D/184 (Ont.C.A.), p.195.

37. *Supra*, note 35, p. 4514. For a criticism of this decision, see J.C. Shepherd, “When the Common Law Fails”, (1989) 9 *Estates and Trusts Journal* 117.

38. *Supra*, note 36, p. 191.

public opinion and sympathy can all too easily shift according to the mood of the day and the popularity of a given cause. Also, while most individuals possess a sense of justice, their conception of the good can easily be clouded by personal interests. It is tempting in this respect to recall what Bertrand Russell has described as "cat-and-mouse ethics." "Sympathy," he said, "is the universalising force in ethics [. . .] Sympathy is in some degree instinctive: a child may be made unhappy by another child's cry. But limitations of sympathy are also natural. The cat has no sympathy for the mouse; the Romans had no sympathy for any animals except elephants; the Nazis have none for Jews [. . .] Where there is limitation of sympathy there is a corresponding limitation in the conception of the good: the good becomes something to be enjoyed only by the magnanimous man, or only by the superman, or the Aryan [. . .] All these are cat-and-mouse ethics."<sup>39</sup>

Therefore, laws against discrimination and the policies on which they are based, may well provide a more reliable standard on which to determine what is or is not a matter of public policy. After all, human rights legislation does not, as one author put it, merely reflect "the common level of morality or accepted standards of social behaviour prevalent in the community; it must be regarded as a positive directing force, which can be used as an instrument of social progress."<sup>40</sup> In any event, the concurring decision in *Canada Trust* appears to accept that public policy is not only determined on the basis of community sentiment but also in light of laws and official documents: "it is gleaned from a variety of sources, including provincial and federal statutes, official declarations of government policy, and the Constitution."<sup>41</sup>

In Quebec, the legislature did not leave it to the judiciary to define public order nor are the courts required to scrutinize community sentiment in this regard. Influenced by the wording of the public order and good morals section of the *Civil Code of Lower Canada*,<sup>42</sup> Section 13 of the Quebec *Charter of Human Rights and Freedoms* states that discriminatory clauses in contracts or other juridical acts are deemed null and void:

13. No one may in a juridical act stipulate a clause involving discrimination. Such a clause is deemed without effect.

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39. B. Russell, *Power*, (London: Unwin Books, 1975), p. 169.

40. D. Lloyd, *The Idea of Law*, (Middlesex: Penguin Books, 1981), p. 143.

41. *Supra*, note 36, p. 198.

42. Which reads as follows:

13. No one can by private agreement, validly contravene the laws of public order and good morals.

Inspired by this provision, the Quebec Court of Appeal once remarked: “Les droits reconnus dans la Charte sont plus que des ‘conditions de travail’, ils sont des ‘conditions de vie en société’.”<sup>43</sup> The same court agreed on the basis of section 13 of the Quebec *Charter* and long before the recent Supreme Court of Canada rulings on a similar point,<sup>44</sup> that an arbitrator had the power to annul a discriminatory clause in a collective agreement.<sup>45</sup>

In both Quebec and other jurisdictions, it would appear therefore that the right to equality has respectively become a matter of public order and public policy not through any major breakthrough in the civil law of Quebec or the common law but directly as a result of anti-discrimination legislation and most probably also because equality is now a constitutionally protected value.

## 2. *Standard of Liability*

Another crucial question is whether the elements of liability for discrimination are compatible with the standards of liability in tort law or that of delict?

An important obstacle to fitting discrimination into the mould that has been shaped by the laws regarding civil liability, is that it has become increasingly evident that the element of “fault” is not a prerequisite to proving discrimination. The relevance of fault in this context was questioned by the Supreme Court of Canada in *Robichaud v. Canada (Treasury Board)*,<sup>46</sup> where LaForest J. remarked that “the Act [. . .] is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination.”<sup>47</sup> While it is true that this case dealt with the specific issue of the employer’s liability for the acts of its employees, the statement has broader implications. Not only does it provide a succinct description of the Supreme Court of Canada’s approach to discrimination law, it also situates recent developments in relation to other areas of law, particularly the common law:

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43. *Ateliers d’ingénierie Dominion Ltée v. Commission des droits de la personne du Québec*, [1980] R.P.209, p. 216.

44. *Douglas College v. Douglas/Kwantlen Faculty Association*, [1990] 3 S.C.R. 570; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5.

45. *Union des employés de commerce v. W.E.Bégin Inc.*, J.E. 84-65:

Le Tribunal d’arbitrage avait juridiction [...] pour interpréter et appliquer la *Charte des droits et libertés de la personne* qui est une loi d’ordre public dont on ne peut déroger contractuellement.

46. [1987] 2 S.C.R. 84.

47. *Ibid.*, p. 92.

The last observation also goes some way towards disposing of the theory that the liability of an employer ought to be based on vicarious liability developed under the law of tort[. . .] It is clear, however, that that limitation, as developed under the doctrine of vicarious liability in tort cannot meaningfully be applied to the present statutory scheme.<sup>48</sup>

The 1985 decision of *O'Malley v. Simpsons-Sears Ltd.*<sup>49</sup> constituted a turning point when the Supreme Court of Canada laid the foundation for an approach to discrimination based not on "intent" but "effect":

The *Code* aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties or restrictive conditions not imposed on other members of the community, it is discriminatory.<sup>50</sup>

Since *O'Malley*, it is recognized that there are at least three different methods of proving discrimination: i) direct discrimination; ii) adverse effect discrimination, and iii) systemic discrimination. The definitions of each of these different forms of discrimination provide the elements that are necessary to make out the plaintiff's case. The choice of one or the other of these methods of proof will, of course, depend on the facts of the case at hand.

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48. *Ibid.*, p. 91.

Interestingly, in matters involving sexual harassment, Quebec has adopted a somewhat different approach to the issue of employer liability. Employers are vicariously liable for the acts of their employees under the rules of delict found in s. 1054 of the *Civil Code of Lower Canada: Halkett c. Ascofigex Inc.*, [1986] R.J.Q. 2697 (S.Ct.Qué.); *Foisy v. Bell Canada*, [1984] C.S. 1164 (S.Ct.Qué.), rev'd on other grounds by [1989] R.J.Q. 521 (Que.C.A.). *Contra: Commission des droits de la personne du Québec v. La compagnie Bombardier M.L.W. Ltée.* (1983), 4 C.H.R.R. D/1447 (Prov.Ct.Qué.).

But the practical consequences of the two regimes are the same: in both there is an irrebuttable presumption of liability against the employer once it has been established that sexual harassment has occurred in the workplace.

Ironically, this standard of liability has been limited by statute in some jurisdictions: e.g. s.48(5) of the *Canadian Human Rights Act*, amended after the complaint had been lodged in *Robichaud*, and s. 44(1) of the *Ontario Human Rights Code*. Restrictions such as these have prompted one board, in the case of *Shaw v. Levac Supply Ltd.* (1991), 14 C.H.R.R. D/36 (Ont. Bd.Inq.), p. 67 to note that:

[T]he only thing that its enactment may have accomplished is to shield such artificial entities from liability for an entire range of unacceptable conduct for which, but for that provision, they might now be held liable, thus relieving them from having to provide a totally "healthy work environment".

49. [1985] 2 S.C.R. 536; (1985), 7 C.H.R.R. D/3102.

50. *Ibid.*, at p. 547.

“Direct discrimination” has been defined as a “practice or rule which on its face discriminates on a prohibited ground”.<sup>51</sup> Mandatory retirement policies, the refusal to rent to an individual because he is Black, or the exclusion of women from jobs in a police department on the grounds that “that is no place for a woman”, are all examples of direct discrimination.

“Adverse effect discrimination” was applied and defined as follows by the *O’Malley* Court:

[T]here is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.<sup>52</sup>

It is worth emphasizing that cases involving “adverse effect discrimination”, also referred to as “indirect discrimination” or “constructive discrimination”, do not require evidence of a causal connection between the prohibited ground and the act complained of. In this respect the use of the word “because” is somewhat misleading for, if taken literally, only cases involving direct discrimination would fit the test:

If the courts become overly preoccupied with *intent* or with *causation*, where the word “because” appears in the legislation being construed, the desirable aims of the legislation may be thwarted, the beneficial effects intended will be reduced, and more importantly, the legislative intent contained in the preamble may not be given effect to.<sup>53</sup>

Rather, the plaintiff must show: i) the existence of a rule, policy or practice, which ii) has a disproportionately negative effect on an individual or group that is protected by legislation from discrimination. If the rule cannot be shown to be job related or otherwise necessary, it will be illegal.

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51. *Ibid.*, p. 551.

52. *Ibid.* See also *Action Travail des Femmes v. Canadian National*, [1987] 1 S.C.R. 1114, p. 1137.

53. *Ontario Human Rights Commission and O’Malley v. Simpson-Sears Ltd.* (1982), 3 C.H.R.R. D/796 (Ont. Div.Ct.), per Smith, J., in dissent, p. 802. Similarly, see *C.N.R. v. Canadian Human Rights Commission* (1983), 4 C.H.R.R. D/1404, per LeDain, J., in dissent, p. 1413: “I note also that the words ‘because of’ [...] did not prevent the Court from concluding that the section permitted the application of the adverse effect concept.” And further, “the words ‘on a prohibited ground’ in section 10, which, in relation to effect, should be understood as meaning by reason of a prohibited ground of discrimination.” Contrary to *O’Malley*, the decision in *Bhinder* was upheld by the the Supreme Court of Canada, but on different grounds: *Bhinder and the Canadian Human Rights Commission v. C.N.R.*, [1985] 2 S.C.R. 561.

See, also *Robichaud*, *supra*, note 46, p.94.

“Systemic discrimination”, the third form of discrimination, was described by Chief Justice Dickson in the case of *Action Travail des Femmes* in this way:

[S]ystemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of “natural” forces, for example, that women “just can’t do the job” [. . .] To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.<sup>54</sup>

Systemic discrimination usually involves evidence that a protected group is underrepresented in the defendant’s institution or enterprise, and that the underrepresentation is the cumulative result of rules, practices or policies that are either directly discriminatory or have an adverse effect on the given group. The *Action travail des femmes* decision in first instance<sup>55</sup> provides a text-book example of a case of systemic discrimination involving proof based on statistics<sup>56</sup> and anecdotal evidence.

It seems difficult, if not impossible, to reconcile the elements of liability that apply to “adverse effect discrimination” and “systemic discrimination” with principles relating to the “duty of care”, a test of “foreseeability”, the need to show a “desire to do harm” or the “knowledge of the consequences of the act”, which may very well be relevant to a fault-based approach to liability, but not to proving discrimination.<sup>57</sup>

A fault-based approach to discrimination implies additional proof requirements and creates a “narrower scheme of liability”<sup>58</sup> than that which has been recognized by the Supreme Court of Canada. The narrow approach is illustrated by the case of *Ville de Québec v. Commission des*

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54. *Supra*, note 52, p. 1139.

55. *Action Travail des Femmes v. CN* [1984], 5 C.H.R.R. D/2327 (Can.Trib.)

56. Regarding the use of statistics see, for example, *Blake v. Min. of Correctional Services* (1984), 5 C.H.R.R. D/2417; *Chapdelaine v. Air Canada* (1988), 9 C.H.R.R. D/4449. The admissibility of scientific and statistical data has also been recognized in cases involving direct discrimination: E.g. *Ont. Human Rights Commission v. Etobicoke* (1982), 3 C.H.R.R. D/781, and *Hope v. The City of St. Catharines* (1988), 9 C.H.R.R. D/4635.

Also, see Aidan R. Vining, David C. McPhillips, and Anthony E. Boardman, “Use of Statistical Evidence in Employment Discrimination Litigation”, [1986] 64 *Can. Bar Rev.* 660.

57. In *Robichaud*, *supra* note 46, p. 96, the Court held that evidence aimed at showing that a respondent had exercised due diligence could, at best “go to remedial consequences,” but “not liability.”

58. *Ibid.*, p. 94.

*droits de la personne*,<sup>59</sup> involving complaints brought by women guards working in the city's female detention centre who sought to obtain equal pay for work that was substantially the same as that of their male colleagues. Although the court seemed to agree that there was no need to prove intent,<sup>60</sup> it relied on a narrow test of causation as the basis for rejecting the women's claim:

[I]l incombe à celui qui se prétend victime de discrimination de prouver un lien de causalité entre l'inégalité salariale dont il se plaint et le motif de discrimination qu'il invoque. Le motif de discrimination doit être la cause efficiente de l'inégalité.<sup>61</sup>

Requiring proof of causation or proof of a discriminatory fault will lead to the very same difficulties as an approach based on intent. Indeed, such proof requirements are little more than surrogates for intent. They are likely to reduce the effectiveness of human rights legislation<sup>62</sup> by imposing proof requirements that may be "a virtually insuperable barrier" to establishing discrimination. In *Ville de Québec*, the plaintiffs were asked to show that a discriminatory motive had been the immediate cause of the unequal system of pay, a task which was akin to searching for a discriminatory needle in a haystack<sup>63</sup> since the pay structure had been in existence for some decades and had probably been exposed to a multitude of factors which inevitably shaped and reshaped the system throughout the years. Moreover, this restrictive approach is likely to exclude cases where the discriminatory effects of a rule or policy are present, but where discrimination is not necessarily the motivating factor. A "fault-based" approach will simply fail to "respond adequately to the many instances

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59. [1989] R.J.Q. 831 (Qué.C.A.).

60. *Ibid.*, p. 841.

61. *Ibid.*, p.842.

62. See also, *Commission des droits de la personne du Québec v. Pavillon St-Charles de Limoilou* (1983), 4 C.H.R.R. D/1284 (Qué.S.Ct.), *conf'd* by the Quebec Court of Appeal, Q.C.A. 200-09-000654-829, in an unreported judgement dated May 8, 1985. *Contra: Corp. des Aliments Ault Ltée. v. Senay*, [1985] C.S. 1073.

The failure of the courts to give any meaning to the equal pay provisions of the Quebec Charter has led the Human Rights Commission to recommend that the existing approach based on complaints be replaced by a "pro-active" approach which would require employers to correct pay inequities without waiting for a complaint.

63. Compare this with the approach in *Re Attorney General for Alberta and Gares* (1976), 67 D.L.R. (3d) 635 (Alta. T.D.), p. 695, where the Alberta Supreme Court refused to be swayed by arguments brought by the respondent that the differential in wages was due not to a discriminatory intent but to the negotiation process and to the fact that the two groups of employees were represented by separate bargaining units, and had been for many years: "It is the discriminatory result which is prohibited and not a discriminatory intent."

where the effect of policies and practices is discriminatory even if that effect is unintended and unforeseen.”<sup>64</sup>

It may, of course, be argued that there exists the possibility of an overlap. But the element of fault is likely to appear in only a limited category of discrimination cases, that is, in matters involving direct discrimination. For instance, where acts are based on ill will or prejudice, where there is a conscious decision to treat people differently by reason of the group or class of persons to which they belong, or where sexual harassment involves threats or actual acts of reprisal against the person being harassed, such behaviour would probably meet the test of a fault-based approach to discrimination. However, as was seen above, there are many circumstances in which discrimination occurs either in the absence of fault, or where it would be impossible to find evidence of fault let alone identify the individual responsible for the fault.

Besides imposing additional proof requirements, the fault-based approach may interfere with the effective enforcement of anti-discrimination legislation in other ways. The evidentiary standards that are used in discrimination law are essentially the same as those that apply to civil cases under the general law. In all jurisdictions, including Quebec, complainants carry the burden of proving discrimination according to the ordinary civil standard of proof, i.e. on a balance of probabilities. Courts and tribunals have also recognized that circumstantial evidence is an important means of proving discrimination where direct evidence or admissions are simply not available.<sup>65</sup> However, a fault-based approach to discrimination, which puts emphasis on the reprehensible nature of discriminatory practices, may lead trial judges to conclude that they are “justified in scrutinizing evidence with greater care if there are serious

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64. *Supra*, note 52, p. 1135.

65. See, for example, *Onischak v. British Columbia* (1991), 13 C.H.R.R. D/87 (B.C. Council), p. 89:

[A]n inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses and the burden for establishing that other explanation rests with the person whose conduct gives rise to the complaint.

For discussions regarding the elements required to make out a prima facie case of direct discrimination, see: *Israeli v. Canadian Human Rights Commission* (1983), 4 C.H.R.R. D/2147. See also *Shakes v. Rex Pak Ltd.*, (1982), 3 C.H.R.R. D/1001, at p. 1002, and *Pelletier v. Marivtsan* (1989), 10 C.H.R.R. D/5889, at p. 5890.

In Quebec, see *Commission des droits de la personne du Québec v. Communauté Urbaine de Montréal*, [1987] R.J.Q. 2024; (1988), 9 C.H.R.R. D/4466, p. 4467: “Tout en demeurant à l’intérieur des limites des règles de preuve, il faut alors donner pleine chance à la démonstration des présomptions.”



allegations to be established by the proof that is offered.”<sup>66</sup> This approach is open to severe criticism because it tends to be more concerned with absolving the respondent of any wrongdoing in the absence of clear and strong evidence of blameworthy behaviour, than with providing adequate “relief for victims of discrimination” as recommended by the *O’Malley* court.<sup>67</sup>

The fault-based approach is also highly individualistic. It ignores the fact that discrimination is essentially a group phenomenon and tends to reduce the discriminatory act to an isolated incident between two specific individuals, thereby denying the realities of institutional and structural discrimination.<sup>68</sup> Thus, one finds instances where courts have refused to allow evidence of patterns of discrimination introduced to buttress an

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66. *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 R.C.S. 164, p. 169.

67. In *Forsyth v. The Corporation of the District of Matsqui* (1989), 10 C.H.R.R. D/5854, the respondent urged the Human Rights Council of British Columbia to assess the evidence in light of the “gravity of the consequences of the findings upon the respondent.” The Council refused to adopt this punitive approach to discrimination preferring to rely on that developed in *O’Malley*.

The same cannot be said of the Quebec decision in *Commission des droits de la personne v. C.U.M.* (1983), 4 C.H.R.R. D/1302, at p. 1306, conf’d by the Court of Appeal, *supra*, note 65, involving police brutality against a black man. Although the complainant was awarded \$500. for racist remarks made during the incident, the Superior court refused to find that the unjustified beating was also discriminatory:

Il n’est pas permis, comme semblait vouloir l’avancer la demanderesse, de souligner certains agissements répréhensifs de certains agents de police de façon à ce que ces fautes déteignent sur tous les défendeurs afin de les tenir tous responsables. Ce n’est pas parce qu’un agent aurait commis des fautes que tous doivent être tenus responsables. On ne peut se contenter ici de parler ‘d’atmosphère.’ Il peut être mentionné ici en rapport aux coups portés à Théard que les paroles discriminatoires adressées aux groupes de noirs dont Théard ne faisait plus partie ne peuvent servir à prouver discrimination contre ceux qui ont frappé. Il aurait fallu qu’il soit prouvé que ceux qui ont frappé sont ceux qui ont prononcé des paroles offensantes ou qu’ils étaient près de ceux qui ont parlé et les avaient entendus ou étaient présumés les avoir entendus presque au moment où ils ont frappé: La situation fut assez confuse à ou près de l’entrée du restaurant.

68. For a description of institutional discrimination which can be adapted to the Canadian context, see Louis Knowles and Kenneth Prewitt, *Institutional Racism in America* (New Jersey: Prentice-Hall Inc., 1969), pp. 142-43:

Maintenance of the basic racial controls is now less dependent upon specific discriminatory decisions. Such behavior has become so well institutionalized that the individual generally does not have to exercise a choice to operate in a racist manner. The rules and procedures of the large organizations have already prestructured the choice. The individual only has to conform to the operating norm of the organization and the institution will do the discriminating for him.

individual complaint,<sup>69</sup> or have made hard and fast distinctions between “direct discrimination” and “systemic discrimination” resulting in the loss of an otherwise legitimate right of redress.<sup>70</sup>

In closing on this section, it should be added that courts in Quebec have on occasion recognized the concept of adverse effect discrimination under the Quebec *Charter*.<sup>71</sup> However, this may have more to do with recent developments in constitutional law and the post-Charter era than with the influence of the laws of delict.<sup>72</sup> It is further suggested that, since fault remains the gravamen of delictual liability, it may well be necessary for Quebec courts to reassess the relevance of the rules that govern delictual liability when applying anti-discrimination legislation if they are to deal with adverse effect and systemic forms of discrimination in an effective and consistent manner. Fortunately, the courts in this province have not rejected the *O’Malley*, *Action travail des femmes* and *Robichaud* trilogy of cases and, so far, we have been spared the futile task of dealing with distinctions involving “fault-based discrimination”, “no-fault-based discrimination”, and why not “strict liability discrimination”, which clearly have nothing to do with the manner in which discrimination law has evolved in recent years.

### 3. Commercial freedom

To say that human rights legislation limits commercial freedom is to state the obvious. Employers and landlords are not free to conduct their business affairs as they please if, in doing so, they curtail the freedom of others to participate as equals in society without discrimination based on the group, category or class of persons to which they belong.

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69. In *Gaz Métropolitain Inc. v. Commission des droits de la personne du Québec*, [1990] R.J.Q. 1317 (Que. S.Ct.), (on appeal), the Court ordered the Commission to interrupt its investigation regarding systemic discrimination and to limit its inquiry to the specific acts of discrimination alleged in the individual complaint.

70. *Toronto (City) Board of Education v. Quereshi* (1991), 14 C.H.R.R. D/243, p. 247: “the finding of discrimination made by the Board of Inquiry [...] was not the discrimination charge that the Board of Education was asked to meet.”

71. *Attorney General of Quebec v. La Chaussure Brown’s Inc.*, [1988] 2 S.C.R. 712, at p.787; *Attorney General of Quebec v. Forget*, [1988] 2 S.C.R. 90, p. 102. But, see the early case of *Commission des droits de la personne v. Ekco Canada Inc.*, [1983] C.S. 968.

72. In *Johnson v. Commission des affaires sociales*, [1984] C.A. 61, p.69, the Quebec Court of Appeal remarked:

J’ajouterai que, peut-être paradoxalement, depuis l’entrée en vigueur, il y aura bientôt deux ans, de la *Charte canadienne des droits et libertés*, les tribunaux vont être portés à donner plus d’emphase à la charte du Québec et à l’interpréter plus généreusement.”

But, it is just as obvious that this feature upsets a basic tenet of the common law.<sup>73</sup> In early cases, freedom from discrimination almost always collided with unlimited commercial freedom and the right to property, a principle which went almost unquestioned before the enactment of human rights legislation. “[T]he general principle of the law”, the Supreme Court of Canada declared at the time, “is that of complete freedom of commerce.”<sup>74</sup> Applying the common law, courts adopted a strong *laissez-faire* policy where deference to economic and business concerns was the rule, and respect for egalitarian values was the exception.

The low priority given to equality rights at common law and under the civil law of Quebec in this respect is illustrated by cases such as *Franklin v. Evans*<sup>75</sup> and *Loew’s Montreal Theatres Ltd. v. Reynolds*.<sup>76</sup> The latter is a well-known case involving an individual who brought a civil action against Loew’s based on a breach of contract when he was denied the right to select a place in the orchestra section and forced to sit in a separate section reserved for Blacks. The Quebec Court of Appeal dismissed the action and looked with favour on the economic arguments put forward by the defence:

Il est prouvé que la présence des Noirs dans les sièges d’orchestre empêche d’autres citoyens d’aller au théâtre et l’appelante n’est pas obligée de subir une perte de revenus qui résulte de ce fait. [...] Les propriétaires de théâtre ne sont pas obligés [...] d’admettre des gens qui empêcheraient leur entreprise de réussir ou qui lui nuiraient financièrement.<sup>77</sup>

In a criticism of *Bhadoria*, one commentator suggested that the Supreme Court of Canada missed an opportunity to exploit the potential of the common law by failing to adopt Dworkin’s “superior model”, which essentially involves “balancing the competing claims of the principles of ‘freedom of contract’ and ‘freedom from discrimination’”.<sup>78</sup>

The competing-claims model may have provided an argument for that commentator to try to open the common law door to equality rights cases, but it says little about the relative weight that is to be given to each of these

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73. W. S. Tarnopolsky, “The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada” (1968), 46 Can. Bar Rev. 565, p. 567: “There can be no denying that human rights legislation marks a clear departure from some formerly basic common law rights”.

74. *Christie v. The York Corporation*, [1940] R.C.S. 139, p. 142.

75. (1924), 55 O.L.R. 349

76. (1921), 30 B.R. 459.

77. *Ibid.*, pp. 464-65.

78. McKenna, *supra*, note 14, p. 137.

two freedoms. This concern is not exaggerated if one considers past experience and also more recent examples where, even in the presence of express anti-discrimination legislation, courts have chosen to subordinate egalitarian values to property rights and economic considerations.

One finds, for instance, the 1981 case of *Paquet*<sup>79</sup> in which an individual complained of a landlord's refusal to rent an apartment to him because he was on welfare and suffered from epilepsy. The court dismissed the plaintiff's case and decided, on a narrow construction of the law, that the plaintiff was not entitled to protection under the *Charter* because he could neither be considered a "handicapped person" nor could he claim to have a particular "social condition", despite the fact that the exclusion was very much based on the complainant's status as a welfare recipient. By characterizing freedom from discrimination as an "exception" to the landlord's right to dispose of his property as he saw fit, the court gave the defendant *carte blanche* to do as he pleased and relieved him of the burden of giving *some* justification for the refusal. There seems to be little in this approach to distinguish it from the reasoning that courts felt free to adopt where there was a complete absence of legislation prohibiting discriminatory practices of this nature.<sup>80</sup>

Another example of this narrow approach to human rights legislation can be found in a 1984 case which followed a public inquiry conducted by the Quebec Human Rights Commission to investigate allegations of racial discrimination in the Montreal taxi industry.<sup>81</sup> The case of *Procureur Général du Québec v. Service de taxis Nord-Est (1978) Inc.*<sup>82</sup> involved a Montreal taxi company which refused to refer calls to black drivers on the basis of the preference expressed by certain customers for white drivers. Justice Girouard of the Court of Sessions of the Peace made these remarks about what eventually came to be known as the "next-in-line" policy:

Et que dire maintenant du droit de l'employeur qui n'apparaît nulle part à la Charte québécoise des droits et libertés, mais qui est quand même un droit réel: celui d'exercer un commerce lui permettant de faire un profit raisonnable pour assurer sa propre survie.

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79. *Commission des droits de la personne du Québec v. Paquet*, [1981] C.P. 78.

80. *Ibid.*, p.82:

Donc, l'exception à ce principe de liberté doit être claire et nette et clairement justifiée. Le législateur, par la charte, n'a voulu restreindre le droit de contracter librement, y compris le droit de refuser de contracter, que dans les cas bien clairs et délimités de discrimination contre la personne [...]

81. La Commission des droits de la personne du Québec. *Investigation into Allegations of Racial Discrimination in the Montreal Taxi Industry*. Final Report, October 1984.

82. (1984), 7 C.H.R.R. D/3109.

On ne peut pas, dans les circonstances présentes, reprocher quoi que ce soit à la compagnie poursuivie. On ne peut pas exiger qu'elle ait dû, en plus de ses efforts d'intégration, se charger à n'importe quel prix, de l'éducation forcée de la population.<sup>83</sup>

The Quebec Superior Court reversed this decision on appeal, unequivocally rejecting the defence based on customer preference and economic freedom:

Si l'un des motifs retenus par le juge était la nécessité à mon avis, ce raisonnement ne peut être accepté en droit. Je trouve inconcevable que de nos jours l'on puisse justifier un acte de discrimination fondée sur la couleur par des motifs monétaires ou économiques.<sup>84</sup>

The Superior Court decision is more in keeping with the prevailing view regarding the interpretation of anti-discrimination legislation. "We should not search for ways and means to minimize those rights and to enfeeble their proper impact."<sup>85</sup> This oft-quoted phrase describes, in a nutshell, the "purposive approach" that the Supreme Court of Canada has followed in a string of cases<sup>86</sup> since that of *Insurance Corporation of British Columbia v. Heerspink*.<sup>87</sup> In this matter, the Court concluded that an insurance company was not free to deny fire insurance coverage on the basis of a "risk analysis" if the analysis was unreasonable and discriminatory. The insurance company had refused to insure an individual, once charged with trafficking in marijuana and thought therefore to represent a "moral hazard" because "persons engaged in the drug trade are unusually vulnerable to property damage and present an increased risk to the property insurer." Denying the insurance company's right to do as it pleased, Lamer J. declared that "[t]he Legislature [. . .] has, as a matter of policy, subjected to the Code the exercise of many traditionally unhindered contractual rights [. . .]"<sup>88</sup> This gives us some indication of the relative worth of equality and economics in discrimination cases.

But since discrimination is not an absolute right, further clarification is needed. It is common practice for respondents to introduce legitimate

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83. *Ibid.*, p. 3112. In a similar vein, see *La Reine v. Association Coopérative de Taxis de l'Est de Montréal*, (1984), 7 C.H.R.R. D/3115 (Ct. of Sess. of the Peace), rev'd by Justice Riopel of the Superior Court, in an unreported judgment dated December 1984. In *St-Pierre et Dumulong v. Fernais Inc.*, (1976) C.S. 717, the Court declared: "En principe, au Québec, la liberté de commerce existe et le marchand est libre de décider avec qui il contracte; ses motifs n'importent pas. Les seules restrictions sont une prescription précise de la Loi ou une conduite contraire à l'ordre public."

84. (1984) 7 C.H.R.R. D/3112, p. 3114.

85. In *Action travail des femmes*, *supra*, note 52, p. 1134.

86. *Craton*, *supra*, note 33, *O'Malley*, *supra*, note 49, *Action travail des femmes*, *ibid.*, and *Alberta Human Rights Commission v. Central Alberta Dairy Pool*, [1990] 2 S.C.R. 489.

87. [1982] 2 S.C.R. 145, (1982), 3 C.H.R.R. D/1163.

88. *Ibid.*, at p. 1176.

business concerns into evidence usually as part of a defence of justification. These defences, often referred to as “bona fide occupational qualification” or “bona fide occupational requirement” defences, have the advantage of bringing some degree of flexibility to the law and of ensuring fairness towards respondents who have acted on the basis of legitimate grounds. In finding the appropriate balance between the objective of providing effective protection against discrimination, on the one hand, and ensuring equitable treatment to respondents, on the other, past experience may be instructive. The structure that is meant to protect against discrimination may crumble like a pillar of salt if business and economic interests become a dominant concern. In order to avoid such risks and adhering once more to the purposive approach, the Supreme Court of Canada decided, in *Ontario Human Rights Commission v. The Borough of Etobicoke*, that “non-discrimination is the rule of general application and discrimination, where permitted, is the exception.”<sup>89</sup> In other words, under existing human rights legislation, the general principle of the law is the opposite of what it was under the common law.

As for the appropriate standard of proof required to make out such a defence, it has been held that “impressionistic evidence” does not suffice and the defendant must show, on a balance of probabilities, that the reasons for which a person has been denied a job or other benefit are “related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.”<sup>90</sup>

There has been pressure to relax the *Etobicoke* test by replacing the “reasonably necessary” criterion by one of simple “reasonableness”. The Ontario case of *Zurich Insurance Company v. Ontario Human Rights Commission*,<sup>91</sup> involving higher automobile-insurance premium rates for young men under the age of 25 years of age, illustrates this approach. According to the Divisional Court of Ontario, “[s]omething may be reasonable without being necessary.”<sup>92</sup> What appears to be a highly subjective and discretionary standard in favour of the insurance industry then follows: “[a]lthough these factors are not in themselves determinative of the reasonableness of the classification, they do tend to show that there is a common perception, shared by the industry and its regulators, of the

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89. *Supra*, note 31, p. 208.

90. *Ibid.*

91. (1987), 8 C.H.R.R. D/4069 (Div. Ct.), conf'd by the Ontario Court of Appeal in an unreported judgment dated October 19-20, 1989. The Supreme Court of Canada recently confirmed the lower court rulings in a judgment, as yet unreported, dated June 25, 1992.

92. *Ibid.*, p.4071.

reasonableness of the classifications.”<sup>93</sup> It is suggested that to weaken the *Etobicoke* test, for instance by placing greater emphasis on subjective standards of justification or by introducing some degree of deference to “business convenience”,<sup>94</sup> is to increase the importance of commercial freedom and to invite a corresponding decline in the protection against human rights violations.

In closing on this section, it should be noted that, where discrimination has been proved to their satisfaction, Quebec courts have also accepted to adopt a narrow approach to defences under the Quebec *Charter*.<sup>95</sup> It may, however, be said that this position is also in keeping with the general principle that he who alleges must prove.<sup>96</sup>

#### 4. Remedies

##### i) Damages

[T]he size of awards is a problem, not just in sexual harassment cases, but in all human rights case in Canada. Awards in human rights cases are not a deterrent. They do not convince anyone that discrimination is important; on the contrary, they demonstrate its insignificance.<sup>97</sup>

There is presently some disagreement regarding the standards which would enable human rights boards to improve existing methods of compensation for victims of discrimination. While some boards have chosen to turn to the common law for guidance in assessing the quantum of damages for lost wages, others have taken the opposite view. In *Torres*,

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93. *Ibid.*, p.4072.

94. Until recently the Supreme Court of Canada had resisted attempts to dilute the *Etobicoke* test. See, in particular, *The City of Saskatoon v. The Saskatchewan Human Rights Commission and Craig*, [1989] 2 S.C.R. 1297; *Central Alberta Dairy Pool*, *supra* note 86; *The City of Brossard v. The Quebec Human Rights Commission*, [1988] 2 S.C.R. 279. However, shortly before the publication of this paper, the Court delivered its judgment in *Zurich* dismissing the appeals. See *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, judgment dated June 25, 1992 (as yet unreported).

95. *Ville de Lachine v. Commission des droits de la personne du Québec*, [1984] C.S. 361, *aff'd* by [1989] R.J.Q. 17, and *Commission des droits de la personne du Québec v. Ville de Brossard*, *supra* note 94; *Commission des droits de la personne du Québec v. Collège de Sherbrooke*, [1981] C.S. 1083; *Association A.D.G.Q. v. C.E.C.M.*, [1980] C.S. 93 (on appeal).

96. Art. 1203 of the *Civil Code of Lower Canada* states that:

Art.1203. The party who claims the performance of an obligation must prove it.

On the other hand he who alleges facts in avoidance or extinction of the obligation must prove them [...]

97. Shelagh Day, “Impediments to Achieving Equality”, in *Equality and Judicial Neutrality*, S. L. Martin and K. E. Mahoney, eds., (Toronto: Carswell, 1987), p. 405-06.

the Board was favourable to the use of common law principles in this context:

[W]hat is the durational extent to which general damages should be ordered in effectuating compensation? There are analogous issues in tort law and contract law, of course, where damages are limited to those reasonably foreseeable [sic] to the wrongdoer. It seems to me, at first impression, that these principles are appropriate to awarding general damages under the *Code*.<sup>98</sup>

But, in *Cashin v. Canadian Broadcasting Corp. (No.2)*,<sup>99</sup> the Tribunal rejected this approach declaring that “it seems on its face to be inappropriate to apply the tort test of foreseeability to damages for discriminatory acts.” And, “one should not try to fit human rights remedies into inappropriate legal doctrines.”<sup>100</sup>

Without attempting to find a complete solution to the debate regarding the appropriate standards to be used in compensating lost wages, there would seem to be cogent reasons for holding that common law principles and, in particular, the theory of reasonable notice are incongruous with the nature of anti-discrimination legislation. Assuming that the purpose of such legislation is to eliminate discrimination in employment, it is logical to conclude that those who have been illegally excluded should be placed in the position that they would have been in had there been no discrimination.<sup>101</sup> This principle can then be made subject to certain qualifying features that are not incompatible with the legislation, such as

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98. *Torres v. Royalty Kitchenware* (1982), 3 C.H.R.R. D/858, p. 872. See also, *A.-G. Canada v. McAlpine*, [1989] 3 F.C. 530, (1990) 12 C.H.R.R. D/253; *DeJager v. Canada (Dept. of National Defence)* (1987), 8 C.H.R.R. D/3963, p. 3966-67.

99. (1990), 12 C.H.R.R. D/222 (Can. Trib.).

100. *Ibid.*, p. 233.

It may be said in passing that the case does not provide much guidance as to the criteria which could effectively be used to determine the amount of damages that ought to be awarded where the claim for lost wages is open-ended either because reinstatement is not requested or seems inappropriate, or where the complainant has not succeeded in mitigating his or her damages. Some cut-off point would seem necessary. It is interesting to note that in labour law the general view is that the “the basic purpose of an award of damages is to put the aggrieved party in the same position he would have been in had there been no breach of the collective agreement.” This is subject only to “three qualifying factors: the loss claimed must not be too remote”, “the aggrieved party must act reasonably to mitigate his loss”, and “the damages must be certain and not speculative.” Brown and Beatty, *Canadian Labour Arbitration*, (Aurora: Canada Law Book Inc., 3rd ed., 1991), # 2:1410.

101. For a criticism of the use of the “reasonable notice” standard in the context of discrimination cases, see *Whitehead v. Servodyne Canada Ltd.* (1987), 8 C.H.R.R. D/3874, at 3877. Examples of cases which support the idea full compensation (*restitutio in integrum*) can be found in *Airport Taxicab (Malton) Assn. v. Piazza* (1989), 10 C.H.R.R. D/6347 (Ont. C.A.); (1989), 69 O.R. (2d) 281; and *Gohm v. Domtar Inc.* (1990), 12 C.H.R.R. D/161 (Ont. Bd. Inq.); *Morgan v. Canada (Armed Forces)* (1991), 13 C.H.R.R. D/42 (Can. Rev. Tribunal).



the duty to mitigate. This approach seems preferable to that of the common law which is based on the right of employers to dismiss “at will”, on condition that appropriate notice be given.

In most jurisdictions, including Quebec, courts and tribunals will award damages for humiliation and hurt feelings, although some jurisdictions have chosen to put a “cap” on such damages.<sup>102</sup> They may also award punitive or exemplary damages for discrimination that is wilful or reckless.<sup>103</sup> In Quebec, the authority to award punitive damages for intentional discrimination under section 49 of the *Charter* is generally seen as a clear derogation from civil law.<sup>104</sup>

ii) *Liability in cases involving mixed motives*

In another vein, where a case of direct discrimination involves “mixed motives”, that is where the evidence shows that both a prohibited factor and a lawful factor affected the act complained of, human rights tribunals have adopted the approach developed by the arbitration decision in *R. v. Bushnell*.<sup>105</sup> The general view is that, if discrimination affected the decision-making process, that is sufficient to establish liability. The respondent may then, but only in order to mitigate damages, introduce further evidence to establish that the exclusion would have occurred regardless of the discriminatory factor and for legitimate reasons: E.g. *Almeida v. Chubb Fire Security Division of Chubb Industries Ltd.*<sup>106</sup>

This approach is a departure from the common law which tends to deny liability where damages cannot be proved, and to emphasize the right to compensation rather than the vindication of an individual’s rights.<sup>107</sup>

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102. Man., s. 43(3) refers to a maximum award of \$10,000; Ont. s. 40 (1) (b), allows up to \$10,000. for “mental anguish”; Fed., s.53 (3) allows up to \$5,000. for “hurt feelings”. A cap on moral damages has been held to not discriminate: *Canada Treasury Board v. Robichaud* (No. 2) (1990), 11 C.H.R.R. D/194, p.202-03.

103. Fed., s.53(3); Ont., s.40(1)(b); Man., s. 43(3), allows up to 2,000. for exemplary damages.

104. André Morel, “La coexistence des chartes canadienne et québécoise: problèmes d’interaction” (1986), 17 *R.D.U.S.* 49, p.75.

105. (1974), 1 O.R. (2d) 442 (Ont. H. Ct.), at p. 447; aff’d by (1974), 4 O.R. (2d) 288 (Ont. C.A.).

106. (1984), 5. C.H.R.R. D/2104, at p. 2113.

107. On this, see Marilyn L. Pilkington, “Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms” [1984], 62 *Can. Bar Rev.* 517, pp. 535 ff.

In *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), the United States Supreme Court held that an employer could avoid liability where discrimination was a contributing factor but where it has shown that it would have acted as it did anyway. It is interesting to note that the *Civil Rights Act of 1991* reverses this aspect of *Price Waterhouse* by amending s. 703 of the *Civil Rights Act of 1964* and adding subsection (m) recognizing that an unlawful employment practice is established where a prohibited ground is a “motivating factor, even though other factors also motivated the practice.”

iii) *Reinstatement*

At common law, reinstatement has not generally been available. But human rights tribunals have rarely hesitated in finding that they had the power to order reinstatement where circumstances warranted such a remedy. In *Harrison v. The University of British Columbia*,<sup>108</sup> the tribunal noted "that reinstatement is a primary remedy in situations involving employment discrimination."<sup>109</sup>

Attempts to prevent boards of inquiry from exercising this power have not met with much success. The question was put before the Divisional Court of Ontario in *The Liquor Control Board of Ontario v. Ontario Human Rights Commission*.<sup>110</sup> The L.C.B.O. appealed a decision of the board of inquiry ordering that the complainant be awarded the position of Director of Laboratory Services, a promotion which had been denied to him on a few occasions because of race. The employer maintained that the board had exceeded its authority but, speaking for the Court, Justice Rosenberg thought otherwise:

It would, in my view, be contrary to the purposes of the Code to hold that [the board] in order to 'achieve compliance with the Act did not have the jurisdiction to place [the complainant] in the position that he should have been placed in many years before.' The words of the section are broad enough in providing that he may 'direct the party to do anything' to allow him to direct the L.C.B.O. to replace [one employee with the complainant].<sup>111</sup>

By contrast, the same issue ignited considerable controversy in Quebec. Some courts viewed requests for the reinstatement of an employee, by way of injunctive relief,<sup>112</sup> as nothing short of heresy under the civil law in light of the 1934 decision of the Supreme Court of Canada in *Dupré Quarries Ltd. v. Dupré*.<sup>113</sup> According to this reasoning such a remedy could only be envisaged if allowed by clear and express legislative language.

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108. (1990), 12 C.H.R.R. D/303, rev'd on other grounds by the Supreme Court of Canada in (1991), 13 C.H.R.R. D/317.

109. *Ibid.*, p. 318.

110. (1988), 9 C.H.R.R. D/4868.

111. *Ibid.*, p. 4874.

112. It should be noted that until recent amendments, the only way in which to obtain the "cessation of the act complained of" or "the performance of an act" was to proceed by way of injunction before the ordinary courts: Quebec *Charter of Human Rights and Freedoms*, 1975 S.Q. c. 6, ss. 82 and 83.

113. [1934] S.C.R. 528.

The debate gave rise to a series of contradictory decisions,<sup>114</sup> creating some disarray for ten years or so, until the Quebec Court of Appeal decided, in 1987, to settle the issue in *Commission des droits de la personne v. Alcan Ltée*.<sup>115</sup> The Court rejected the civil law approach and turned instead to a “purposive approach” to human rights legislation. Justice Dubé said this:

A la lecture de ces articles, il apparaît que le législateur a entendu soustraire du régime de droit commun, le recours en injonction de l'article 83 [de la Charte]. De fait, l'article 16 prohibe la discrimination dans l'embauche alors que l'article 49 prévoit le droit d'une victime d'obtenir la cessation d'une atteinte à ses droits protégés par la Charte. En l'espèce et en de pareils cas, je suis convaincu qu'une telle cessation ne peut être obtenue que par une injonction enjoignant à l'employeur fautif d'embaucher le postulant victime de discrimination.<sup>116</sup>

It may well be, as some authors have suggested,<sup>117</sup> that cases such as *Alcan* may eventually contribute to the development of the civil law on such issues as the right to seek reinstatement by way of injunctive relief. But the corollary of this proposition is that the development of discrimination law is then subordinated to the sluggish pace with which the civil law and the common law tend to progress. This hardly seems a justified or necessary restriction on the application of human rights legislation in Canada today.

On the basis of this overview, one may conclude that the law of discrimination has evolved in a manner that is at times compatible with established common law principles, but most often is not. To this extent, the Supreme Court of Canada's refusal in *Bhadauria* to treat the right to nondiscrimination as part of the common law appears, with the benefit of hindsight, to have been a judicious choice. Unfortunately, the same cannot be said of other aspects of the 1981 judgment.

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114. The following cases recognized the right to reinstatement under the Québec Charter: *Martin v. Jobin et al.*, S.C.Q. 200-05-001185-854, delivered July 23, 1985 (unreported); *Blanchette v. Cogera Inc.* (1980), 7 C.H.R.R. D/3355; *Le Prêtre v. Auberge des Gouverneurs* (1980), 7 C.H.R.R. D/3356; *Gagnon v. Brasserie La Bulle Inc.* (1981), 7 C.H.R.R. D/3357. *Contra: Commission des droits de la personne v. Cie Price Ltée.*, J.E. 81-866; *Commission des droits de la personne du Québec v. Alcan Ltée* (1983) 4 C.H.R.R. D/1614, rev'd on appeal in [1987] D.L.Q. 340 (Qué.C.A.).

115. *Ibid.*

116. *Ibid.*, p. 345.

117. Marie-France Bich, “Du contrat individuel de travail en droit québécois: essai en forme de point d'interrogation” (1985), 17 *R.G.D.* 85; Audet, Bonhomme and Gascon, *Le congédiement en droit québécois*, (Cowansville: Les éditions Yvon Blais Inc., 3rd ed., 1991), #2:6.4, p. 2-51.

III. *Exclusive Jurisdictions, Human Rights Commissions and Tribunals: The Vexing Issue of the Limited right to Seek Redress for Discrimination.*

In *Bhadauria* Chief Justice Laskin made the following remarks:

The comprehensiveness of the Code is obvious from this recital of its substantive and enforcement provisions. *There is a possibility of a breakdown in full enforcement if the Minister refuses to appoint a board of inquiry where a complaint cannot be settled* and, further, whether penalties on prosecution will be sought also depends on action by the Minister. I do not, however, regard this as supporting (and no other support was advanced by the respondent) the contention that the Code itself gives or envisages a civil cause of action, whether by way of election of remedy or otherwise. The Minister's discretion is simply an element in the scheme.<sup>118</sup>

(emphasis is mine)

Breakdown indeed. Admittedly, the decision can be seen as an act of judicial deference towards specialized human rights bodies. However, to deprive individuals of the right to seek redress for acts of discrimination unless they have the support of governmental authorities, is quite another matter.

In discussing the procedural consequences of *Bhadauria*, it once more seems appropriate to distinguish between two separate issues: (A) the right of individuals to seek redress for discrimination irrespective of an administrative decision allowing the recourse, and (B) the merits of specialized human rights tribunals.

Recent developments regarding the nature and the extent of the procedural obligations of human rights commissions tend to reinforce objections against the present system of exclusive jurisdictions. In *Syndicat des employés de production du Québec et de l'Acadie v. Canadian Human Rights Commission*,<sup>119</sup> a case involving complaints based on the right to equal pay for work of equal value, the complainants sought judicial review when the Canadian Human Rights Commission "chose not to give reasons for its decision to dismiss the complaint as unsubstantiated." The Supreme Court of Canada held, in a majority judgment, that the "decision of the Commission was not one that was required to be made on a judicial or quasi-judicial basis." Consequently, when deciding whether or not to take a matter before a tribunal, the Commission was essentially exercising "administrative functions not subject to the requirements of natural justice."<sup>120</sup>

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118. *Supra*, note 11, p. 188.

119. [1989] 2 S.C.R. 879.

120. *Ibid.*, p.900.

In short, while the Commission has the duty to act fairly<sup>121</sup> during its investigation, it is not bound by the full panoply of natural justice rules: for instance, it need not give parties the opportunity to cross-examine witnesses<sup>122</sup> nor is it expected to conduct a hearing in the presence of the parties concerned.

Such procedural standards would not be unreasonable if alternate means of redress were available or if the right to a hearing were eventually guaranteed. But, surely, there is an absence of fair play where the organization has a final say in whether the matter should or should not be taken through a process of adjudication. It is a system which deprives complainants of a right to a hearing before their rights are determined. It is a system which creates a double standard because respondents, but not complainants, are entitled to a hearing and often the possibility of an appeal before their rights or obligations are ultimately decided. Ironically, the group of individuals that are likely to be penalized in this fashion are the very same groups that human rights laws are meant to protect from discrimination. It is a system which appears to be in complete contradiction with judicial statements regarding the value of equality rights under the constitution and the principles enunciated in *Andrews*:<sup>123</sup>

Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, . . . discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee.<sup>124</sup>

It is, lastly, a system which provides a right but not necessarily a remedy, and a well-known dictum holds that it is “a vain thing to imagine a right without a remedy; for (a) want of right and want of remedy are reciprocal”<sup>125</sup>

This criticism should not be understood as a desire to undermine human rights commissions which have a legitimate and, I believe, important mandate to carry out in education, the investigation of complaints, the settlement of complaints where possible, and the availability of free legal help where the commission considers that the

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121. *Nicholson v. Haldiman-Norfolk Regional Board of Commissioner of Police*, [1979] 1 S.C.R. 311; *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12.

122. But, see *Cashin v. Canadian Broadcasting Corp.*, [1984] 2 F.C. 209 (Fed. C.A.).

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

124. *Reference Re an Act to Amend the Education Act* (1986), 53 O.R. (2d) 513, at p. 554, as quoted in *Andrews, ibid.*, p.171.

125. *Ashby v. White* (1703), 2 Ld. Raym. 938, p. 953, as quoted in *Bhadauria, supra* note 12, p. 201.

case should go forward. But where the commission is not prepared to take a matter further, complainants should have the option of pursuing their case alone.

This proposal is not new.<sup>126</sup> However, most commentators seem to be of the opinion that, in the event of legislative reform, such an option could adequately be exercised by means of a civil action before the ordinary courts. To exclude the possibility of exercising this option before a specialized human rights forum is, in my view and in light of the discussion in the first part of this paper, a mistake.

Human rights tribunals have contributed considerably to the development of a coherent and detailed system of legal principles aimed at ensuring the effective enforcement of anti-discrimination legislation. The Supreme Court of Canada could probably not have formulated its approach to equality rights in *O'Malley*, *Action travail des femmes*, *Robichaud* and *Andrews*, without the preparatory work and analysis of human rights boards.<sup>127</sup> Furthermore, despite the important theoretical advances that these cases represent, there now seems to be a great deal of confusion regarding the proper application of the concepts of "adverse effect discrimination" and "systemic discrimination". Expert chairs are probably in a better position than the courts to unravel some of these difficulties and to bring greater coherence to this area of the law. Hopefully, they will also be more successful in avoiding reliance on "intent surrogates" which have appeared in the case law with unexpected frequency. This is in reference to a cluster of cases in which an "effects" analysis would have been appropriate but where adjudicators have, wittingly or unwittingly, resorted to standards that are more suited to intentional discrimination by requiring, for instance, evidence of a "causal link" between the discriminatory motive and the act complained of,<sup>128</sup> a "connection between the characteristic [. . .] and the different

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126. See, *supra*, notes 14 and 15.

127. See, for instance, the cases considered by the *O'Malley* Court.

128. See, *supra*, note 58 and accompanying text. And also, *Toronto (City) Board of Education v. Quereshi*, *supra*, note 70, p. 246: "it cannot be said that [the complainant's] interviewers failed to give him the job because he was from Pakistan. They did not give him the job because they thought someone else could do a better job." But, as Campbell J. points out in dissent, at page 250, "the intuitive preference for the outgoing excited enthusiasm of the less qualified candidate was not found on the evidence to be objectively justified."

treatment”,<sup>129</sup> or proof that the respondent was “singling out” protected group members for negative treatment.<sup>130</sup>

Specialized human rights tribunals are also more likely to resist common law influences than the ordinary courts which are accustomed to applying the general law on a day to day basis and are therefore more likely to incorporate such influences into every facet of the decision-making process.

As one judge put it, “[t]he Legislative Assembly decided that it wanted these decisions to be made in the first and crucial fact-finding instance by expert tribunal chairs [ . . . ] and not by judges [ . . . ].”<sup>131</sup> If anything, this part of the legislative scheme should be reinforced.

The Quebec legislature refused for many years to consider the possibility of creating a specialized human rights tribunals. However, today it provides an interesting model in this respect. The Quebec Human Rights Tribunal, established under s. 100 of the *Charter of Human Rights*

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129. *Dartmouth/Halifax County Regional Housing Authority v. Att.Gen. of Nova Scotia*, decision of the Halifax County Court, dated April 13, 1992, as yet unreported, p. 26.

130. *Romano v. Board of Education for the City of North York* (1987), 8 C.H.R.R. D/4347, aff'd by (1989), 10 C.H.R.R. D/5807 (Ont. S. Ct.), aff'd by (1989), 10 C.H.R.R. D/5807 (Ont. Div. Ct.). At p. 4358: “The requirements of the respondent Board are not designed and do not have the impact of singling out any particular group.”

Similarly, see *LeDeuff v. The Canadian Employment and Immigration Commission* (1986), 8 C.H.R.R. D/3692, in which a Tribunal found that discrimination had not occurred when the complainant was contacted by an official of CEIC wishing to locate immigrants who had engaged in illegal acts in Canada on the basis that he had a “foreign-sounding” name, a criterion systematically relied upon by the official in question. According to the Tribunal, discrimination had not taken place because the official did not single out any one particular national origin, race or ethnic group. Fortunately, this decision was reversed by a Review Tribunal in (1989), 9 C.H.R.R. D/4479, at p. 4487, on the grounds that the interpretation of the law was too restrictive.

See also, *Belya v. Statistics Canada* (1990), 11 C.H.R.R. D/308 (Can. Trib.), p.322: “An employment practice can only be classified as discriminatory which singles out an individual or group of individuals for adverse treatment [ . . . ]”

Other boards have been quick to react to the questionable approach relied in these cases:

The test articulated in *Romano*, [ . . . ] is that the respondent’s policies have the impact of ‘singling out [a] particular group’ such as South Asians. With respect, I do not accept that the evidence need go that far. It ought to be sufficient for the identified group to show that policies impact adversely on that group or any other group of persons sharing the same cultural characteristics who are identified by a prohibited ground of discrimination.

*Bhadauria v. Toronto (City) Bd. of Education* (1990), 12 C.H.R.R. D/105 (Ont.Bd.), p.135. The reasoning of *Romano* was also rejected in *Gajecki v. Surrey School District No. 36* (1990), 11 C.H.R.R. D/326, p.332 (B.C.Council).

131. *Toronto (City) Board of Education v. Quereshi*, *supra*, note 70, p. 248.

*and Freedoms*, is a permanent tribunal composed of Quebec Court judges having experience and expertise in matters involving human rights.<sup>132</sup> Presiding judges who have the power to decide cases alone are assisted by two assessors.<sup>133</sup> Most importantly for our purposes here, while “only the commission may initially submit an application to the Tribunal”, sections 84 and 111 of the *Charter* allow complainants to take their case before the Tribunal personally should the Commission decide that it is not interested in pursuing the matter any further. Section 84 reads as follows:

Where, following the filing of a complaint, the commission exercises its discretionary power not to submit an application to a tribunal to pursue, for a person’s benefit, a remedy provided for in section 80 to 82, it shall notify the complainant of its decision, stating the reasons on which it is based.

Within 90 days after he receives such notification, the complainant may, at his own expense, submit an application to the Human Rights Tribunal to pursue such remedy and, in that case, he is, for the pursuit of the remedy, substituted by operation of law for the commission with the same effects as if the remedy had been pursued by the commission.

While it may be too early to assess the effectiveness of this new Tribunal, there are indications that by giving individuals access to a specialized tribunal and one which is not only less costly but also less formal than the ordinary courts,<sup>134</sup> the legislation is meeting an important need in the community.<sup>135</sup>

#### IV. Conclusion

Despite the reservations that one may have regarding certain consequences of *Bhadauria* and, in particular, the limited right of individuals to seek redress for acts of discrimination, it is a ruling that remains significant with respect to the effective application and enforcement of human rights legislation. The view that specialized human rights tribunals may provide a better forum than the courts for discrimination cases in first instance is as valid today as it was when contemporary human rights legislation was first enacted in the 1960s. In addition, the Supreme Court of Canada chose a positive course in refusing to incorporate the right to nondiscrimination into the common law.

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132. S. 101.

133. S. 104.

134. It should be noted that under s. 49 of the Quebec *Charter* an individual always has the option of taking a civil action for discrimination before the ordinary courts.

135. According to information provided by the Human Rights Tribunal, approximately one third of its case load involves requests brought by individuals rather than the commission.



In the years that have followed the Court's decision in *Bhadauria* it has become increasingly clear that although common law principles may provide some guidance, by way of analogy, in determining discrimination cases, they must also be treated with caution if one is to ensure the coherent and effective development of discrimination law. Although common law principles may often seem neutral in appearance, they did not evolve in a vacuum; they form part of a network of rules which have been crafted, not to support social legislation, but to uphold a system of law in which commercial freedom is a dominant value to which the right to equality has regularly been subordinated.

In 1975, referring to the Canadian Bill of Rights in *Hogan v. The Queen*,<sup>136</sup> Chief Justice Laskin defined the term "quasi-constitutional" as a "half-way house between a purely common law regime and a constitutional one." The Bill of Rights was a patent failure before the courts. If human rights legislation is to enjoy a better fate, then it will be necessary to attach concrete and not only symbolic value to the principle that, while not quite constitutional in character, this is legislation of a special nature. And, does discrimination law have anything in common with the common law? Not much.

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136. [1975] 2 S.C.R. 574, p. 597.