

Are Human Rights Commissions still relevant?

Highlights of the recent trend towards the enforcement of human rights principles and remedies by labour arbitrators and private litigants rather than by Human Rights Commissions and Tribunals.

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Introduction

Are human rights commissions still relevant? This question really has two aspects to it. First, are human rights commissions still legally relevant? That used to be a trivial question: human rights commissions were legally relevant because they had exclusive jurisdiction over human rights complaints. However, recent decisions have cast doubt on whether human rights commissions do in fact have exclusive control jurisdiction. Commissions may be becoming less legally relevant as that jurisprudence develops. Second, are human rights commissions practically relevant? This has always been a contentious question: human rights commissions are often criticized for the way they administer human rights complaints. They have been criticized for being slow, for dismissing too many complaints, or for failing to give complainants the assistance they deserve. Are these criticisms fair?

This paper begins by tracking the development of jurisprudence surrounding the exclusiveness of the jurisdiction of human rights commissions and tribunals. Although the jurisprudence still demonstrates some flickering of the ethos of exclusive jurisdiction of human rights regulators over human rights claims, more recent decisions demonstrate that courts are receptive to human rights being adjudicated outside of the normal administrative mechanism set up to regulate human rights statutes. The Supreme Court of Canada has been particularly eager for labour arbitrators to assume jurisdiction over human rights complaints, and has even indicated that in some instances arbitrators themselves have exclusive jurisdiction over human rights matters.

We originally hypothesized that the reason behind this shift away from the exclusive jurisdiction model was an example of legal realism: courts recognized the myriad of problems with the human rights commission system, and reacted by creating avenues for claimants to have their case heard outside of that system. However, we think this argument is too simplistic. Instead, the move away from the exclusive jurisdiction model is probably best understood in light of the Supreme Court's concurrent move away from

exclusive control over *Charter* cases. If *Charter* issues can be decided by other decisions-makers, so too should human right issues. In short, if the *Charter* belongs to the people, so too does human rights law.

Through our analysis and subsequent rejection of our original hypothesis, we did confirm that human rights commissions are beset by a myriad of problems. We also concluded that these problems are systemic and cannot be satisfactorily addressed by minor administrative changes, or by increased funding. However, we are not yet ready to abandon the commission system in favour of direct access to human rights tribunals. Instead, we advocate a reformed commission system.

First, the commission should retain the power to deal with preliminary questions of jurisdiction: if a complaint is untimely, in the wrong jurisdiction, or should be adjudicated in another forum, the commission may dismiss it at the outset.

Second, once the commission has declared a complaint valid, the complainant should be able to opt between the current commission system (where the commission investigates the complaint and decides whether to refer the matter to the tribunal) and a system of direct access. The Tribunal will also have the express jurisdiction to award legal costs.

Third, the commission should no longer responsible for mediation. Mandatory mediation must occur before any case is heard by the tribunal, but it would be conducted by an independent body of human rights mediators. Mediation will continue to be at no cost to the parties.

Fourth, the commission should still be responsible for public education, audits (where required by statute), and bringing cases to the tribunal even in the absence of a complaint.

Finally, human rights legislation should be amended to increase the maximum penalty for breach of human rights to the point where the penalty constitutes a real deterrence against violating a complainant's human rights.

Exclusive Jurisdiction

The traditional rule is that claims based on discrimination must be determined using the administrative mechanism put in place by various human rights statutes in Canada. This rule was first propounded by the Supreme Court of Canada in *Seneca College of Applied Arts and Technology v. Bhadauria*.¹ In that case, Ms. Bhadauria brought a civil claim against the Seneca College of Applied Arts and Technology, claiming damages for being deprived of teaching opportunities at the College. She was a woman of East Indian descent with a PhD in mathematics. From 1974 to 1978, she had made ten separate applications for a teaching position at the College. Each time, she was never even interviewed for the position, and the positions were eventually awarded to candidates without her educational qualifications, but who were not of East Indian origin.

Ms. Bhadauria claimed damages based on a new intentional tort protecting a plaintiff against the unjustified invasion of his or her interest not to be discriminated against in respect of a prospect of employment on the grounds of race or national origin – essentially, a tort of discrimination. The Supreme Court decided not to create this new intentional tort, in large measure because the same interest was protected through various administrative regimes set out in statute. The Court stated:

In the present case, the enforcement scheme under the Ontario *Human Rights Code* ranges from administrative enforcement through complaint and settlement procedures to adjudicative or quasi-adjudicative enforcement by boards of inquiry. The boards are invested with a wide range of remedial authority including the award of compensation (damages in effect), and to full curial

¹ [1981] 2 S.C.R. 181 [hereinafter *Bhadauria*].

enforcement by wide rights of appeal which, potentially, could bring cases under the *Code* to this Court.

. . . In my opinion, however [the new tort] is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the *Code*.²

Bhadauria amounts to an exclusive jurisdiction model for human rights matters, foreclosing access to the courts for human rights abuses. *Bhadauria* reflects a clear preference by the Supreme Court at that time that human rights issues should be dealt with by human rights commissions and tribunals, and not by the courts. While the Court never explicitly used the language of “exclusive jurisdiction”³, this is a fair way to interpret the Court’s reasoning in that case.

The idea that human rights commissions and tribunals should have exclusive jurisdiction over human rights complaints has had powerful normative force in Canadian jurisprudence since *Bhadauria*. There are a number of lines of authority that have been influenced by the exclusive jurisdiction ethos, and thus have shown a marked proclivity towards assigning jurisdiction over human rights complaints to human rights commissions and tribunals.

For example, there is a line of authority in many jurisdictions stating that human rights commissions are required to investigate allegations of discrimination in employment even where the employee has already sought redress in another forum. In *Thomas v. Ontario (Human Rights Commission)*⁴, the Ontario Court of Appeal concluded that the Ontario Human Rights Commission not only had the jurisdiction to deal with a complaint filed

² *Ibid.* at 194-195.

³ Unlike its decision in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, in which the Supreme Court expressly stated that arbitrators have exclusive jurisdiction over matters that arise, in their essential nature, from the collective agreement.

⁴ [2001] O.J. No. 4146 (C.A.) [hereinafter *Thomas*].

after the complainant had already lost an arbitration hearing concerning the same dispute, but that the Commission must deal with such complaints in certain circumstances. The complainant, Jean Thomas, was employed by Midas Canada Inc. from November 1974 until April 1995. She worked in various shop floor jobs in a workplace that was dominated by men (only 3 out of 175 employees were women). Midas terminated Ms. Thomas' employment in 1995 after an incident in which she was alleged to have verbally harassed and threatened a co-worker (who also happened to be her union steward). There was a long-standing dispute between these two co-workers, and Ms. Thomas had, on many occasions, complained that he was harassing her. Her own union agreed with her allegation, but did not go so far as to conclude that she was being sexually harassed. Ms. Thomas was represented by a union, and thus covered by a collective agreement. The collective agreement explicitly incorporated the terms of the Ontario *Human Rights Code* and gave bargaining unit members the right to file grievances related to alleged breaches of the *Code*.

Ms. Thomas' union filed a grievance against her termination. The arbitration hearing into her termination lasted five days. On the third day of the hearing, Ms. Thomas also filed a human rights complaint against Midas alleging that she was the victim of sexual harassment. The arbitrator eventually upheld her dismissal, and his decision made very brief references to Ms. Thomas' complaints of harassment and discrimination. Eventually, the Ontario Human Rights Commission also refused to deal with⁵ her complaint. Section 34(1) of the Ontario *Human Rights Code*⁶ gives the Commission the discretion not to deal with a complaint on several grounds, including that the complaint is one that could or should be more appropriately dealt with under an Act other than this Act. The Commission decided that Ms. Thomas' complaint could more appropriately be dealt with under the provisions of the *Labour Relations Act* and her collective agreement.

⁵ The use of the vague and colloquial term "deal with" is deliberate, as that is the very term contained in the *Human Rights Code*.

⁶ R.S.O. 1990, c. H-19, s. 34(1).

Ms. Thomas was eventually successful on judicial review and convinced the Ontario Court of Appeal to order the Commission to deal with her complaint. The Court concluded that the Commission's decision was unsupportable. The complaints of discrimination and harassment were not dealt with by the arbitrator in his decision. It is not enough that the grievance process simply be available; the grievance arbitration must be "more appropriate to deal with the particular complaint than the process under the *Code*."⁷ Since an arbitration hearing had already concluded without dealing with the allegation of harassment, the process under the *Code* had to be the most appropriate way to deal with the complaint.

Similar conclusions have been reached with respect to decisions under the *Canadian Human Rights Act* as well. For example, in *Parisien v. Ottawa-Carleton Regional Transit Commission*⁸ (which was reversed on judicial review, but not on this point) the complainant was dismissed for chronic absenteeism. He filed both a grievance under his collective agreement and a complaint with the Canadian Human Rights Commission. His grievance was eventually dismissed by an arbitrator. The arbitrator in that case actually dealt with some of the human rights issues raised by the complainant. The employer then argued that the doctrine of issue estoppel barred the Human Rights Tribunal from hearing the case. The Tribunal rejected this argument for two reasons. First, even though the arbitrator had dealt with human rights issues in his decision, the Tribunal concluded that the complaint raised different issues than the arbitration:

I am of the view that the issue before Arbitrator Adams was not the same as the issue that this Tribunal will be required to resolve. It is evident from Mr. Adams' decision, as well as from the grievance form and the submissions of the parties to the arbitration, that while the parties certainly raised the *Canadian Human Rights Act*, ultimately, the issue for the arbitrator was whether Mr. Parisien's dismissal by OC Transpo was unjust. The issue for this Tribunal is whether Mr. Parisien has been the victim of a discriminatory practice within the meaning of the *Canadian Human Rights Act*. It should further be observed that the rights in issue in Mr. Parisien's grievance are private rights arising out of the collective

⁷ *Thomas, supra* at paragraph 24.

⁸ [2002] C.H.R.D. No. 23 (CHRT), rev'd [2004] F.C.J. No. 2172. See also *Canada Post Corporation v. Barrette*, [2000] 4 F.C. 145 (C.A.).

agreement between the Amalgamated Transit Union and OC Transpo. In contrast, the rights asserted by Mr. Parisien in his human rights complaint are quasi-constitutional rights which embody public policy and reflect the broader public interest.⁹

Second, the Tribunal concluded that the parties to the two proceedings were not the same: the Human Rights Commission was a party before the Tribunal, but not before the arbitrator. The Commission's job is not to "represent" the complainant but to represent the public interest. Therefore, it is not a privy or agent of the complainant, and consequently there is no privity of parties between the two forums.

The exclusive jurisdiction ethos is probably best demonstrated in the federal public service. Unlike in other jurisdictions, grievances in the federal public service may never deal with any issue relating to human rights unless explicitly authorized by the Canadian Human Rights Commission. In *Canada (Attorney General) v. Boutilier*¹⁰, the Federal Court of Appeal was asked to decide whether the Canadian Human Rights Commission had exclusive jurisdiction over three grievances that had human rights elements to them. In all three cases, the grievances were filed under the *Public Service Staff Relations Act*¹¹, but the Federal Court of Appeal decided all three must instead be dealt with by the Canadian Human Rights Commission. The first grievance involved harassment based on religion, race, and colour. The grievance was filed based on an anti-discrimination clause in the collective agreement. The second grievance involved an allegation by several nurses that they had been sexually harassed over a two and one-half year period. The third grievance involved an employee who was denied a five-day "marriage leave" to attend his same-sex commitment ceremony. In each case, the Federal Court of Appeal concluded that the Canadian Human Rights Commission provided an alternative "administrative procedure for redress" and therefore section 91 of the *Public Service Staff Relations Act* prevented those cases from being dealt with by way of grievance.

⁹ *Supra* at paragraph 26.

¹⁰ [2000] 3 F.C. 27 (C.A.).

¹¹ R.S.C. 1985, c. P-35, s. 91. The *Public Service Staff Relations Act* is scheduled to be repealed shortly and replaced with a new Act that expressly permits human rights complaints to be presented by way of grievance. This scheduled amendment will be discussed below.

These cases all demonstrate that the exclusive jurisdiction ethos expressed in *Bhadauria* has had a considerable influence over some decisions.

Cracks in the Exclusive Jurisdiction Model

The idea of an exclusive jurisdiction model implies that there is a metaphorical wall surrounding human rights commissions: no issues of discrimination and human rights can escape a human rights commission. However, there are a number of cracks that have appeared in that wall.

The first such crack appeared in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*¹² and *Canada (Attorney General) v. Mossop*.¹³ In both of those cases, the Supreme Court of Canada decided to review decisions of human rights tribunals on the “correctness” standard of review. The majority in both cases concluded that human rights tribunals deserve no deference on issues of law. Essentially, the courts concluded that they are equally expert as human rights tribunals on issues of discrimination and human rights law generally. These two decisions do not explicitly state or indicate that human rights bodies do not have exclusive jurisdiction over human rights issues. They did, however, knock away one of the pillars justifying the exclusive jurisdiction model: if courts have the same level of expertise as human rights tribunals, then the exclusive jurisdiction of human rights bodies cannot be justified on the basis of their relative expertise.

The second, much larger crack appears in civil suits brought for wrongful dismissal where courts have allowed human rights issues to be litigated so long as the plaintiff raises those issues in the guise of a cause of action recognized at law. For example, in *Lehman v. Davis*¹⁴, the plaintiff alleged that she was demoted by the defendant after

¹² [1992] 2 S.C.R. 321.

¹³ [1993] 1 S.C.R. 554.

¹⁴ (1993), 16 O.R. (3d) 338 (Gen. Div.).

complaining of sexual harassment by her supervisor. She filed a human rights complaint and also brought a civil action for constructive dismissal. The court dismissed the defendant's application to stay the civil action pending a decision in the human rights inquiry. The court decided that before declining to exercise its jurisdiction, there should be clear legislative intent that such jurisdiction ought not to be exercised.

Similarly, in *Montague v. Bank of Nova Scotia*¹⁵, the plaintiff had filed both a civil claim for wrongful dismissal and a human rights complaint. The Canadian Human Rights Commission had already dismissed her complaint and concluded that she had not been unreasonably dismissed. The defendant argued that the plaintiff was now estopped from making the same claim in the civil courts. The Court of Appeal rejected this argument, stating:

[G]iving the decision of the Commission, which is not expressed in the clearest terms, the most generous interpretation possible in favour of the defendant, we do not think that the Commission has decided "the same question" as that which was raised in the action. The Commission may have decided that the plaintiff was not unreasonably dismissed by the defendant on the basis of her disability, but it did not adjudicate upon the issue also raised by the plaintiff in her statement of claim that she was dismissed unreasonably in that the defendant acted precipitously and in bad faith in terminating her employment.¹⁶

In *Farris v. Staubach Ontario Inc.*¹⁷, the court was even more specific in rejecting the argument that a civil action should be stayed simply because a human rights proceeding had been commenced concerning the same events:

Where both a civil action and a complaint arise from an employer-employee relationship, some similarities in evidence and allegations are inevitable. However, given the important remedial purpose of human rights legislation, where the litigation contains some claims independent of the provisions of the Code, mere similarities should not impair the pursuit of a civil remedy. A plaintiff should not be put to the choice: proceed in the courts but only if the human rights process is halted. The threat of a stay in a civil action where a

¹⁵ [2000] O.J. No. 1434 (C.A.).

¹⁶ *Ibid.* at paragraph 4.

¹⁷ [2004] O.J. No. 1227.

plaintiff also brought a complaint under the Code would be a disincentive for future plaintiffs to use human rights legislation and could result in fewer complaints being brought forward. Furthermore, it could result in employer respondents not being held accountable for their human rights violations.¹⁸

This crack in the exclusive jurisdiction model has opened even more broadly in cases where a former employee argues that he or she is entitled to damages for a breach of the obligation to act in good faith in the manner of dismissal because the employer discriminated against him or her in some way. The Supreme Court in *Wallace v. United Grain Growers*¹⁹ held that an employer owes its employees an obligation of good faith and fair dealing in the manner of dismissal, and that a breach of this obligation would be remedied by an increase in the employee's reasonable notice period. The cases mentioned above were all situations where the human rights violation formed part of the narrative or reason for the other legal breach; however, it was not itself relied upon as the cause of action. For example, in *Lehmen* the cause of action was based on the demotion, not the sexual harassment itself (although one flowed from the other). On several occasions, however, a more direct relationship between the discriminatory act and a *Wallace* claim has been accepted by the courts. For example, in *Wallace* itself the Justice Iacobucci stated that firing an employee immediately upon return from disability leave would constitute bad faith in the manner of dismissal. It would almost certainly also constitute discrimination on the basis of disability. In *McKinley v. B.C. Tel.*²⁰ the Supreme Court of Canada agreed that *Wallace* damages were appropriate when an employee was terminated while on short-term disability and suffering from hypertension and depression.²¹ In neither of those cases, however, did the defendant raise the issue of

¹⁸ *Ibid.* at paragraph 14. See also *Ross v. IBM Canada Inc.*, [2004] O.J. No. 414.

¹⁹ [1997] 3 S.C.R. 701 [hereinafter *Wallace*].

²⁰ [2001] 2 S.C.R. 161.

²¹ See also *McNamara v. Alexander Centre Industries Ltd.* (2000), 2 C.C.E.L. (3d) 310 (Ont. SCJ) where the employee was awarded an additional two months notice because the employee was fired for asking for time off due to health reasons. The case was appealed, but not on this point: (2001), 53 O.R. (3d) 481 (CA). In addition, in *Delaquis v. College de Saint-Boniface*, [2000] M.J. No. 181 (Man. QB) the plaintiff was awarded additional notice in part because he had suffered a heart attack shortly before being dismissed. In *Rinaldo v. Royal Ontario Museum*, [2004] O.J. No. 5068 (SCJ) the plaintiff received three months additional notice because of the employer's insensitivity to his disability. Finally, in *Rowbotham v. Addison*, [2000] B.C.J. No. 250 the employer acted in bad faith by being indifferent to the vulnerability of the employee's position due to disability. There are other examples of *Wallace*-type damages being

whether those matters were within the exclusive jurisdiction of the human rights commission.

Finally, allegations of human rights violations may constitute an independent actionable wrong sufficient to generate an award of punitive damages in wrongful dismissal cases. It is by now trite law that an award of punitive damages in a claim for breach of contract requires that the defendant have committed an independent actionable wrong.²² In *Gigliotti v. Masev Communications Inc.*²³, the plaintiff alleged that he was dismissed at age 55 because the corporation wanted to put forward a different and more youthful face going forward. He alleged that this constituted discrimination on the basis of age and a breach of the British Columbia *Human Rights Code*. He then used this allegation to support his claim for punitive damages. Although the court dismissed his claim for punitive damages for want of evidence, it did conclude that a breach of the *Human Rights Code* would constitute an “independently actionable wrong” even though it is not “actionable” in the sense of giving rise to a claim in a lawsuit. The Ontario Court followed the B.C. Court and concluded in *Rinaldo v. Royal Ontario Museum*²⁴ that discrimination prohibited by the Ontario *Human Rights Code* could constitute an independently actionable wrong sufficient to support a claim for punitive damages. In that case too the plaintiff’s allegation of discrimination on the basis of sexual orientation was not made out on the evidence; however, the Court did explicitly reject the idea that a breach of human rights statute could never be the subject matter of a court proceeding.

awarded because of concerns about acts that probably constituted human rights violations, but a complete discussion of these cases is beyond the scope of this paper.

²² See *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 and *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595.

²³ [2004] B.C.J. No. 94 (B.C. S.C.).

²⁴ *Supra*, note 21.

The hole in the exclusive jurisdiction model

If the cases discussed above constitute cracks in the wall protecting the exclusive jurisdiction of human rights commissions, then the ability of labour arbitrators to decide human rights issues resembles not a crack, but an open (and poorly guarded) gate.

Prior to 1993, arbitrators in Ontario had gradually begun to accept jurisdiction to hear grievances alleging a violation of the *Human Rights Code*.²⁵ In 1993, the Ontario government enacted what is now section 48(12)(j) of the Ontario *Labour Relations Act*.²⁶ This gave arbitrators the explicit authority “to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.” Despite this wording, an arbitrator’s jurisdiction over human rights complaints was not automatic. The prevailing (but not universal) assumption among arbitrators was that this authority only extended to disputes that had some nexus or “landing pad” in the collective agreement.²⁷

The Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324*²⁸ has broadened the jurisdiction of labour arbitrators to deal with human rights complaints. In that case, a probationary employee alleged that she was discharged because she went on maternity leave. The collective agreement stated that a probationary employee may be discharged at the sole discretion of the employer, and such action is not subject to the grievance and arbitration procedures. The employer therefore argued that the arbitration board did not have the requisite jurisdiction to hear the grievance. The majority of the arbitration panel concluded that it had jurisdiction to hear the grievance because of section 48(12)(j) of the Ontario *Labour Relations Act*.

That section:

²⁵ B. Etherington, “Promises, Promises: Notes on Diversity and Access to Justice” (2000), 26 Queen’s L.J. 43 at paragraph 17.

²⁶ Now S.O. 1995, c. 1, Schedule A, s. 48(12)(j).

²⁷ B. Adell, “Jurisdictional Overlap Between Arbitration and Other Forums: An Update” (2000), 8 C.L.E.L.J. 179 at 196. See also *Metropolitan Toronto Reference Library Bd. v. CUPE, Local 1582* (1995), 46 L.A.C. (4th) 155 (Burkett).

²⁸ [2003] 2 S.C.R. 157 [hereinafter *Parry Sound*].

. . . obligates and empowers a board of arbitration to interpret a collective agreement in a manner consistent with the Human Rights legislation in this province. The *Human Rights Code* prohibits discrimination on the basis of family status. The collective agreement must be interpreted and applied in a manner that is consistent with the statutory rights available to all employees, including probationary employees.²⁹

The majority of the Supreme Court agreed that the arbitration panel had jurisdiction to hear the grievance, but it did not rely upon section 48(12)(j). Instead, the Court concluded that the provisions of human rights legislation – and other employment standards legislation – comprise implied terms in every collective agreement:

As a practical matter, this means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract. . .

. . . the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which an arbitrator has jurisdiction. Because of this interpretation, an alleged violation of the *Human Rights Code* constitutes an alleged violation of the collective agreement, and falls squarely within the Board's jurisdiction.³⁰

The Supreme Court has therefore created an exception to the exclusive jurisdiction of human rights commissions for an entire class of complaints: arbitrators have jurisdiction over human rights complaints brought by unionized employees. In fact, it is arguable that labour arbitrators have exclusive jurisdiction over human rights complaints that originate from unionized workplaces. The Supreme Court decision in *Weber v. Ontario Hydro*³¹ states that arbitrators have exclusive jurisdiction over issues whose essential character

²⁹ *Parry Sound* (arbitration decision), [1999] O.L.A.A. No. 76 (Knopf) at paragraph 21.

³⁰ *Parry Sound*, *supra* note 28 at paragraphs 28 and 55.

³¹ *Supra*, note 3.

arises out of the collective agreement. Since human rights complaints now arise out of the collective agreement (because human rights protections are incorporated into the agreement), it is at least arguable that arbitrators have exclusive jurisdiction over human rights complaints post-*Parry Sound*. The Ontario Human Rights Commission intervened in *Parry Sound* to address this issue, but the Supreme Court deliberately refrained from answering it.³² Cases decided since *Parry Sound* have done little to resolve this controversy. In *Canpar Industries v. International Union of Operating Engineers*, the British Columbia Court of Appeal used the heading of “concurrency” to discuss the jurisdiction of arbitrators and the human rights commission; however, the Court then applied the *Weber* analysis to determine who had jurisdiction:

In my view, the essential nature of the dispute in this case was that of a labour relations dispute. It arose because the grievor was dismissed from his employment, which he alleges contravened the requirement of "just and reasonable cause" under the Labour Relations Code. He seeks reinstatement of his seniority rights - again, a subject which engages the particular expertise of a labour arbitrator as opposed to the Human Rights Tribunal. Only the employer and the Union are involved in the dispute, and it is of the kind normally decided by labour arbitrators. The purpose of the Labour Relations Code is to facilitate the efficient resolution of employment-related disputes by a specialized body with undoubted expertise. The Tribunal also has specialized expertise, but in this case, the essential nature of which is an employment dispute, the goal of the Labour Relations Code is to “enable the parties to develop long-term, harmonious, ongoing relationships.”³³

Then, the Court of Appeal went on to state that if a complaint were filed with the Human Rights Commission it would “leave open the possibility that a party to this dispute might also wish to bring it to the attention of the Human Rights Tribunal at some point. It would not be appropriate to comment on jurisdictional questions that might arise in such event.”³⁴

³² *Parry Sound*, *supra* at paragraph 15.

³³ [2003] B.C.J. No. 2577 (B.C. C.A.) at paragraph 55.

³⁴ *Ibid.* at paragraph 55.

The Supreme Court of Canada decisions in *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*³⁵ and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*³⁶ indicate that the exclusive jurisdiction model may prevail for labour arbitrators. In the first case, the complainant was entitled to participate in a government program that provided social assistance benefits to low income families with children where at least one adult was working. The complainant went on maternity leave, and was told that she could not receive benefits because her employment insurance benefits were not income from employment. She filed a complaint with the Quebec Human Rights Commission. The province brought a motion before the Human Rights Tribunal alleging that the matter was within the exclusive jurisdiction of the Commission des affaires sociales (CAS). The Tribunal dismissed the motion, but eventually the Supreme Court concluded that the CAS did have exclusive jurisdiction over the matter. In so doing, both the majority and minority of the Supreme Court applied the “essential character” test to determine whether the CAS had exclusive jurisdiction over the dispute.

In the second case, the issue was whether a grievance arbitrator had exclusive jurisdiction over an allegation that a negotiated term of a collective agreement violated the rights of a group of younger members of the bargaining unit. The majority of the Supreme Court decided that the arbitrator did not have exclusive jurisdiction over this matter because, in its essential nature, the dispute was about the formation of the agreement, not its interpretation or application. Although the Court decided that the matter was within the jurisdiction of the human rights commission, they still applied the “essential character” test – implying at least that in the appropriate case a labour arbitrator would have exclusive jurisdiction over a human rights complaint.

³⁵ [2004] 2 S.C.R. 223 [hereinafter the *CAS Case*].

³⁶ [2004] 2 S.C.R. 185 [hereinafter the *Labour Arbitration Case*].

Therefore, because of the decision in *Parry Sound*, labour arbitrators have at the very least concurrent jurisdiction with human rights tribunals, and quite possibly have exclusive jurisdiction over human rights complaints brought concerning labour matters.

Why has the exclusive jurisdiction of human rights been eroded?

As set out above, courts in Canada (and the Supreme Court in particular) have departed from the exclusive jurisdiction model advocated in *Bhadauria* towards a model where human rights issues are determined by a wider range of decision-makers. Having reviewed those decisions, it is clear that the Supreme Court has never explicitly answered an important question: why move away from the exclusive jurisdiction model? Our hypothesis was that judicial realism played a role in this evolution.

Human rights commissions have come under a great deal of public criticism in recent years. They have been accused of being too slow, of unjustly dismissing complaints without allowing them to proceed to a tribunal hearing, or (more generously) of being under-funded.³⁷ The judges of the Supreme Court had these complaints placed squarely before them in *Blencoe v. British Columbia (Human Rights Commission)*³⁸, when the respondent in a human rights complaint petitioned the courts to find that the Commission had lost jurisdiction because the delays in processing the complaints against him constituted an abuse of process. The majority of the court concluded that the delay was not sufficient to constitute an abuse of process. Four judges dissented in this result, however, concluding that the delay (which was not unusual for the Commission) resulted in an abuse of process. Of those four dissenting judges, three formed part of the majority of the Court in *Parry Sound*. Even the five judges in the majority in *Blencoe* commented adversely on the delays in processing that case.

³⁷ See, for example, Etherington, *supra* note 25; J. Birenbaum & B. Porter, "Screening Rights: The Denial of the Right to Adjudication Under the Canadian Human Rights Act and How to Remedy It" (unpublished research paper submitted to Canadian Human Rights Act Review Panel, 1999); L. Melanson, "Late-Filed Complaints in the Federal Human Rights Process" (1998), 26 Man. L.J. 25.

³⁸ [2000] 2 S.C.R. 307.

In *Parry Sound*, the Supreme Court also indicated that practical problems with processing human rights complaints formed part of the rationale behind its decision. On several occasions, the majority in *Parry Sound* stated that it preferred labour arbitrators on policy grounds because this promoted the “expeditious resolution” of complaints. The majority also referred to arbitrators as an “accessible and inexpensive forum” for the resolution of disputes.

It is clear then that concerns about the operation of human rights commissions (concerns that were not as prevalent in 1981 when *Bhadauria* was decided) played some role in the evolution away from an exclusive jurisdiction model. Having said that, it is worthwhile to examine whether these concerns are justified.

Concern #1: Commissions are dismissing or refusing to deal with valid complaints

The first concern about the operation of human rights commissions is that commissions are too eager to dismiss or refuse to deal with complaints. Human rights commissions have the authority to refuse to refer a complaint to the relevant tribunal for a variety of reasons. They may refuse to deal with complaints that are untimely, or that (in the Commission’s opinion) should be resolved in another forum.³⁹ For example, the Ontario Human Rights Commission has had a policy since the enactment of section 48(12)(j) of the Ontario *Labour Relations Act* in 1993 of refusing to deal with any complaint by a unionized worker unless the matter has been referred to arbitration. If the human rights commission decides to “deal with” a complaint, it will then typically assign an investigator to investigate the complaint. The investigator will then prepare a report for the Commission, who decides whether to dismiss the complaint or refer it to a tribunal. The Commission may also attempt to settle the dispute at any stage of its involvement in the complaint.

³⁹ See, for example, sections 41 of the *Canadian Human Rights Act*, *supra* and section 34 of the Ontario *Human Rights Code*.

There is a perception that only a small percentage of complaints ever make it to the tribunal stage. Some commentators allege that only 1-2 percent of complaints are ever adjudicated before the tribunal.⁴⁰ In order to determine whether these allegations are true, we have examined the annual reports of the Canadian Human Rights Commission to find out how many complaints are processed each year, and what happens to them. The chart below sets out what the Canadian Human Rights Commission has done with complaints since 1988.

Year⁴¹	Not dealt with	Dismissed	Settled	Refer to Tribunal	No further proceeding⁴²	Total
1988-97	300 (4%)	2,595 (40%)	1,250 (19%)	375 (6%)	2,030 (31%)	6,550
1998	23 (4%)	192 (35%)	189 (34%)	22 (4%)	129 (23%)	555 ⁴³
1999	44 (7%)	243 (36%)	213 (32%)	52 (8%)	109 (16%)	661 ⁴⁴
2000	39 (5%)	263 (32%)	286 (35%)	123 (15%)	109 (13%)	820 ⁴⁵
2001	48 (7%)	266 (40%)	273 (41%)	85 (13%)	N/a	672
2002	46 (6%)	312 (43%)	301 (41%)	70 (10%)	N/a	729
2003	213 (16%)	437 (34%)	457 (35%)	200 (15%)	N/a	1,307

The sharp increase in the number of cases not dealt with in 2003 is not an aberration. It is part of a deliberate policy on the part of the Canadian Human Rights Commission to deal

⁴⁰ Birenbaum & Porter, *supra*.

⁴¹ Years 1988-1997: *Report of the Auditor General of Canada, 1998, Chapter 10, Exhibit 10.4*. Years 1998-2003: Canadian Human Rights Commission, Annual Reports 1998-2003.

⁴² These could include complaints that settled outside of the Commission process, or complaints where the complainants have abandoned their complaint. This statistic was only kept until 2000. After that date, cases where the complainant has abandoned the matter are considered “dismissed.”

⁴³ This number does not include the 824 cases that were “discontinued” – cases where the complainant decided not to pursue the matter further and/or decided not to sign a complaint.

⁴⁴ This number does not include the 713 cases that were discontinued.

⁴⁵ This number does not include the 585 cases that were discontinued. After 2000, the Commission stopped including the discontinued cases in their analysis of their completed cases.

with its backlog by directing complaints “to the appropriate body for resolution”⁴⁶ – i.e. refusing to deal with them if they can be heard by another tribunal.

These statistics demonstrate that it is not entirely fair to criticize the Canadian Human Rights Commission for sending fewer cases to the Tribunal in recent years, and that it is certainly unfair to say that only 1-2% of cases are referred to the Tribunal. However, it is fair to point out that almost 50% of complaints are either not dealt with or dismissed, or between four and five times as many as are sent to the Tribunal (except for 2003, when the ratio is just over 3:1). Similarly, a large number of cases settle, without the public ever finding out about the result. Since public awareness and behaviour modification is a significant goal of human rights legislation, we question whether these purposes are best served through an emphasis on alternative dispute resolution. Further, some commentators raise a concern that complainants (particularly unrepresented complainants) are being convinced to accept settlements by Commission staff eager to decrease their backlog of case files. There is, however, no evidence to support or test this allegation because of the confidential nature of the settlement process.

Finally, just because a case is referred to the Tribunal does not mean that the Tribunal will ever hear the matter. The Tribunal also mediates disputes, and approximately 73% of cases referred to the Tribunal settle prior to a hearing being commenced. Thus, in 2001 there were 672 complaints filed with the commission and only 13 hearings (2%); in 2002, there were a total of 729 complaints filed with the Commission and only 21 hearings commenced (3%).⁴⁷

The statistics for the Ontario Human Rights Commission are similar to the federal statistics. The Ontario Commission referred approximately 14% of its caseload to a tribunal in 2003-2004. Roughly 38% of cases settled, the Commission refused to deal

⁴⁶ Canadian Human Rights Commission, Annual Report 2003, page 13.

⁴⁷ Canadian Human Rights Tribunal, *Annual Report 2003* at page 10.

with 12% of cases, and the rest (34%) were either resolved or dismissed in some other way.⁴⁸

Concern #2: Commissions take too long to process complaints

A more common concern is that Commissions take too long to process human rights complaints. The Canadian Human Rights Commission in particular has been accused of unnecessary delays in its decision-making. As early as 1985, the Auditor General criticized the Commission for “long delays in its investigation of complaints” and the failure to “bring the backlog of complaints to a reasonable level.” The Auditor General reported that 39% of the complaints accepted by the Commission to June 30, 1984 had taken over 12 months to reach the Commission members for a decision, and 21% took over 18 months before the Commission made a decision.⁴⁹ Despite recognition by the Commission that the delays were a problem, the delays actually got worse. Between January 1988 and November 1997, the Commission reached final decision on about 6,550 cases. On average, the Commission took 27 months to reach a decision. In 1993 the Commission received additional funding from Treasury Board specifically to reduce these delays and deal with the backlog of cases, and in February 1994 the Commission established a new system to expedite investigations. From 1994 to 1997, the average time to make a decision decreased to 23 months.⁵⁰ In 2003 the Commission decided to start “focusing on older cases” in order to reduce the average time to make a decision. According to its 2003 annual report, the Commission’s decision to focus on older cases has reduced the average age of complaints from 25 months in December 2002 to 15.6 months in December 2003. However, 19% of the Commission’s caseload is still over two years old.⁵¹

⁴⁸ Ontario Human Rights Commission, Year-End Results 2003-2004, page 11.

⁴⁹ 1985 Report of the Auditor General of Canada, Chapter 11, Canadian Human Rights Commission, paragraphs 11.25-11.29.

⁵⁰ 1998 Report of the Auditor General of Canada, Chapter 10, Canadian Human Rights Commission, paragraphs 10.40-10.42.

⁵¹ Canadian Human Rights Commission, 2003 Annual Report, page 10.

The Ontario Human Rights Commission does not fare much better. It reports that the average age of its case inventory was 10.8 months as of March 31, 2004; however, when it excludes cases that are dismissed or “not dealt with” at a preliminary stage, the age of cases in the “investigation inventory” rises to 17.5 months.⁵² In both Commissions, this is just the time the Commission deals with the complaint, and does not include any delays that occur before the Tribunal.

In fairness, labour arbitration is not as expeditious as the Courts seem to presume. In *Canada Post Corp. and C.U.P.W. (Godbout)*⁵³ a grievance about the duty to accommodate a disabled employee lasted almost four years (the grievance was filed in 1989, and a decision rendered in 1993). However, most labour arbitration cases involving the duty to accommodate seem to take less time to complete than a human rights case takes to get processed by the Commission, particularly if the Tribunal time is taken into account. In *Bayer Rubber Inc. and C.E.P., Local 914 (Hannaford)*⁵⁴, the grievance took two years to result in an arbitration decision; in *Essex Police Services Board and Essex Police Assn.*⁵⁵ the matter took 15 months (but only six months to get to the first hearing date); and in *North Vancouver (City) v. North Vancouver Firefighters Union Local 1183*⁵⁶ the matter took only 10 months to be resolved. While this is by no means a scientific sample, it does give some indication that the labour arbitration process is often quicker than the human rights process.

Concern #3: Commissions are underfunded

One of the concerns often raised about human rights commissions (or, alternatively, one of the excuses made for their desultory performance) is that they are underfunded. In particular, there is an impression that the commissions suffered deep budget cuts in the

⁵² Ontario Human Rights Commission, *Year-End Results 2003-2004*, page 7.

⁵³ (1993), 32 L.A.C. (4th) 289 (Jolliffe).

⁵⁴ (1997), 65 L.A.C. (4th) 261 (Watters).

⁵⁵ (2002), 105 L.A.C. (4th) 193 (Goodfellow).

⁵⁶ [2002] B.C.C.A.A.A. No. 103 (Burke).

mid-1990s (particularly at the federal level), and that performance suffered as a result. The facts do not bear this hypothesis out. In 1993-1994, the Canadian Human Rights Commission spent \$18,019,806. In 1994-1995, that amount decreased to \$16,465,818 (but the Commission had \$17,370,334 available for use, and simply did not spend it all).⁵⁷ However, by 2003-2004 the Commission's expenditures increased to \$22,224,928 – an increase of 35% since 1994-1995.⁵⁸ Even taking inflation into account, the Commission's budget has increased over the past decade.⁵⁹ Therefore, we doubt that budget cuts can be the sole reason for the federal Commission's underperformance.

It could be the case that the Commission's increased budget has not kept pace with an increase in the number of complaints. Below is a chart containing the Commission's budget, the number of complaints, and then a ratio of the budget to complaint since 1995. The chart indicates that the Commission funding per complaint began to rise in 1999 – the same time that the Commission's funding began to rise as well.

⁵⁷ *1994-1995 Public Accounts*, Section 15, page 4.

⁵⁸ *2003-2004 Public Accounts*, Section 16, page 5.

⁵⁹ The rate of inflation since 1994 is roughly 23%.

Year	Budget ⁶⁰	Complaints ⁶¹	Ratio
1995	\$16,911,228	1,783	\$9,484.70
1996	\$15,576,900	1,799	\$8,658.64
1997	\$14,751,954	1,527	\$9,660.74
1998	\$15,969,001	1,776	\$8,991.51
1999	\$18,498,458	1,430	\$12,935.98
2000	\$19,801,940	1,238	\$15,995.11
2001	\$21,752,763	1,485	\$14,648.33
2002	\$24,286,430	1,653	\$14,692.34
2003	\$23,481,951	2,153	\$10,906.62

Concern #4: Poor morale

The last concern (or, again, an explanation for poor performance) is that the Canadian Human Rights Commission is suffering from poor employee morale. Again, however, the evidence does not bear this hypothesis out. Commission employees feel overworked, but are not planning on leaving the federal public service in the next three years. The federal public service conducts regular (and anonymous) surveys of its employees.⁶² When asked whether they feel they can complete their assigned workload during regular working hours, 57% of Commission employees either disagreed or strongly disagreed.

⁶⁰ The “budget” is of a fiscal year, not a calendar year. For example, the 1995 budget is actually for fiscal year 1995-1996. The number of complaints is calculated according to the calendar year. The ratio of budget to complaints will therefore not be entirely accurate. The “budget” is the amount available for use in the operating budget, according to the *Public Accounts of Canada* for the respective year.

⁶¹ This does not include “inquiries” received by the Commission that did not become complaints. However, it does include what the Commission refers to as “potential complaints” – complaints that do not trigger the investigation process. The “signed complaints” trigger an investigation. The Commission did not distinguish between the two types of complaints in its annual reports until 2002. In that report, the Commission indicated that 600 signed complaints was normal for a year. In 2002 there were 800 signed complaints, and in 2003 there were 1,084 signed complaints. Therefore, the Commission’s actual workload (resulting from signed complaints) may have gone up significantly in the past 2- 3 years; without actual data from before 2001, we cannot say for certain.

⁶² 2002 *Public Service Employee Survey, Organizational Report for Canadian Human Rights Commission* (found at www.survee-sondage.gc.ca/2002/results-resultats/41/result-e.htm.)

This compares to 42% of employees in the rest of the federal public service. However, when asked if they are planning to leave the public service in the next three years, only 25% of Commission employees said yes, compared to 29% of employees in other departments. Most importantly, 93% of Commission staff responded that they were proud of the work they carried out.⁶³

In the interests of accuracy, we should note that the sample size of the survey is fairly limited (only 146 Commission employees responded to the survey, of whom 29 worked in the Investigations branch). However, we believe that the survey does indicate that while Commission staff feel busy, they are generally happy with their job and are very proud of the work that they do. This survey indicates that there is a disconnect between the Commission's own view of itself and the significant public criticism of the Commission's work.

A non-practical explanation for a shift away from the exclusive jurisdiction model

The discussion above demonstrates four things:

- i) The Commission dismisses or settles the vast majority of complaints made to it, often without a thorough investigation;
- ii) The Commission takes an inordinately long time to do so;
- iii) These problems cannot be explained away by inadequate budgets or disheartened staff; and
- iv) Commission employees are proud of the work they have done.

The Canadian Human Rights Commission has responded to these criticisms by proposing bigger budgets and better procedures. While more money and better administration may help at the margins, the fact that the Commission has been aware of these problems for many years, received money to help, and has been unable to correct them indicates that

⁶³ Interestingly, 100% of the staff in the Investigations Branch who responded were proud of their work.

the problem is systemic or structural, not administrative. This brings us back to the question posed as the topic of this presentation: are Human Rights Commissions still relevant?

Before tackling that question, we want to point out some of the difficulties with labour arbitration as an alternative to a human rights commission. The main concern is what Brian Etherington refers to as the “privatization and collectivization” of the administration and enforcement of human rights.⁶⁴ The “privatization” concern is over the fact that labour arbitrators are chosen and paid for by the parties. Etherington worries that shifting jurisdiction over human rights complaints from human rights commissions to labour arbitrators is part of a larger trend of transferring jurisdiction over claims based on individual rights from public officials and tribunals to private organizations and procedures. Labour arbitrators have been generally accepted as fair and neutral decision-makers for decades, so the concern is not that labour arbitrators are somehow biased or unable to understand human rights principles.⁶⁵ The concern is that the evolution of statutory public rights is now, in large measure, in the hands of “privately appointed arbitrators whose future employment depends on the satisfaction of the union and the employer and not on the satisfaction of the individual or the government who, one assumes, are most concerned with the protection of such rights.”⁶⁶

In our opinion, the concern about possible bias by arbitrators because they are paid by the parties is overblown. However, we should remember that a labour arbitrator’s role is different from a public decision maker. Public decision makers exist to do justice; labour arbitrators exist to maintain industrial peace. This is, in part, what Etherington means when he worries about the “collectivization” of human rights litigation. First, as stated, arbitrators are trained to render decisions that encourage industrial peace. Labour

⁶⁴ Etherington, *supra* note 25 at paragraph 22.

⁶⁵ The Supreme Court in *Parry Sound* did discuss the relative expertise of labour arbitrators and human rights commissions, concluding that human rights commissions have greater expertise in human rights law, but that this did not outweigh the other factors in favour of labour arbitrators having jurisdiction over human rights claims. In light of the Court’s previous decisions in *Mossop* and *Zurich Insurance*, the Court’s claim that human rights commissions have expertise in human rights law rings a bit hollow.

⁶⁶ Etherington, *supra* note 25 at paragraph 23.

arbitration is, after all, an alternative to going on strike over labour disputes.⁶⁷ This means that arbitrators look at a broader scope of rights than human rights: established rights under a collective agreement (such as seniority) should be important to an arbitrator, and may influence his or her decision on a human rights matter.⁶⁸

Second, grievances are brought by the union, not individual employees. The union has control over the carriage of the case. This means a union could agree to settle a case in situations where the grievor would refuse the employer's offer. While this is unlikely to occur for reasons of internal union politics, it is possible. More likely is that a union's approach to a human rights issue is coloured by its collectivist role. A union's job is to protect the interest of all its members, not just the grievor. In many cases, this means that a union has unwillingly contributed to the discrimination or, in some cases, become a party to it by preventing the employer from accommodating an employee. Unions are themselves bound by human rights statutes and by their duty of fair representation not to discriminate against members⁶⁹; however, when a union has agreed to a collective agreement that an employee considers discriminatory, it may be difficult to expect the union to advance a grievance to arbitration and admit that it has discriminated against its members.⁷⁰ Human rights are individual rights; to expect a trade union to protect those rights against the will of the majority goes against its collectivist nature.

There are obviously problems with assigning jurisdiction over human rights complaints to labour arbitrators. Therefore, we need to reassess (in part) our earlier thesis that the practical problems with human rights commissions are the reason behind the Supreme Court's decision to shift away from an exclusive jurisdiction model. A better justification

⁶⁷ In some countries – most notably the United Kingdom – a strike is the only way to enforce the terms of a collective agreement. Labour arbitration in Canada represents a compromise: unions cannot strike during the currency of a collective agreement, but they can enforce its terms through arbitration.

⁶⁸ On the potential conflict between human rights and seniority rights, see C. Rootham, S. McGee and B. Cole, "More Reconcilable Differences: Developing a Consistent Approach to Seniority and Human Rights Interests in Accommodation Cases" (2004), 11 C.L.E.L.J. 69.

⁶⁹ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

⁷⁰ See *Labour Arbitration Case*, *supra* note 36 at paragraph 28 and *Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission)* [2001] O.J. No. 4937 (C.A.) at paragraphs 61-62 for illustrations of this problem.

can be found in the Court's decisions about the jurisdiction of administrative tribunals to adjudicate *Charter* issues. In *Nova Scotia (Workers' Compensation Board) v. Martin*⁷¹, the Court expanded the ability of tribunals to interpret and apply the constitution. Two of their reasons for doing so are also applicable to human rights legislation, and may explain why the Court has opted against the exclusive jurisdiction model.

First, the Court in *Martin* reaffirmed that "The *Charter* is not some holy grail which only judicial initiatives of the superior courts may touch. The *Charter* belongs to the people."⁷² The Supreme Court has also commented a number of times on the quasi-constitutional nature of human rights legislation.⁷³ The Supreme Court's decision in *Parry Sound* could be read as flowing logically from the policy expressed in *Martin*: fundamental human rights law should be spread as broadly as possible, and accessible through a variety of forums.

Second, the Court stated that it wanted to take advantage of the expertise of whatever tribunal is deciding the *Charter* issues:

Charter disputes do not take place in a vacuum. They require a thorough understanding of the objectives of the legislative scheme being challenged, as well as of the practical constraints it faces and the consequences of proposed constitutional remedies.⁷⁴

Similarly, *Parry Sound* means that human rights disputes will be adjudicated through the lens of labour relations, by arbitrators cognizant of the objectives of labour law and good industrial relations. Seen this way, the collectivist impulse of labour arbitrators is a strength, not a weakness.

In light of this interpretation of the Supreme Court's decision in *Parry Sound*, we cannot conclude that human rights commissions have outlived their usefulness. *Parry Sound* on

⁷¹ [2003] 2 S.C.R. 504.

⁷² *Ibid.* at paragraph 29.

⁷³ See, for example, *Mossop, supra* at paragraph 94.

⁷⁴ *Supra* note 64 at paragraph 30.

this reading is not a reaction against the practical problems claimants have had with human rights commissions; instead, it is a recognition that human rights commissions and tribunals do not have a monopoly on useful contributions to human rights law.

Have human rights commissions outlived their usefulness?

Notwithstanding the problems with human rights commissions discussed above, and the benefits of adjudicating human rights issues outside of the human rights process, we remain of the opinion that human rights commissions are still useful entities. We feel that a direct access model is inappropriate for human rights complaints, and that commissions still have a role to play in processing complaints. However, we feel that the commission system as it currently exists is flawed, and should be reformed in several ways described below.

We have based our conclusion on the following premises, developed from the discussion above:

1. The problems with human rights commissions (delay, dismissing potentially valid complaints) are systemic and cannot be cured simply by ensuring increased funding.
2. Human rights (like the *Charter*) are “for the people” and human rights law should be diffused throughout the legal system. Additionally, it is important to have a variety of perspectives on human rights from different decision-makers. Therefore, human rights complaints should not be the sole property of human rights commissions.

We advocate that human rights commissions reform by adopting a different model of regulatory enforcement. There are two basic models of regulatory enforcement that governments may pursue: the compliance model and the deterrence model. The compliance model is a model of deregulation and weak enforcement. Its aim is to

promote conformity with the law by persuasion instead of punishment. State agencies pursuing a compliance model will rarely, if ever, prosecute offenders. The compliance model's main benefit is its economic rationality. It involves a cost-conscious use of resources, because persuasion requires fewer transaction costs than retributive enforcement procedures.⁷⁵ Furthermore, the compliance model involves lower measurement costs (the costs of estimating both the risk of a breach of the law and the loss if the risk does materialize).⁷⁶ These costs are not born by the regulatory agency, but by the individual employee and employer, who are better situated to determine the risk of damages suffered from a legal breach. The compliance or deregulation model has many critics, however. Professor Collins points out that a "crude adjustment of the private law model that grants an employee a new right supported by a liability is not likely to be the most efficacious route, and not always even the cheapest route for the legal system."⁷⁷ Private enforcement can lead to lengthy and costly court battles between parties that could have been avoided if another enforcement mechanism were used. If there is a pre-existing power imbalance between the parties, then the efficacy of private enforcement is undermined because courts are more accessible to the stronger party. The compliance model has also been criticized as being indicative of regulatory capture.⁷⁸

The deterrence model involves a highly retributive and punitive approach to enforcement. The regulatory agency will prosecute as many legal infractions as possible. There is little or no room for persuasion or discretionary prosecutions in this model. This model can, in some circumstances, be highly effective in changing corporate culture. By branding certain conduct as unacceptable, it enhances the social pressure put on firms to comply with the law. However, this strategy can backfire as firms become resentful of being branded criminals and show hostility and lack of cooperation towards regulators. This can further lead to "creative compliance" where firms follow the letter of the law but

⁷⁵ R. Baldwin & M. Cave, *Understanding Regulation* (Oxford: Oxford University Press, 1999).

⁷⁶ R. Posner, *Economic Analysis of Law*, 2nd ed. (Boston: Little, Brown & Company, 1977) at 77.

⁷⁷ H. Collins, "Justifications and techniques of legal regulations of the employment relation" in H. Collins et al., eds. *Legal Regulation of the Employment Relation* (The Netherlands: Kluwer Law International, 2000) at 22.

⁷⁸ Baldwin & Cave, *supra*.

exploit legal loopholes in flouting its purpose. Finally, prosecutions are costly in time and money and may actually produce less compliance with a given set of resources than the compliance model.

We propose using a third model of regulation: the responsive model. This model uses both compliance and deterrence enforcement mechanisms, and is therefore a sophisticated balance between those two models.⁷⁹ The responsive model has four components: a responsive strategy by regulators (what Ayres and Braithwaite call “tit for tat”); a hierarchical range of sanctions and intervention; a “benign big gun” at the top end of that range; and tripartism. The responsive strategy reacts directly to firm non-compliance. Regulators begin by cooperating with firms; however, as soon as a firm ceases to cooperate, the regulator retaliates with harsh deterrence penalties. As soon as the firm cooperates again, the regulator reciprocates. This method is best explained by a prisoner’s dilemma where firms seek to minimize regulatory costs and regulators try to maximize compliance outcomes. Each player has two options: cooperate or defect. As shown in the diagram below, the best outcome is where both players cooperate. The responsive strategy works best in this scenario because regulators only lose one “sucker payoff”; they keep all the advantages of showing goodwill for as long as possible because they are never the first to defect; and the simplicity of responsive model makes it easily recognized by an opponent, causing him to move back towards cooperation quickly.⁸⁰ This strategy works equally well against businesses motivated purely by economic interests (by punishing attempts to cheat), and those motivated by social goodwill by not undermining that goodwill with unnecessarily punitive systems.⁸¹

A responsive strategy alone is insufficient to maximize compliance. Instead, “compliance is most likely when an agency displays an explicit enforcement pyramid.”⁸²

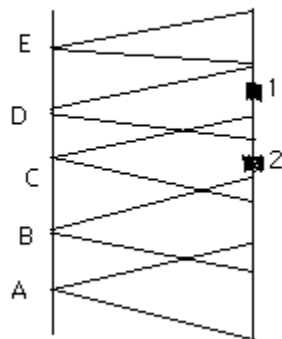
⁷⁹ J. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992) at 20-21.

⁸⁰ J.T. Scholz, “Deterrence, cooperation and the ecology of regulatory enforcement” (1984), 18 *Law and Society Review* 179 at 192.

⁸¹ Ayres & Braithwaite, *supra* at 24.

⁸² Ayres & Braithwaite, *supra* at 35.

A gradient of sanctions is better than a limited number of sanctions. If the sanction is not severe then the punishment payoff for the firm may not be lower than the reward payoff; and if there is only one (very severe) remedy, then social and political considerations will constrain its use, so threats become less credible. These two scenarios are shown in the diagram below, where there are five levels of offences (A-E), but only two available sanctions (1, 2). The minor offences never get punished, and the worst offence never gets punished enough. Therefore, the best method is to escalate deterrence in a way that is responsive to the degree of uncooperativeness of the firm.



(The lines on the right indicate the acceptable range of punishment for each offence.)

It is not enough, in this model, to have an escalating series of sanctions; the final sanction must be heavy: a “benign big gun”. This sanction, even if never used, entices firms to stop escalating the level of their defection from cooperation, because they fear this final sanction. The sanction is credible because the regulator has shown its willingness to use it by enforcing the lower levels of sanctions.

This model may be just as susceptible to agency capture as other persuasive models if the regulator begins to actively dislike punishing non-complying firms.⁸³ The solution proposed is tripartism. Tripartism empowers public interest groups, granting them access to the information available to the regulator; involving them in negotiations; and

⁸³ This could occur if there is bribery, or if political success depends upon cooperating with firms regardless of the outcome.

giving them the same standing to prosecute as regulators. This prevents agency capture by allowing these groups to prosecute the firm and punish the regulators by exposing their capture.

The reforms that we propose are designed to conform to the responsive model. Not all of the requirements of that model can be met by the commission; the “benign big gun” must be established by statute. Some of our proposals therefore include changes to human rights acts; however, most of the changes can be accomplished by reforms to the commission’s role and activities.

a) Commission still deals with preliminary, jurisdictional questions

First, we agree that the only way to prevent otherwise valid claims from being dismissed by a commission is to allow claimants the option of direct access to the tribunal.

However, we still feel that the Commission should screen claims on the criteria listed in section 41(1) of the *Canadian Human Rights Act*, namely:

- Whether there are alternative avenues of recourse available;
- Whether the complaint is beyond the jurisdiction of the commission; and
- Whether the complaint is untimely.

The remaining criterion in section 41(1) – that the complaint be in good faith and not motivated by malice – is more properly dealt with by the tribunal, as it involves competing factual accounts and in most cases an assessment of credibility. The Commission may deal with each of those three criteria in a preliminary manner, even without any representation by a respondent. If the respondent has a different view of the matter than the Commission on any of those three points, it may raise that defence before the tribunal in the normal course of events. Any possible choice of procedures must recognize that the human rights adjudication system has limited resources. Some method of disposing of claims on these three bases in an expeditious fashion must remain. By reserving this power to the commission, the commission also retains the ability to advise

claimants if they should be using another forum or jurisdiction for their claim. A fully impartial tribunal would not be able to provide that advice.

In our opinion, the current preference for complaints to be dealt with by alternative forums when available should continue. We are not proposing a return to the exclusive jurisdiction model. This is not only consistent with the court decisions turning away from the exclusive jurisdiction model for human rights enforcement, but also consistent with the Supreme Court's preference to make human rights widely available through a variety of forums.

b) Hybrid system: direct access if wished, otherwise commission investigation

Second, claimants should have the choice of whether to proceed directly to the tribunal, or whether to ask the commission for assistance. Claimants who have filed valid claims and who wish to proceed to the tribunal without the commission may do so. Claimants who want the Commission's help would go through the current system where the commission would investigate their complaint and decide whether to proceed. This dual-track system will help alleviate some of the problems with both the direct access model and the current commission-only model. It will decrease the commission's caseload, allowing it to investigate the remaining complaints more quickly and allocate its resources towards other priorities if necessary. However, it also means that claimants with their own counsel or who are supported by a large organization (a union or an advocacy group, for example) could avoid the delays created by the commission and proceed directly to the tribunal.

The direct access model alone also poses problems. The experience with a direct access model in the United Kingdom and in Quebec (prior to 1997) is that a direct access model means that complainants are rarely represented and rarely successful.⁸⁴ Therefore, we feel that there is still a role for commissions to fill in when unrepresented claimants need

⁸⁴ Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision*, 2000 [hereinafter the LaForest Report] at page 74;

assistance. However, the Commission made a policy decision in 2003 that it would only represent claimants in between 20 and 25 cases before the Tribunal (out of 200 cases referred).⁸⁵ Since the vast majority of claimants are either unrepresented or need to hire their own counsel before the Tribunal in any event, the assistance currently provided by the Commission is limited. A hybrid model would allow the Commission to focus its resources more carefully on those claimants who cannot afford to be represented before the Tribunal.

We have considered but rejected the idea of a human rights clinic.⁸⁶ Our experience is that members of the bar are typically hostile to the idea of public legal clinics. Without the support of the human rights bar, these clinics are doomed to failure. Also, there are numerous practical problems with a human rights clinic. Where would the offices be located? Would the clinics be limited to matters within a particular jurisdiction (i.e. would there be a federal clinic and a provincial clinic)? If not, who would be responsible for funding the clinics? Would the clinic be allowed to turn away clients whose claims are (in the opinion of a clinic lawyer) unfounded? If so, what would be the difference between the clinic and the commission? The clinic model poses more questions than it solves.

In our opinion some measure of direct access to the tribunal is necessary. Commissions as they are currently constructed are beginning to show indications of “regulatory capture.” Regulatory capture in its true form occurs when the regulator and the regulated firms have sufficient identification with each other to make prosecution unthinkable.⁸⁷ While we have no evidence that commissions have reached a state of true regulatory capture, their record of referring a small proportion of complaints to the tribunal combined with the current emphasis on settling disputes show some of the characteristics of regulatory capture. Direct access acts as a substitute for the tripartism necessary for a responsive model and will expose regulatory capture.

⁸⁵ Canadian Human Rights Tribunal, *Annual Report 2003* at page 5.

⁸⁶ As proposed in the LaForest Report, *ibid.*

⁸⁷ R. Baldwin & M. Cave, *Understanding Regulation* (Oxford: Oxford University Press, 1999).

Part of the direct access option should include giving the Tribunal the express jurisdiction to award legal costs for successful parties.

c) Commission is no longer responsible for mediation/conciliation

Currently, commissions are required to fulfil three roles: they investigate complaints and determine their validity; they become advocates before the tribunal once they have decided that the claim is valid; and they also attempt to mediate resolutions to disputes. A mediator cannot also be a decision-maker and an advocate. The commission structure as currently designed means that it is expected to mediate disputes where it will eventually be either the final decision-maker or a party. While final decision-makers may sometimes also make effective mediators⁸⁸, the commission's role as advocate is irreconcilable with its role as mediator. The problems caused by the commission having too many roles is demonstrated in cases where a human rights commission has dismissed a complaint because the complainant turned down a settlement offer made during conciliation.⁸⁹

We therefore propose that commissions no longer be responsible for mediation services. Instead, there should be an independent mediation service available to the parties at the tribunal stage. The mediation service could be modeled on the Advisory, Conciliation and Arbitration Service (ACAS) in the United Kingdom. ACAS is directed by a tripartite council made up of three employer representatives, three union representatives, and three independent members. It is charged with the improvement of industrial relations in the United Kingdom. One of its roles is conciliation and (if the parties agree) mediation of individual disputes before the Office of Employment Tribunals.⁹⁰ It would be difficult to create a truly representative body to run an independent human rights mediation service.

⁸⁸ This is a frequent practice in labour arbitration, for example.

⁸⁹ See *Garnhum v. Canada (Canadian Human Rights Commission)*, [1996] F.C.J. No. 1254 and *Losenno v. Ontario (Human Rights Commission)*, [2004] O.J. No. 2667. In *Canadian Broadcasting Corporation v. Paul*, [2001] F.C.J. No. 542 (C.A.) the Federal Court of Appeal questioned the result in *Garnhum* in light of section 47(3) of the *Canadian Human Rights Act*, which guarantees the confidentiality of settlement discussions during conciliation.

⁹⁰ S. Deakin & G. Morris, *Labour Law*, 2nd ed. (Butterworths: London, 1998) at 97-99.

However, having the mediation service directed in part by representatives of labour and management (in light of the fact that the large percentage of human rights complaints arise out of the workplace) might encourage confidence in that institution. The parties could be free to opt out of this free mediation service and hire their own mediator instead; however, mediation should be mandatory prior to a tribunal hearing.

d) Commission still performs other roles

Human rights commissions should continue to be involved in public education and public awareness about human rights issues. They should also (where required by statute) continue to conduct human rights audits.

e) Changes to remedies: adding a “big gun”

Currently, human rights tribunals in Canada are limited in the non-compensatory remedies they can impose. The federal tribunal, for example, may only award \$20,000 for pain and suffering, and an additional \$20,000 if the respondent’s conduct was either wilful or reckless.⁹¹ In Ontario, the tribunal is limited to an award of \$10,000 for mental anguish where the conduct has been wilful or reckless. These penalties are insufficient to deter respondents from breaching a claimant’s human rights, and do not constitute a “big gun” as required in the responsive model. The maximum penalty should be raised in order to provide a true deterrent against human rights abuses.

⁹¹ *Canadian Human Rights Act*, s. 53(2)(e) and 53(3).

Conclusion

This paper began by asking two questions: are human rights commissions legally relevant, and are they practically relevant? The answer to both questions remains a qualified yes. Human rights commissions have a legal role to play. That role has been eroded, however, as the exclusive jurisdiction model has given way to an increased role for labour arbitrators and courts. Similarly, human rights commissions have several practical and administrative problems to overcome. We have suggested some reforms to alleviate those problems. Commissions still play a valuable role in the human rights system, and should continue to perform that role in the future.

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