

CIVIL ACTIONS FOR DISCRIMINATION

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Midway through its second decade, Canadian human rights legislation has passed infancy and is rapidly maturing. Since 1970, eight provinces have either enacted or substantially amended human rights statutes.¹ Bill C-72 the Canadian Human Rights Act received first reading in the federal parliament on July 21st, 1975. In 1976, the province of Ontario which was the first jurisdiction to enact human rights legislation and has the largest staff and budget to enforce it, conducted a "public review" of the adequacy of its legislation; eighteen public hearings were held in all regions of the province and more than 200 briefs or written submissions were received.

This spate of legislative activity has resulted in considerable innovation and diversity in the grounds upon which discrimination is prohibited,² and in the social areas to which the legislation applies.³ It has scarcely touched, however, the traditional pattern

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¹ British Columbia Human Rights Code, S.B.C., 1973, c. 119; Alberta Bill of Rights, S.A., 1972, c. 1; Alberta Individual Rights Protection Act, S.A., 1972, c. 2; Saskatchewan Human Rights Commission Act, S.S., 1972, c. 108; Manitoba Human Rights Act, S.M., 1974, c. 65; Quebec Charter of Human Rights, S.Q., 1975, c. 6; New Brunswick Human Rights Act, S.N.B., 1971, c. 8, as am. by S.N.B., 1973, c. 45; P.E.I. Human Rights (Amendment) Act, S.P.E.I., 1975, c. 72.

² In addition to the relatively standard grounds of race, creed, colour, sex, marital status, ancestry and ethnic origin, the following novel grounds have been introduced in some jurisdictions: "political opinion" (Newfoundland); "source of income" (Manitoba); "past criminal record" (B.C.); "physical handicap" (Nova Scotia); "family status" (proposed in Manitoba, Bill 62, 1976); and "social conditions or civil status" (Quebec).

³ The legislation usually applies to discriminatory signs and notices, public accommodations, services and facilities, housing and commercial accommodation, and employment. Extensions to new social areas include membership in trade unions and professional organizations (*i.e.* Ontario and several other provinces), volunteer services (Nova Scotia) and contracts (Manitoba).

of administration and enforcement,⁴ which has remained substantially unchanged since the first comprehensive Canadian human rights legislation in 1962.⁵ It is appropriate that some consideration now be given to alternative procedures to redress acts of discrimination. This article explores one such alternative: the possibility and desirability of private civil actions for discrimination. Three questions will be examined: (1) is there in Canada a common law right of action, sounding in damages, for discrimination? (2) might a Canadian court imply a cause of action from human rights legislation? and (3) should human rights legislation be amended to expressly provide such a remedy?⁶

I. *Availability of a Common Law Action.*

The availability of a common law action, sounding in damages, against any particular human conduct depends upon judicial recognition that the conduct complained of is harmful or socially offensive. The novelty of a claim, or its failure to fit within previously recognized nominative categories is not alone a bar to a compensatory remedy, for as Professor Prosser has noted:⁷

There is no necessity whatever that a tort must have a name. New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the Court has struck out boldly to create a new cause of action, where none has existed before.

... the law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.

⁴ Essentially, a statute-created Commission to receive, investigate and attempt to conciliate complaints of discrimination; failing settlement, referral to a quasi-judicial tribunal (usually an independent Board of Inquiry although in Saskatchewan the Commission itself, or a panel thereof, may constitute the inquiry tribunal); if discrimination is found to have occurred, an order to rectify the violation; a penultimate but rarely invoked criminal sanction; finally, a provision is usually made for injunctive relief to restrain continuing violations. To my knowledge, no jurisdiction has ever found it necessary to seek an injunction.

⁵ The Ontario Human Rights Code, S.O., 1961-62, c. 93, now R.S.O., 1970, c. 318.

⁶ For convenience, reference will be made throughout to the Ontario Human Rights Code but, on most points, identical or similar provisions will be found in each provincial statute.

⁷ Law of Torts (4th ed., 1971), p. 3.

There are Canadian cases, admittedly sparse and dated, in which the plaintiff has claimed a remedy in tort against a defendant's discriminatory act.

In *Loew's Montreal Theatres Ltd v. Reynolds*⁸ a Negro patron purchased a general admission theatre ticket but was refused an orchestra seat because of the theatre manager's rule which restricted Negroes to the balcony seats. Fortin J. of the Quebec Superior Court awarded \$10.00 damages. However the Court of King's Bench reversed this decision holding that the theatre manager's rule offended neither good morals nor public order.⁹

Five years later, in *Franklin v. Evans*, a common law Canadian court reached a similar conclusion holding that a restaurant was entitled to refuse service solely because of a patron's colour, although, because of the "...unnecessarily harsh humiliating and offensive attitude of the defendant..." Lennox J. denied costs.¹⁰ It is interesting to note that the action was framed in tort "...to recover damages for insult and injury" and failed not through judicial refusal to acknowledge such a cause of action, but rather because the plaintiff could not convince the court that a restaurateur was included within the innkeeper's common law duty to serve the public.¹¹

In *Christie v. York Corporation*¹² the plaintiff, a Negro, was refused a glass of beer in a tavern in the Montreal Forum and claimed \$200.00 damages in tort for "humiliation". The trial judge awarded the plaintiff \$25.00 damages plus costs, but the

⁸ (1919), 30. Que. K.B. 459. Two years later, an American case arising on virtually identical facts was decided the opposite way resulting in the plaintiff being awarded \$300.00 damages for humiliation, mental suffering and injury to feelings: *Anderson v. Pantages Theatres Co.* (1921), 114 Wash. 24, 194 Pac. 813. The court cited an early Michigan case in which it was said:

"Where a statute imposes upon any person a specific duty for the protection or benefit of others, if he neglects or refuses to perform such duty, he is liable for any injury or detriment caused by such neglect or refusal, if such injury is of the kind which the statute was intended to prevent." *Ferguson v. Gies* (1890), 46 N.W. 718, at p. 720.

⁹ Lamothe C.J. stated: "...chaque propriétaire est maître chez lui; il peut à son gré, établir toutes règles non contraires aux bonnes moeurs et à l'ordre public". *Ibid.*, at p. 461.

¹⁰ *Franklin v. Evans* (1924), 55 O.L.R. 349, at p. 352.

¹¹ See: *Constance v. Imperial London Hotels Ltd*, [1944] 2 All E.R. 171 (K.B.); also H. Molot, *The Duty of Business to Serve the Public: Analogy to the Innkeeper's Obligation* (1968), 46 Can. Bar Rev. 612.

¹² [1940] S.C.R. 139.

King's Bench Court reversed and dismissed Christie's claim. The majority¹³ in the Supreme Court of Canada confirmed this dismissal, but the existence of a civil remedy for an act of discrimination was not questioned. Instead, the Supreme Court held that the doctrine of freedom of commerce justified refusals of service except such as might be inconsistent with "... a specific law [or] good morals or public order"¹⁴ which this was not. Davis J., dissenting, assumed the validity of the cause of action¹⁵ and held that "... the old doctrine of the freedom of the merchant to do as he likes ..." must give way when State monopolies, such as the sale of liquor, are established.¹⁶

In *Rogers v. Clarence Hotel*¹⁷ the British Columbia Court of Appeal held that *Christie v. York Corporation* had correctly stated the common law as well as the civil law position. Although the appellant admitted that her sole reason for refusing the respondent a glass of beer was his race and colour, the majority held that a merchant "... may conduct a business in the manner best suited to advance his own interests".¹⁸ Thus, there is no common law duty upon a tavern-keeper in these circumstances to serve an individual; but, again nothing in either Chief Justice MacDonald's judgment, nor in the short concurring judgment of Sloan J.A., denies the possibility that a discriminatory act may give rise to a tort cause of action. In a vigorous dissent, O'Halloran J.A. concluded that the tavern-keeper's conduct was tortious because it offended an "... elementary principle of the common law", that "... all British subjects have the same rights and privileges under the common law — it makes no difference whether white or coloured; or what class, race or religion".¹⁹

It would be rash to advance dogmatic conclusions based on such scanty, dated authorities. Nonetheless, it could be argued

¹³ Duff C.J., Crockett and Kerwin J.J. concurred in Rinfret J.'s majority judgment.

¹⁴ *Christie v. York Corporation*, *supra*, footnote 12, at p. 142.

¹⁵ "No objection was taken to the suit having been brought both on contract and in tort on the same set of facts and I assume that this form of action is permissible under the Quebec practice and procedure." *Ibid.*, at p. 147.

¹⁶ *Ibid.*, at p. 152.

¹⁷ [1940] 2 W.W.R. 545.

¹⁸ *Ibid.*, per Macdonald C.J.B.C., at p. 546.

¹⁹ *Ibid.*, at p. 550. O'Halloran J.A.'s judgment has been criticized: "... no matter how socially desirable the view ... might appear to be, there is little legal authority supporting it." D. A. Schmeiser: *Civil Liberties in Canada* (1964), p. 272.

that the obstacle to recovery in each of these cases was attributable to factors other than judicial unwillingness to acknowledge that discrimination, in some circumstances, may be tortious conduct reparable by an award of damages in civil proceedings. Specifically, lack of success could be explained because (a) the argument centred on subsuming tavern or restaurant keepers within the scope of the recognized inn-keeper's common law obligation (for instance, in *Franklin v. Evans* and *Rogers v. Clarence Hotel*); and (b) more importantly, because discrimination itself was not perceived as socially harmful or offensive conduct (for instance, in *Loew's v. Reynolds* and *Christie v. York Corporation*). The latter factor, although probably determinative of these early cases, is mutable, and who would deny that social and judicial attitudes about discrimination have radically changed with the passing years.

At least since 1945, no doubt influenced by the revelations of the Nuremberg trials and the unanimous adoption by the United Nations of the Universal Declaration of Human Rights in 1948,²⁰ Canadian judgments have exemplified greater judicial sensitivity to the pervasive and invidious consequences of discrimination. In *Re Drummond Wren*,²¹ MacKay J. held void a racially discriminatory property covenant purporting to prohibit sale to "... Jews or persons of objectionable nationality". He did so in such sweeping and unequivocal terms as to suggest that henceforth discrimination *per se* would be judicially regarded as antithetical to public policy:

How far this is obnoxious to public policy can only be ascertained by projecting the coverage of the covenant with respect both to the classes of persons whom it may adversely affect, and to the lots or subdivisions of land to which it may be attached. So considered, the consequences of judicial approbation of such a covenant are portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics or other groups or denominations. If the sale of one piece of land can be so

²⁰ In *Re Drummond Wren*, [1945] O.R. 778, MacKay J. acknowledged this influence: "My conclusion therefore is that the covenant is void because offensive to the public policy of this jurisdiction. This conclusion is reinforced, if reinforcement is necessary, by the wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate." At p. 783.

In a breathtaking display of judicial notice, MacKay, J. cited: the United Nations Charter; a resolution adopted by the World Trade Union Congress; extra-judicial utterances of Justices Holmes and Cardozo; and speeches by President Roosevelt, Prime Minister Churchill and General de Gaulle.

²¹ *Ibid.*

prohibited, the sale of other pieces of land can likewise be prohibited. In my opinion nothing can be more calculated to create or deepen divisions between existing religious or ethnic groups in this province...²²

It is true that a subsequent Supreme Court of Canada decision on a similar covenant avoided invocation of public policy, but this is explainable since the court held the covenant void on narrower grounds: as a restraint on alienation and for uncertainty.²³ Subsequent cases contain language indicating that discrimination clearly offends public policy.²⁴ And the enactment of human rights statutes has now placed the matter beyond dispute, since most begin with a preamble explicitly declaring: "... it is public policy [in Ontario] that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin".²⁵

Since the judiciary must now acknowledge that at least those forms of discrimination specified in human rights legislation are contrary to declared public policy, it seems probable that cases like *Loew's* and *Christie* would be decided differently today. While no Canadian case has explicitly held that discrimination is tortious conduct,²⁶ it is noteworthy that in none of these early cases did the court question the cause of action *per se*. Consequently, it is submitted that it is erroneous to interpret these cases as an impediment to a contemporary re-assertion of a common law private action for discrimination.

Then why have there been none? Three reasons explain this: first, the existence of alternative procedures, in human rights legislation, for redressing acts of discrimination. Secondly,

²² *Ibid.*, at pp. 782-783; *contra*, Schroeder J. in *Nobel v. Wolf and Alley*, [1948] 4 D.L.R. 123, at p. 139 (H.C.); *aff'd* [1949] 4 D.L.R. 375 (C.A.).

²³ [1951] S.C.R. 64.

²⁴ *E.g.*, *John Murdock Ltée v. La Commission des relations ouvrières*, [1956] Que. S.C. 30; *R. ex. rel. Nutland v. McKay* (1956), 5 D.L.R. (2d) 403, 113 C.C.C. 56; *Gooding v. Edlow Corporation*, [1966] Que. S.C. 436.

²⁵ The Ontario Human Rights Code, *supra*, footnote 5.

²⁶ I am not overlooking *Roncarelli v. Duplessis*, [1959] S.C.R. 151 which might be regarded as having done so; but because the claim was grounded on article 1053 of the Quebec Civil Code and given the peculiar circumstances of the case (ably expounded by Professor McWhinney in a note in (1959), 37 Can. Bar Rev. 503), I prefer to regard this case as *sui generis* and not as establishing any general tortious remedy against discrimination.

the risks and costs attendant on litigation, particularly in such an uncharted area of the law. Thirdly, one must consider the likely victim of discrimination: even a cursory analysis of any human rights commission's files would reveal that the victims of discrimination tend disproportionately to be among the disadvantaged of society: usually members of visible minority groups, often poor, frequently recent arrivals unfamiliar with Canadian institutions and anxious to be adaptive rather than disruptive in a new culture and environment. Given the cumulative effect of these factors, the dearth of private actions is explainable by reasons other than the lack of such a cause of action.

II. *Implying a Cause of Action from Human Rights Legislation.*

With certain specified exceptions, Canadian human rights legislation commonly prohibits discrimination because of race, religion, colour, sex, marital status and ethnic or national origin in public accommodation, services and facilities, in sale or rental of housing or commercial accommodation, in employment, and in membership in trade unions and professional organizations. The legislation also provides an enforcement procedure by which a complaint of discrimination is investigated and conciliation attempted through the medium of a statutorily created Commission; if settlement is not achieved, the complaint may be referred to an independent inquiry but only upon the recommendation of the Commission and the appointment of an inquiry tribunal by the designated Minister.²⁷ Once a complainant has taken the first step of filing a complaint, the initiative for its resolution effectively passes to the Commission.²⁸

The issue now to be considered is whether the remedial procedure specified in the legislation is the exclusive remedy, or whether there is an implied private right of action for damages or other relief based on a breach of human rights legislation. Despite Professor Linden's cautionary warning that "... the common law treatment of legislation has never been happy" and that, in this area "... the outcome of the cases defies predic-

²⁷ In Ontario, the Minister of Labour; *cf.* s. 19(f) of the Ontario Human Rights Code, *supra*, footnote 5.

²⁸ Even at the board of inquiry stage, s. 14(b)(1)(a) of the Ontario Code, *ibid.*, provides that it is the Commission, not the complainant "... which shall have the carriage of the complaint".

tion",²⁹ this difficult question of statutory interpretation must be addressed.

Clearly a provincial legislature may, if it chooses, specifically provide a civil remedy in any statute within its jurisdiction.³⁰ Where it does not expressly do so, it does not follow that a private civil remedy is excluded.

A court may imply a private remedy for breach of a statute where that is not manifestly inconsistent with legislative intention. In the context of human rights legislation which seeks to prevent discrimination, the tortious conduct complained of would be the act of discrimination; this is to be distinguished from the court's use of statutes to set standards of care in negligence. In *London Passenger Board v. Upson*, Lord Wright stated:³¹

... a claim for damages for breach of a statutory duty intended to protect the person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty.

The most recent, comprehensive judicial examination of the implied cause of action under provincial legislation was by the Ontario Court of Appeal in *Stewart v. Park Manor Motors*.³² Stewart sued the defendant, his former employer, for vacation pay owing under the Hours of Work and Vacations with Pay Act.³³ Although section 11 of the Act made non-compliance a summary conviction offence, and section 12 made it mandatory, on conviction, for the magistrate to order the delinquent employer to reimburse the employee in full, nevertheless a unanimous Court of Appeal held that these statutory remedies did not preclude a private civil proceeding:

... [the] summary remedy was provided as a matter of convenience or, perhaps, policy, but in my view it was at most an optional remedy

²⁹ Wright and Linden, *Canadian Tort Law: Cases, Notes and Materials*, (6th ed., 1975), p. 237. In *Solomons v. Gertzenstein Ltd.*, [1954] 2 Q.B. 243, at p. 266, Romer L.J. stated: "No universal rule can be formulated which will answer a question whether in any given case an individual can sue in respect of a breach of a statutory duty."

³⁰ E.g., Liquor License Act, R.S.O., 1970, c. 250, s. 68; Municipal Act, R.S.O., 1970, c. 284, s. 427(1).

³¹ [1949] A.C. 155, at p. 168.

³² (1968), 66 D.L.R. (2d) 143.

³³ R.S.O., 1960, c. 181.

which was never intended to replace the ancient remedy available in the Superior, District or County Courts.³⁴

The Hours of Work and Vacations with Pay Act is comparable to human rights legislation in two important aspects: both provide redress for unjustly treated employees; in the former case, as a result of denial of pay for vacations; in human rights legislation, by denial of statutorily guaranteed equality of employment opportunity. Moreover, the former Act provided both a penal section (comparable to the summary conviction offence provisions of human rights legislation³⁵), and reimbursement to the complainant (comparable to the prerogative of the Board of Inquiry under human rights legislation³⁶).

In the *Stewart* case, Schroeder J.A. phrased the issue this way:³⁷

Where a statute creates a liability not existing at common law and provides a particular remedy for enforcing it, the question is raised as to whether the particular remedy provided is the only remedy or whether there is, in addition a right of action for damages or other relief based on the breach of the statutory duty. As statutory duties deal with a great variety of matters of varying degrees of importance and are directed to a number of different objects, it is impossible to give a simple, affirmative or negative answer to this question. Everything depends upon the object or intention of the statute.

It could scarcely be contended that, in terms of "varying degrees of importance" human rights legislation is any less important than vacations with pay legislation. In fact, most provincial human rights legislation begins with a preamble, unparalleled in terms of an unequivocal declaration that equality of opportunity without discrimination constitutes the cornerstone of public policy.³⁸ It is true that legislative intention is a wavering

³⁴ Per Schroeder J.A., *supra*, footnote 32, at pp. 150-151.

³⁵ Ontario Human Rights Code, *supra*, footnote 5, s. 15.

³⁶ A board of inquiry is empowered to order any person who has contravened the Code "... to do any act or thing that in the opinion of the board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor." Ontario Human Rights Code, *ibid.*, s. 14(c)(b).

³⁷ *Stewart v. Park Manor Motors*, *supra*, footnote 32, at p. 147. See also: Atkin L.J. in *Philips v. Britannia Hygienic Laundry Company*, [1923] 2 K.B. 832, at pp. 840-841; and Lord Cairns L.C. in *Atkinson v. Newcastle Waterworks* (1877), 2 Ex D. 441, at p. 448.

³⁸ "Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...."

will-o'-the-wisp, but one may at least start from the proposition that a private civil remedy is not inherently incompatible with anything in the legislation itself.

Mr. Justice Schroeder suggested three factors relevant to ascertaining whether the legislature intended statutory breach to give rise to a private civil remedy: (1) "... whether the action is brought in respect of the kind of harm which the statute was intended to prevent"; (2) "... if the person bringing the action is one of the class which the statute was designed to protect"; and (3) "... if the special remedy provided by the statute is adequate for the protection of the person injured".³⁹

In the *Stewart* case, the court quickly concluded that points (1) and (2) were satisfied. Point (3) was more problematic. But Schroeder J.A. enumerated several reasons why the statutory remedy was insufficient and therefore a private remedy should be implied. These reasons were: the natural reluctance of an employee to prosecute an employer; the possibility of dismissal of a summary conviction charge "... on technical grounds"; and expiry of the six month limitation period on summary conviction offences.⁴⁰

If one hypothesizes a private civil action based on a breach of human rights legislation, it will be apparent that the first two of the three factors suggested as indicative of legislative intention are satisfied. The plaintiff is alleging that he is a victim of discrimination, and there can be no doubt that discrimination is precisely the harm that the statute is intended to prevent.⁴¹

Are the statutory remedies provided adequate to the plaintiff's protection? It should first be noted that there are, in effect, two possible remedies under human rights legislation: (1) the investigation, conciliation and inquiry procedure leading to an order "... to rectify any injury caused to any person or to make compensation therefor";⁴² and (2) prosecution for violation of the Act, or for any order made under the Act

And whereas it is public policy in Ontario that every person is free and equal in dignity and rights...." Preamble, Ontario Human Rights Code, *supra*, footnote 5.

³⁹ *Stewart v. Park Manor Motors*, *supra*, footnote 32, at p. 148.

⁴⁰ *Ibid.*, at p. 149.

⁴¹ S. 9, which enumerates the duties of the Ontario Human Rights Commission, charges it to, *inter alia* "... develop and conduct research and educational programs designed to eliminate discriminatory practices". Ontario Human Rights Code, *supra*, footnote 5, s. 9(c). Emphasis added.

⁴² *Ibid.*, s. 14(c)(b).

(such as an order of compensation made by a Board of Inquiry) leading to a fine of up to \$1,000.00 in the case of an individual, or \$5,000.00 in the case of a corporation or trade union.⁴³

Are these remedies adequate? It is submitted that in most cases they are. In fact, in the vast majority of cases they are unnecessary for the complaint is resolved by conciliation. In 1975, out of 1,423 formal complaints of discrimination the Ontario Human Rights Commission proceeded to the Board of Inquiry stage in only seven cases; in none was prosecution necessary.⁴⁴

But, in a minority of cases, the statutory remedy may be inadequate for several reasons. First, for exactly the reasons which the Ontario Court of Appeal found persuasive in the *Stewart* case. An employee's natural reluctance to publicly embarrass his present or former employer will be even more acute in respect of an allegation of racial discrimination, given the social condemnation it entails, than in respect of unpaid vacation benefits. Nor are technical objections or expired limitation periods any less hazardous pitfalls to a claim under human rights legislation.

But there are at least two additional reasons, unique to human rights legislation, which suggest that the statutory remedies are inadequate in some cases.

I have previously indicated that the initiative for resolution of a human rights complaint is in the hands of the Commission, not the complainant. In most cases, this poses little problem for the Commission's and the complainant's interest will be, if not identical, at least similar. But, in some cases, the Commission's position may diverge from the complainant's interest and it may happen at any stage of the process. For example, it is not uncommon for the Commission and the complainant to differ on the appropriate conclusions to be drawn from the investigation; the Commission may honestly conclude that the investigation has failed to substantiate the accusation of discrimination and that there is nothing therefore to be settled through conciliation. Nevertheless, the complainant will frequently persist in his belief in discrimination. To date, the disgruntled complainant's only recourse has been to seek judicial review for an order in the nature of mandamus to order the Commission to

⁴³ *Ibid.*, s. 15.

⁴⁴ R. W. McPhee (Executive Director of O.H.R.C.) in (1975), 15 Human Relations 22.

appoint a Board of Inquiry. Since the Commission's discretion to recommend for or against appointment of a Board of Inquiry is expressly given in the statute,⁴⁵ it is highly unlikely that judicial review will ever be successful.⁴⁶ But even if it were, could a complainant reasonably be expected to have confidence that a reluctant Commission which had previously expressed its doubts as to the veracity of the complaint, would now vigorously present his case to a Board of Inquiry? And is it sensible that the complainant's money and energy be consumed peripherally in attempting to persuade a reviewing court to order a reluctant Commission to recommend the appointment of a Board of Inquiry, rather than directly pursuing the point of discrimination by a private action in the ordinary courts?

The Ontario Human Rights Code imposes a mandatory obligation on the Commission to "...endeavour to effect a settlement of the matter complained of". It is not uncommon for the complainant and the Commission to differ, sometimes drastically, on what constitutes a reasonable settlement in the circumstances of the case. In one case, the Commission took the position: "...the terms of settlement offered by the respondent are, in the circumstances, reasonable and this case ought to be settled in the public interest without proceeding to a Board of Inquiry."⁴⁷ The complainant did not agree and rejected any settlement, insisting on a public inquiry. The Board of Inquiry refused a Commission motion to disband and held that, once appointed, the Board must convene unless a settlement satisfactory to *all* parties has previously been reached.⁴⁸

⁴⁵ Ontario Human Rights Code, *supra*, footnote 5, s. 14(a)(1).

⁴⁶ I am aware of only two cases in which judicial review has been sought on this basis: *Re Polten v. Governing Council of the University of Toronto et al.* (1976), 8 O.R. (2d) 749; and *Re Damien v. Ontario Human Rights Commission*, application for judicial review filed Dec. 8th, 1975, decision pending.

⁴⁷ *Amber v. Leder*, Report of a board of inquiry (Professor W. S. Tarnopolsky) under the Ontario Human Rights Code, dated April 10th, 1969, p. 4.

⁴⁸ "If the Commission decides to recommend to the Minister that a Board of Inquiry be appointed, and the Minister makes such an appointment, there is no provision in the Ontario Human Rights Code for the Commission at this stage to withdraw the complaint from the jurisdiction of the Board of Inquiry, nor to recommend the revocation of the appointment. This is so even if subsequent to the appointment the respondent is prepared to settle on terms considered reasonable by the Commission but not the complainant. There is nothing to indicate that failure to effect a settlement occurs only upon disagreement between the Commission and the respondent. It occurs also when the complainant does not agree with the Commission." *Amber v. Leder*, *ibid.*, Clarification of Report dated May 1st, 1970, p. 4.

This means that once a Board of Inquiry has been appointed, a persecutorial or publicity-seeking complainant may disregard all settlement proposals, however reasonable, and ineluctably compel a public inquiry. Such an inquiry could only be embittered, thus exacerbating those tensions which human rights legislation seeks to dissipate, and fundamentally antithetical to the conciliative intent of the Act. If the complainant is intransigent in rejecting even a reasonable settlement, it seems more sensible that he be allowed to attempt to vindicate his position at his own, rather than public, expense. The Commission has satisfied itself (and, thereby, the public interest) either that discrimination did not occur or, if it did, that it has been appropriately rectified. Any lingering private grievances should be resolved by private proceedings.

Such an approach would substantially resolve what has been recognized as a paradox⁴⁹ at the heart of human rights legislation: that is, the conflict between the complainant's statutory right to redress of discrimination, a civil wrong,⁵⁰ versus the Commission's obligation to resolve complaints of discrimination through a statutory procedure which subordinates considerations of guilt and innocence to conciliation and settlement.⁵¹ If judicial recognition were given to the possibility of

⁴⁹ "The root of the problem is that the Act embodies a series of policy paradoxes. On the one hand, public respect for the policies embodied in the statute is enhanced by publicity, yet at the same time the opportunity to preserve confidentiality and anonymity, and to avoid stigma, is an inducement to a respondent to agree to a settlement. Second, because there is an individual complainant on whose behalf the proceedings are instituted, a premium is properly placed upon obtaining effective relief for him. Moreover, the hazards of litigation generate pressures for both sides to compromise their differences with the result that the complainant may forego some degree of vindication. Yet to the extent that the complainant abandons his claim, the Commission's objectives remain unfulfilled. To this extent, pursuing the private interests of the complainant may be inimical to the full achievement of public purposes." *Ruest v. International Brotherhood of Electrical Workers*, Report of a Board of Inquiry (Professor H. W. Arthurs) under the Ontario Human Rights Code, dated April 9th, 1968, p. 24.

⁵⁰ "An act of discrimination does not give rise merely to a new private claim for compensation — it amounts to a public wrong." *Amber v. Leder*, *supra*, footnote 47, p. 9.

⁵¹ In the first article explaining the legislation, co-authored by Dr. Daniel G. Hill (the Commission's first Director and subsequently first full-time Chairman) and Mr. T. M. Eberlee (the Commission's first Secretary), it is stated: "The conciliation process is highly flexible and, as a policy, the investigator concentrates rather less on the issue of legal guilt than on the issue of effectuating a satisfactory settlement." (1963), 15 U. of T. L.J. 448, at p. 449.

private civil proceedings for discrimination, the Commission could discharge its function, and the unsatisfied complainant could, if he wished, pursue a private remedy.

An Ontario County Court has recently held⁵² that a tenant may bring a private tort action against a landlord for breach of a section of the Landlord and Tenant Act requiring that rental premises be kept habitable and safe.⁵³ To ascertain legislative intention, the court cited the three factors enumerated by Schroeder J.A. in *Stewart*,⁵⁴ and seemed primarily influenced by the inadequacy of the statutory penalty provided:

... the remedies provided are wholly inadequate and do not represent adequate compensation should damages be suffered.⁵⁵

Do the remedies in the Ontario Human Rights Code provide adequate compensation to rectify the damage caused by discrimination?

The Commission could bypass the investigation, conciliation and inquiry procedure, in favour of immediate prosecution for contravention of the Act.⁵⁶ On summary conviction the respondent could be ordered to pay a fine which, of course, comes into the consolidated revenue fund of the province. Such a remedy would provide no financial or other redress to the complainant except, perhaps, the psychic satisfaction of witnessing the respondent convicted; for this reason, the Ontario Human Rights Commission has never, in its fourteen-year history, proceeded to prosecution without the prior Board of Inquiry step.⁵⁷

Thus, if the complainant is to find an adequate remedy it must be at the Board of Inquiry. An analysis of Board of Inquiry decisions in Ontario reveals substantial uniformity in terms of the orders made. The standard requirements typically include: (a) a letter of assurance against further discrimination to be sent to the Commission and often to the complainant;⁵⁸

⁵² *Cunningham v. Moore*, (1972), 28 D.L.R. (3d) 277; See also *Lewis v. Westa Holdings et al.* (1976), 8 O.R. (2d) 181.

⁵³ R.S.O., 1970, c. 236, s. 96(1).

⁵⁴ *Supra*, footnote 32.

⁵⁵ *Cunningham v. Moore*, *supra*, footnote 52, at p. 289.

⁵⁶ Ontario Human Rights Code, *supra*, footnote 5, s. 15.

⁵⁷ The Commission has, on four occasions in fourteen years, prosecuted for failure to comply with a ministerial or board of inquiry order.

⁵⁸ In a housing discrimination case, Professor H. Krever (now Krever J. of the Ontario Supreme Court) recommended that the respondents write the complainant a letter of apology, but added: "If they refuse to do so, I would not compel them to do so by means of a ministerial order because

(b) the posting of human rights cards in the respondent's rental premises or place of employment; and (c) infrequently, notification to the Commission of future rental vacancies or positions of employment for a specified period.⁵⁹ Usually, the complainant will have found alternative accommodation or employment in the months elapsed between the filing of the complaint and the inquiry. Many Boards of Inquiry have also awarded compensation to the complainant for out-of-pocket expenses directly incurred as a result of the discriminatory act. Such an order might cover a variety of claims⁶⁰ but all are analogous to special damages.

Prior to 1971, the Ontario Human Rights Code empowered a Board of Inquiry only to "... recommend to the Commission the course that ought to be taken with respect to the complaint".⁶¹ No Board of Inquiry considered this adequate legislative authority to recommend payment of general damages. For

I do not favour compelling a hypocritical gesture that is devoid of real meaning." *Massey v. Castlefield Apartments*, Report of a Board of Inquiry (Professor H. Krever) under the Ontario Human Rights Code dated January 24th, 1969, p. 20. A Board of Inquiry under the B.C. Human Rights Code condemned letters of apology or assurance of future compliance as an "indignity" and "inconceivable" as a Board recommendation: "Human rights legislation is no different in importance from other legislation, howsoever important it may be. Law is law. If an employer breaks the law, with impunity or otherwise, he pays the penalty assessed by a proper tribunal. ... Remedies in law should remain with judicial tribunals, not with administrative ones." *MacKay v. Westfair Foods*, Report of a Board of Inquiry (Jerome Reyda, Q.C., Chairman) under the British Columbia Human Rights Code dated January 9th, 1974, pp. 13-14.

⁵⁹ In *Mitchell v. O'Brien*, the respondent was obliged to insert the phrase "no colour or race bar" in any future advertising concerning rental vacancies for a period of one year. Report of a Board of Inquiry (Professor W. S. Tarnopolsky) under the Ontario Human Rights Code dated July 11th, 1968, p. 15. In *Massey v. Castlefield Apartments*, *ibid.*, the respondent was required to render financial assistance to the complainant "... in obtaining alternative accommodation when she is next required to move", p. 21.

⁶⁰ In *Amber v. Leder*, *supra*, footnote 47, a total of \$461.00 compensation was ordered. The Board allowed claims under the following heads: (a) rent differential (between the apartment the complainant was denied and the apartment she subsequently rented) of \$15.00 per month for two years; \$360.00 total; (b) \$89.00 for hotel and living expenses of complainant while seeking alternative accommodation; and (c) \$12.00 for truck rental to move furniture.

The Board rejected as too remote a claim for the extra daily cost of transportation to work, and a claim for solicitor's costs. See also: *Walls v. Loughheed*, Report of a Board of Inquiry (Professor H. Krever) under the Ontario Human Rights Code dated August 21st, 1968.

⁶¹ *Supra*, footnote 5, s. 14(3).

example, in a 1971 decision, Professor Horace Krever (now Krever J. of the Ontario Supreme Court) lamented that the inadequacies of the remedial provisions of the Ontario Human Rights Code:

...drastically limited the range of possible recommendations open to the Board of Inquiry. I particularly regret that I am unable to suggest anything that could, even in a small way, compensate or console Mr. Michon for the psychic wound which he suffered as the victim of the discriminatory act, the gravity of which was magnified by its nature as a defamation of an entire ethnic group.⁶²

Other Boards of Inquiry had echoed this view.⁶³

In 1971 the legislation was amended to give the Board broad remedial authority to order any party who had contravened the Act "...to do any act or thing that, in the opinion of the Board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor".⁶⁴ Since the amendment, some Boards of Inquiry have included in their order a financial award analogous to general damages. In the first Board decision to do so, the Board Chairman wrote:

Surely this head of damage is as valid and integral an ingredient of discriminatory injury as injury to feelings in libel, slander, malicious prosecution and assault actions. In these latter actions, compensation is permitted to remedy the harm inflicted upon a man's reputation and dignity. Hurt to similar feelings should be the subject of compensation under the Human Rights Code.⁶⁵

⁶² *Michon v. Kyrlyluk*, Report of a Board of Inquiry (Professor H. Krever) under the Ontario Human Rights Code dated July 29th, 1971, p. 14.

⁶³ "In submitting my recommendations as to future action with respect to the complaint, I find it very difficult to know what could be done in the circumstances to assuage the injury suffered by Miss Mitchell. Certainly she would gain no compensation through the mere punishment of the respondent following a subsequent prosecution. The threat of prosecution may be a deterrent but it is ineffective salve to heal the wounds of one who has suffered discrimination. Perhaps the only comfort that the victims of discrimination can get, until a better world evolves, is the knowledge that the community does not condone nor ignore the overt manifestations of prejudice." *Mitchell v. O'Brien*, *supra*, footnote 59, p. 14.

⁶⁴ S.O., 1971, c. 50, s. 63.

⁶⁵ *Gabiddon v. Golas*, Report of a Board of Inquiry (Professor S. N. Lederman) under the Ontario Human Rights Code dated July 9th, 1973, p. 28. Cf. *Chance v. Frank's Beauty Salon* (1970), 316 N.Y.S. (2d) 236; *Jarvis v. Swan Tours Ltd.*, [1973] 1 All E.R. 71.

However, to date, the largest amount of compensation awarded under this head has been \$100.00.⁶⁶ This is equivalent to the *minimum* award allowable by state legislation in some American jurisdictions.⁶⁷ If, as has been suggested, the injury inflicted by discrimination is analogous to defamation or assault, these awards are uniformly and absurdly low, and call into question the adequacy of the statutory remedy.

Unlike specific out-of-pocket expenses, humiliation and injury to human dignity are extremely difficult to prove, or to assign a monetary value to. Thus, it may not be surprising that awards would tend to be low, but should they be so low as to be inconsequential? There is a gross disparity between the gravity of the language used to describe the consequences of discrimination and the frugal sums of money awarded to compensate for it. It is open to question whether such insignificant awards could possibly have any deterrent effect on discriminatory conduct, or constitute sufficient inducement to victims to expose acts of discrimination by filing complaints.

In summary, I have submitted (a) that recent decisions have allowed private civil remedies for breaches of statutes of less compelling public importance than human rights legislation; (b) that the court will attempt to discern legislative intention primarily by examining the adequacy of the statutory remedy; (c) that, in a minority of cases, the statutory remedies provided in human rights legislation are demonstrably inadequate either because the complainant cannot require any even quasi-judicial determination of the validity of his complaint, or because the scope for financial redress is insufficient. Thus, I submit that it is possible that a Canadian court would be prepared to award damages to a plaintiff in an action for discrimination contrary to human rights legislation. Of course, lacking unequivocal precedents the outcome of such a case must remain speculative.

⁶⁶ \$100.00 in *Gabiddon v. Golas*, *ibid.*; \$75.00 in *Segrave v. Zellers Ltd*, Report of a Board of Inquiry (Professor S. N. Lederman) under the Ontario Human Rights Code dated September 22nd, 1975; \$50.00 in *Jones and Wilkinson v. Hubert*, Report of a Board of Inquiry (Professor S. N. Lederman) dated June 29th, 1976; \$100.00 in *Shack v. London Driv-Ur-Self*, Report of a Board of Inquiry (Professor S. N. Lederman) under the Ontario Human Rights Code dated June 7th, 1974. In a Saskatchewan Board of Inquiry decision (Judge T. Taylor, Chairman) \$100.00 general damages was awarded: *Bird v. Gabel*, dated September 16th, 1974.

⁶⁷ S. 52 of the California Civil Code provides a minimum liability in damages of \$100.00 in any private action by the victim of discrimination who is denied accommodation or facilities because of race and colour.

It remains to consider whether certainty should supplant speculation by amending human rights legislation to expressly provide an alternative private remedy. And, if so, at what stage?

III. *Amending Human Rights Legislation to Provide a Private Remedy.*

The recognition of a generalized duty of care to one's neighbour⁶⁸ combined with the modern judicial inclination to expand nominative tort categories to insure, where possible, that relief is available where wrongful conduct has occasioned injury⁶⁹ at bottom attest the principle that members of a civilized society are entitled to legal protection against conduct devoid of social utility. Discrimination is such conduct. Any remedy which will assist to curtail its incidence is, *prima facie*, desirable.

In most cases, the victim of discrimination has an adequate remedy in the investigation, conciliation and inquiry process of human rights legislation; in a small number of cases, for reasons previously outlined, that remedy is inadequate. Would an alternative private right of action, at some stage, interfere with effective administration of human rights legislation?

Human rights statutes combine several legislative techniques (regulatory, penal, hortatory and educational)⁷⁰ in an attempt to more effectively realize a single social purpose: genuine equality of opportunity. But the unifying element, from its inception, has been the emphasis on conciliatory rather than adversarial procedure.⁷¹ Is a private remedy incompatible with conciliation?

Private civil proceedings are unquestionably adversarial. If one had a simple election, at the outset, either to file a com-

⁶⁸ *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562.

⁶⁹ *E.g.*, in areas such as mental suffering and liability for negligent misrepresentation.

⁷⁰ The Commission "regulates" newspaper advertising to ensure compliance with s. 4(2) of the Code by requiring advertisers to submit potentially discriminatory advertisements for pre-publication scrutiny and approval; s. 15 contains a penal sanction; the Preamble is hortatory; s. 9(c) charges the Commission to "develop and conduct research and educational programs designed to eliminate discriminatory practices".

⁷¹ "Modern day human rights legislation is predicated on the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the process of re-education, discussion, and the presentation of socio-scientific materials that are used to challenge popular myths and stereotypes about people. . . . Human rights legislation on this continent is a skillful blending of educational and legal techniques in the pursuit of social justice." D. G. Hill, (1965), 1 *Human Relations* 4.

plaint with the Human Rights Commission or to issue a writ for discrimination, the latter course of action could exacerbate rather than ameliorate community racial tensions. Any defendant whose first inkling of a human rights problem is receipt of a writ will be understandably embittered and more likely to be defensive and fractious than conciliatory. Clearly no one gains by polarizing the parties into vindictive, litigious positions, particularly not in racial disputes which are often already inflamed by suspicion and hostility.

One of the chief virtues of human rights legislation is the obligation⁷² on the Commission to investigate and attempt to conciliate complaints of discrimination. Independent investigation benefits both complainant and respondent. The complainant usually lacks the time, resources or expertise to investigate and document his own complaint; the Commission provides, free of charge, trained, experienced staff empowered by statute⁷³ to do so. But investigation may indicate that a complaint is based on misunderstanding, which can be cleared up, or is groundless and should be dismissed;⁷⁴ thus, the respondent is spared trial by newspaper in defending himself against a groundless accusation at a public inquiry. The extremely high ratio of complaints successfully conciliated is persuasive evidence of the wisdom and efficacy of this approach.

If private proceedings could be commenced at the outset, the investigation and conciliation process would be bypassed. Community race relations could be exacerbated. It is submitted that this risk outweighs any possible advantage of such an innovation.

But, at a later stage, that is (a) if, after a full investigation, the Commission concludes that there is insufficient evidence on which to proceed and the complainant disagrees; or (b) if the Commission and the complainant cannot agree about what constitutes a reasonable settlement; then, it is submitted that the complainant should be entitled to abandon the statutory procedure in favour of a private suit.

⁷² "...the Commission or an officer thereof *shall* inquire into the complaint and endeavour to effect a settlement of the matter complained of." Ontario Human Rights Code, *supra*, footnote 5, s. 14(1). Emphasis added.

⁷³ Ontario Human Rights Code, *ibid.*, s. 14(2).

⁷⁴ By a recommendation to the Minister of non-appointment of a board of inquiry; *cf.* s. 14a(1).

It is a rare case where the Commission's investigation will fail to reveal evidence probative of discrimination if such exists. Unfortunately, it is not rare for a complainant to adamantly reject any explanation of events other than wilful discrimination. Indeed, it is sad but true that a significant proportion of the time of a human rights commission is consumed in trying to satisfy complainants whose belief in discrimination has taken on paranoid dimensions. When the Commission refuses to acknowledge what seems clear to him, the complainant will often conclude that the Commission is participating in an attempt to "cover up" discrimination.

There are other cases in which the results of an investigation are genuinely ambiguous. The Commission may conclude, on balance, that it could not discharge the onus of proving to a Board of Inquiry, on the balance of probabilities, that discrimination occurred.⁷⁵ Presently, a complainant who disagrees with this and might be willing to take a chance on litigation, has no realistic alternative but to accept the Commission's decision. Express provision of a right to bring civil proceedings in the court at this stage would not only give the complainant an independent forum, the court, of greater legitimacy and public confidence than a governmental commission, but it would also provide a salutary check on both oversight and the admittedly remote possibility of perversity in the Commission's assessment of investigative findings.

It is true that this would mean that a respondent who might, in effect, claim to have been "vindicated" by the Commission's investigation, could still face the possibility of civil proceedings. But given the costs and hazards attendant on such litigation, it would be rare. It is not uncommon for a person's conduct to be the subject of scrutiny by both a public authority and a court, nor, in some cases, for each to come to valid but different conclusions.⁷⁶ The situation would be analogous to that of a Crown Attorney who, after investigation, exercises his discretion not to prosecute an assault charge, either because he concludes that there is insufficient evidence or, for some other

⁷⁵ "...the onus of proving a contravention of the Ontario Human Rights Code 1961-62 is on the Commission to establish the facts of the complaint on the balance of probabilities." *Massey v. Castlefield Apartments*, *supra*, footnote 58, pp. 17-18. All Canadian Boards of Inquiry have concurred that the civil standard is applicable and that the onus is on the Commission.

⁷⁶ Cf. *Imrie v. Institute of Chartered Accountants of Ontario* (1972), 28 D.L.R. (3d) 53.

reason, it is contrary to the public interest to do so; his decision is no bar to a civil action by the victim of the assault. The court's discretion in awarding costs, and the power to strike out any statement of claim as frivolous or vexatious or not disclosing a reasonable cause of action⁷⁷ are sufficient protection of respondents against harassing claims of discrimination.

If the Commission and the complainant cannot agree about settlement, it will usually be because the complainant rejects the financial component of the settlement as inadequate.⁷⁸ Yet, given the extremely low general damages awards at Boards of Inquiry, the Commission may be constrained to regard a settlement offer as reasonable. It is senseless to incur the considerable public expense and private inconvenience of a Board of Inquiry if, based on past awards, the respondent's offer is as generous as the Board's award is likely to be. Anticipation of an inadequate award would not justify a Commission failing to recommend appointment of a Board of Inquiry if it was satisfied that discrimination occurred; better scanty compensation than none at all. But a better alternative, it is submitted, is to give the complainant an option to assert his claim in the ordinary courts where, if successful, he can reasonably anticipate more generous treatment.

Since I have recommended the option of civil proceedings only *after* investigation, all complaints of discrimination would continue to be channelled through the Human Rights Commission. Specific complaints would thus continue to alert the Commission to racial problems in the community. The tried and tested statutory procedures, emphasizing conciliation, what Professor Walter Tarnopolsky has aptly called "the iron hand in the velvet glove" technique,⁷⁹ would continue to effectively resolve all but a handful of complaints. But the unsatisfied complainant would have one additional recourse directly to the courts, at his own expense and risk, to vindicate a violation of human rights.

What is proposed would be similar to the United States practice under the Civil Rights Acts of 1964⁸⁰ and 1968⁸¹

⁷⁷ Supreme Court of Ontario Rules of Practice, R.R.O., 1970, Reg. 545, r. 126.

⁷⁸ As in *Amber v. Leder*, *supra*, footnote 47.

⁷⁹ 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.

⁸⁰ Pub. L. 88-352, 78 Stat. 255.

⁸¹ Pub. L. 90-284, 82 Stat. 88.

which deal with discrimination in employment and housing respectively. The complainant must initiate his complaint with the appropriate human rights agency⁸² and an attempt is made to resolve it satisfactorily through the ordinary investigation and conciliation procedures. But if the agency is unable to conciliate the complaint, the complainant may institute private proceedings.⁸³ Similarly, several leading state human rights jurisdictions provide an express private action either as an alternative⁸⁴ or supplementary remedy.⁸⁵

Formerly, English race relations legislation was virtually identical to Canadian human rights legislation in its enforcement procedures. Investigation, conciliation and the initiative for legal proceedings were in the hands of a statutorily-created race rela-

⁸² The 1964 Act is administered by the Equal Employment Opportunity Commission; the 1968 Act is administered by the Secretary for Housing and Urban Development.

⁸³ See Berg, *Equal Employment Opportunity under the Civil Rights Act of 1964* (1964), 31 *Brooklyn L.Rev.* 62; Note, *Discrimination in Employment and Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968* (1969), 82 *Harv. L.Rev.* 834.

⁸⁴ Pennsylvania Consolidated Labour Act, 1970, No. 230, 43, ss 962 (b): "Except as provided in subsection (c) . . . the procedure herein provided shall, when invoked, be exclusive, and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complainant concerned. . . ."

(c) In cases involving a claim of discrimination if a complainant invokes the procedures set forth in this Act, the individual's right of action in the Courts of the Commonwealth shall not be foreclosed. If within one (1) year after the filing of a complaint with the Commission, the Commission dismisses the complaint or has not entered into a conciliation agreement to which the complainant is a party, the Commission must so notify the complainant. On receipt of such a notice the complainant shall be able to bring an action in the courts of common pleas of the Commonwealth based on the right to freedom from discrimination granted by this Act."

New York Executive Law: Human Rights, ss. 297: 9:

"Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person has filed a complaint hereunder, or with any local commission on human rights, provided that, where the division has dismissed such complaint on the ground of administrative convenience, such person shall maintain all rights to bring suit as if no complaint had been filed."

⁸⁵ Illinois Annotated Statutes, Criminal Law and Procedure, c. 38, ss. 65-29: "Any person personally aggrieved by a discriminatory employment practice or a discriminatory housing practice may, in addition to any other remedy available under applicable law, bring a court action for damages resulting from such discriminatory employment practice or discriminatory housing practice for any order granting him employment, or for any other relief which the Court may allow."

tions board.⁸⁶ But, in September 1975, the Home Secretary published a government *White Paper* on racial discrimination⁸⁷ which was critical of the lack of direct access to the courts by a victim of discrimination.⁸⁸

The requirement that all complaints should be investigated in this way may create resentment and hostility among those it is designed to assist. The process may seem cumbersome and protracted. The complainant may feel aggrieved at being denied the right to seek legal redress while his complaint is being processed. If his complaint is not upheld, he is likely to resent the fact that he is denied direct access to legal remedies. Even if it is upheld, he may feel aggrieved because, in his view, the Board or conciliation committee has accepted a settlement or assurance that he regards as inadequate; or, worse still, because after conciliation has failed, the Board has decided not to bring legal proceedings, whether because it considered that it had insufficient prospects of proving the case in Court or for some other reason.

Thus the requirement that all complaints should be investigated by the Race Relations Board or its conciliation committees and that the alleged victim of racial discrimination (unlike the victims of almost all civil wrongs) should be denied direct access to legal remedies suffers from a double disadvantage. It distracts the statutory agency from playing its crucial strategic role while leaving many complainants dissatisfied with what has been done on their behalf by means of procedures which may seem cumbersome, ineffective or unduly paternalistic.

New race relations legislation has now been officially proposed in England⁸⁹ which will remedy this deficiency by allowing private tort actions by victims of discrimination. Section 56 of the proposed Act provides that a claim for discrimination "... may be made the subject of civil proceedings in like manner as any other claim in tort or [in Scotland] in reparation for breach of a statutory duty".⁹⁰ Employment discrimination actions will be heard by an industrial tribunal;⁹¹ all other actions will be heard by the county courts. The proposed Race Relations Commission will have discretion to assist the individual, where desirable, in bringing his private action; assistance may take the form of attempting conciliation on his behalf, providing legal representation or defraying expenses.⁹² However, attempted conciliation will no longer be mandatory.⁹³

⁸⁶ Race Relations Act, 1968, 16 & 17 Eliz. II, c. 71.

⁸⁷ H.M.S.O. Cmnd. 64 (1975).

⁸⁸ *Ibid.*, p. 10.

⁸⁹ Race Relations Bill, Bill 68, 1976.

⁹⁰ *Ibid.*, s. 56(1).

⁹¹ *Ibid.*, s. 53.

⁹² *Ibid.*, s. 65.

⁹³ *Ibid.*, s. 65(2)(b).

It is clear that some comparable jurisdictions have already recognized the desirability of legislating that a victim of discrimination may, in specified circumstances, assert a private tort claim. It is submitted that Canadian human rights legislation would be strengthened by the addition of such an alternative remedy.

Since provincial human rights legislation deals only with activities within provincial jurisdiction (that is, housing, employment, and so on) there can be little dispute as to its constitutional validity.⁹⁴ The proposed Canadian human rights legislation is similarly intended to be limited to areas of federal legislative jurisdiction.⁹⁵ The power of a province to amend its human rights legislation to expressly provide a tort remedy would seem to be an incident of its legislative authority in relation to "... property and civil rights in the province".⁹⁶

Without attempting to satisfy the intricacies of legislative draughtsmanship, such an amendment to the Ontario Human Rights Code might resemble this:

Section : (1) Any contravention of the prohibitions contained in Part I of this Act is a tort actionable without proof of damage.

(2) In an action brought pursuant to paragraph (1) a Court may:

(a) award compensation under any head of damages recognized at common law;

(b) award compensation for indignity, humiliation and mental suffering; and

(c) award punitive or exemplary damages.

(3) Notwithstanding section (1), no action in tort shall be commenced for contravention of this Act until after a complaint has been filed with and investigated by the Commission, and until after the Commission has recommended against a Board of Inquiry under section 14a(1).

Conclusion

The few Canadian cases in which a tort claim for discrimination was asserted were unsuccessful. All were litigated before the

⁹⁴ See *R. ex. rel. Nutland v. McKay* (1956), 5 D.L.R. (2d) 405; Tarnopolsky, *The Canadian Bill of Rights*, (2nd ed., 1975), p. 74; Laskin, *An Inquiry into the Diefenbaker Bill of Rights* (1959), 37 Can. Bar Rev. 77, at p. 105; Laskin, *Canadian Constitutional Law* (4th rev. ed. by A. S. Abel, 1975), p. 900: 25; Huckler and Macdonald, *Securing Human Rights in Canada* (1969), 15 McGill L.J. 220, at p. 222.

⁹⁵ Bill C-72, s. 2.

⁹⁶ *British North America Act, 1867*, 30 & 31 Vict., c. 3, s. 92 (13); See: *Privacy Act, S.B.C.*, 1968, c. 39, s. 2(1); *Privacy Act, S.M.*, 1970, c. P-125, s. 2(1).

advent of human rights legislation. Since such legislation enunciates an unequivocal public policy against discrimination, and creates a statutory right not to be discriminated against in certain activities, a modern court might imply a civil remedy for breach.

To date human rights legislation has depended for its enforcement solely on the procedures of investigation, conciliation and inquiry with the initiative, at each stage, resting with the Commission not the complainant. Although generally successful, the statutory procedures and remedies are, in a minority of cases, demonstrably inadequate. In such cases, an express amendment authorizing private actions would provide the complainant an alternative possible remedy. To avoid exacerbating racial tensions and to preserve the conciliatory thrust of human rights legislation, a private remedy should not be available until after the Commission has been unable to resolve the complaint by investigation and conciliation, and has recommended against appointment of a Board of Inquiry. Then, it is submitted, the complainant should be authorized, at his own risk and expense, to attempt to persuade a court that he has been civilly wronged. Recognition by Canadian courts that discrimination is an actionable tort should provide a means of compensation commensurate with the indignity and humiliation of discrimination.
