

The Authority of Human Rights Tribunals to Grant Systemic Remedies

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This article addresses a critical issue of human rights law: the authority of human rights tribunals to grant systemic remedies when faced with concerted opposition, particularly from government respondents. The systemic discrimination faced by women, indigenous peoples, prisoners and people with disabilities demands effective remedies. It is clear that human rights tribunals cannot be effective if they are precluded from granting systemic remedies, especially as Canada faces more difficult and complex discrimination that is entrenched in institutional practices. Government respondents tend to argue for remedies such as bare declarations and retroactive, individual make-whole remedies. This line of argument, with its roots in a private law model of corrective justice, has a backwards pull on human rights jurisprudence.

The authors argue that the remedial authority of tribunals should be grounded in the principle of effective remedy, recognizing the unique character of human rights legislation, its broad purposes, distinct provisions and administrative machinery. Such an approach confirms the authority of tribunals to grant systemic remedies.

A touchstone for this article is the litigation in Family Caring Society of Canada v Canada (Attorney General).

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Cet article traite d'une question fondamentale du droit relatif aux droits de la personne : l'autorité des tribunaux des droits de la personne d'accorder des redressements systémiques lorsqu'ils sont confrontés à une opposition concertée, particulièrement à celle des répondants gouvernementaux. La discrimination systémique subie par les femmes, les peuples autochtones, les prisonniers et les personnes ayant une déficience nécessite des mesures de redressement efficaces. Il est évident que les tribunaux des droits de la personne ne peuvent être efficaces s'ils se voient dans l'impossibilité d'accorder ce type de redressements, particulièrement à une époque où, au Canada, les cas de discrimination deviennent de plus en plus complexes et difficiles en raison de l'enracinement de la discrimination dans les pratiques institutionnelles. Les répondants gouvernementaux ont tendance à plaider en faveur de mesures telles que des déclarations générales et des mesures réparatrices individuelles et rétroactives. Ce type d'arguments, qui émane du modèle de justice correctionnelle du droit privé, a un effet rétrograde sur la jurisprudence des droits de la personne.

Les auteurs soutiennent que l'autorité des tribunaux en matière de mesures de redressement devrait se fonder sur le principe du recours effectif, lequel reconnaît le caractère particulier de la législation relative aux droits de la personne, ses fins générales, ses dispositions et son appareil administratif distincts. Une telle approche confirme l'autorité des tribunaux d'accorder des redressements systémiques.

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I. Introduction

This paper is concerned with a critical issue of human rights law: the authority of human rights tribunals to grant systemic remedies in human rights litigation. The paper is primarily focused on the federal statutory regime, and the federal government as service-provider, because this issue is central in the groundbreaking case, *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)* (“*FNCF Caring Society*”).¹ However, the issue of systemic remedies is relevant for human rights tribunals in every jurisdiction, whether dealing with public or private respondents.

Some government respondents argue against tribunals granting remedies for systemic discrimination at all. Too often government respondents argue for a remedial approach that consecrates bare declarations and backward-looking, individual remedies, and they oppose forward-looking, programmatic remedies that are often needed to address cases of complex, systemic discrimination. When they do so, they exert a backwards pull on human rights jurisprudence.

This paper argues that the exercise of a human rights tribunal’s remedial discretion must be grounded in the overriding principle of effective remedy, and the unique character of human rights legislation, its broad purposes, distinct provisions and administrative machinery. Further, the special and distinct mandate of human rights tribunals gives them the jurisdiction to grant systemic remedies, and differentiates them from the courts which tend to be consumed by constitutional law controversies about judicial competence and legitimacy.

Broadly speaking, a systemic remedy is one that attempts to ensure that a group that has been affected by discrimination will “not face the same insidious barriers that blocked their forebears.”² The goal of a systemic remedy is to prevent the same or similar discriminatory practices from occurring in the future. This is a somewhat distinct purpose from corrective remedies such as financial awards and other forms of redress which are intended to return the victim of a legal wrong to the position they would have been in but for the harm caused.

Whereas corrective remedies tend to focus on past harms done to

¹ 2016 CHRT 2, 83 CHRR D/207 [*FNCF Caring Society* 2016 CHRT] (redetermination following *Canada (Human Rights Commission) v Canada (AG)*, 2013 FCA 75, 76 CHRR D/353, aff’g 2012 FC 445, 74 CHRR D/230, rev’g *First Nations Child and Family Caring Society of Canada v Canada (AG)*, 2011 CHRT 4, 73 CHRR D/219). See also the Tribunal’s remedial order: *First Nations Child and Family Caring Society of Canada v Canada (AG)*, 2016 CHRT 10, 83 CHRR D/266 [*FNCF No 16*], and subsequent decisions that serve as a continuation and clarification of the Tribunal’s initial remedial order: *First Nations Child and Family Caring Society of Canada v Canada (AG)*, 2016 CHRT 16, 84 CHRR D/111 [*FNCF No 18*].

² *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1116, 40 DLR (4th) 193 [*Action Travail des Femmes SCC*], rev’g [1985] 1 FC 96, 20 DLR (4th) (FCA) 668 [*Action Travail des Femmes FCA* cited to FC].

individual victims, and to assume that the remedy is to reestablish the *status quo* that existed before the wrongful act (*status quo ante*), systemic remedies tend to be prospective and group-based. Systemic remedies can be a necessary adjudicative tool to bring about the reversal of entrenched patterns of discrimination and inequality that are the product of institutional, societal, and governmental structures and inertia.

For human rights legislation to achieve its preventative, transformative goals it is crucial that tribunals grant remedial orders that can be an effective counter to the full extent of the proven discrimination, and penetrate known institutional barriers to change.

The federal human rights regime confers broad remedial powers on the Canadian Human Rights Tribunal to make various kinds of systemic orders –including orders that impose detailed obligations on governments and public institutions to alter institutional structures. These orders may require ongoing monitoring. It is crucial that the authority of human rights tribunals to make such orders, sometimes referred to as structural remedies, not be artificially circumscribed. When an institution, such as the prison system, has shown itself to be resistant to criticism and change, ongoing monitoring of a tribunal order may be essential to effective implementation. In other cases, the discrimination may be embedded in a complex web of legislative and governmental funding agreements that needs to be substantially refocused and rewoven, and affected communities may not believe that government can or should be trusted to complete the repair work without supervision and community involvement. In such cases, a simple declaratory order will not achieve the intended practical outcome.

To a large extent the systemic discrimination that needs to be addressed in Canada today is the result of historical attitudes, stereotypes and practices that have become embedded in the normal operation of institutions. This discrimination is not always the result of overt, intentional acts but of discriminatory practices that remain in place because they have become normalized. Institutional inertia helps to entrench these practices and hold them in place. To address that inertia, to make systems change, it is not sufficient to simply identify discrimination and mete out individual corrective remedies, one by one. Systemic problems require systemic remedies.

This, then, is a critical moment in Canadian human rights jurisprudence. Will tribunals grant orders that effectively serve the broad and transformative purposes of human rights legislation? In light of concerted respondent push back, will human rights jurisprudence evolve to recognize the authority of human rights tribunals to grant systemic remedies? What is at stake may be judged by conditions of systemic discrimination that exist in Canada today. Current examples that engage the obligations of governments under human

rights legislation include: the lack of potable water and inadequate housing on reserves; the failure of police services in Canada to provide Indigenous women with effective protection from male-perpetrated violence and with non-discriminatory treatment; the plight of prisoners with mental illnesses who are denied treatment and placed in solitary confinement; and the lack of access to adequate educational services for children with special needs.

In *FNCF Caring Society*, currently before the Canadian Human Rights Tribunal, the issue is the ongoing under-funding of the on-reserve child welfare system, which results in Indigenous children being removed from their families in disproportionately high numbers. In its decision on the merits, the Tribunal found that the complaint of systemic discrimination was substantiated; it ordered the federal government to cease its discriminatory practices and to reform the First Nations program. The Tribunal also ordered the government to cease applying a narrow definition of an established protocol, commonly referred to as “Jordan’s Principle”, to the provision of emergency services for Indigenous children.³ Over time, as the government has failed to take steps to implement the initial declaratory orders, the Tribunal has issued increasingly detailed orders and directed the government to report back to the Tribunal.

The Trudeau Liberal government, then newly elected, did not seek judicial review of the Tribunal’s initial decision on the merits. Nor has it sought judicial review of the Tribunal’s subsequent decisions on remedy. However, the government did dispute the authority of the Tribunal to grant systemic remedies, and its continuing lack of material progress in reforming the program to comply with the Tribunal’s orders looks like either intransigence or incompetence, or both.

FNCF Caring Society is a touchstone case for this paper because the ultimate outcome will be crucially important to Indigenous children, families and communities. This ongoing litigation is also significant from a remedies perspective because, bubbling just under the surface, is an unresolved disagreement about whether the Tribunal has the authority to grant detailed systemic remedies. This subterranean dispute reflects a larger struggle to determine the right theoretical framework for conceptualizing a human rights tribunal’s remedial authority. It is manifest in case law, respondents’ arguments and in the reluctance of some human rights commissions and complainants’ counsel to request systemic remedies.

We have come to critical moments of jurisprudential struggle like this before. For example, since the early days of human rights legislation, in many different ways, direct discrimination against individuals has been elevated over

³ The protocol known as “Jordan’s Principle” is intended to ensure that governments do not allow inter-jurisdictional disputes, over who is responsible, to delay the provision of emergency services to Aboriginal children. See *FNCF Caring Society* 2016 CHRT, *supra* note 1 at paras 183, 350–59.

adverse effect discrimination against groups. Before *British Columbia (Public Service Employee Relations Commission) v BCGSEU*,⁴ direct discrimination was considered the “real” discrimination and adverse effect discrimination was a secondary form. This hierarchy was reflected in a dichotomous approach to available remedies, and only direct discrimination permitted a rule or policy to be struck down.

Analogously, there is now respondent resistance and an element of tension in the jurisprudence about whether mere declaratory relief and backward-looking remedies that work best for individuals are the “real” remedies, to be elevated over remedies designed to change systemic patterns and practices. The evolution of Canadian jurisprudence is a story of continual struggle to ensure that the law is interpreted and applied in ways that effectively address the more embedded, group-based forms of discrimination in a modern society.

It is clear that tribunals cannot be effective if they are precluded from granting systemic remedies, particularly as Canada faces increasingly complex discrimination that is entrenched in institutional practices, and as more complaints are filed against governments. This is a moment when human rights jurisprudence needs to reaffirm the authority of human rights tribunals to ensure that remedies can be shaped that are appropriate, innovative and true to the transformative and forward-looking purposes of human rights legislation. Commissions and counsel representing complainants need effective advocacy to remind human rights tribunals and reviewing courts of established insights about systemic discrimination, and the purpose of human rights legislation, in order to build a robust human rights jurisprudence on effective remedies.

The first part of this paper argues that human rights tribunals have a mandate, grounded in the purpose of human rights legislation, to provide remedies that are aimed at the elimination of group patterns of discrimination. That mandate is reinforced by Canada’s obligations under international human rights law. The second part engages with the arguments made by governmental respondents in opposition to the systemic remedial authority of tribunals, concluding both that the remedial function of tribunals is different from the remedial function of courts addressing a constitutional violation, and that the private law model of corrective justice is not adequate to satisfy the purpose of human rights legislation. The third part examines the forms that systemic remedies can take and how they can be designed to fit particular evidentiary patterns.

⁴ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 SCR 3, 176 DLR (4th) 1 [Meiorin cited to SCR].

II. A Purposive Approach to Rights and Remedies

A. Introduction

The proposition that human rights tribunals have a mandate to deal with systemic discrimination and provide systemic remedies is strongly supported by a variety of sources: established principles for the interpretation of human rights legislation; tribunal decisions dealing with systemic discrimination; the remedial language of human rights legislation; Supreme Court of Canada jurisprudence affirming the authority of tribunals to grant effective remedies, including systemic remedies; and international human rights law.

B. Human Rights Legislation Reflects Broad Public Policy Objectives

It is well established that human rights legislation serves an important public policy objective and forms a central Canadian value. It is designed to address and eliminate discrimination when it affects a sole individual, and when it mars the lives and restricts the opportunities of whole groups of people because it has become embedded in systems, policies and practices.

The stated purpose of the *Canadian Human Rights Act* is to extend the laws in Canada to give effect:

to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have ... without being hindered in or prevented from doing so by discriminatory practices.⁵

The intention of Parliament is to encourage and support measures that will create an inclusive and respectful social environment in which all individuals can live free from the barriers, restrictions and harms of discrimination.

Human rights legislation in other jurisdictions also articulates this forward-looking and transformative goal in purpose clauses and preambles. For example, one of the purposes of the British Columbia *Human Rights Code* is

to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code...⁶

When human rights legislation was introduced in Canada, it was intended to move beyond the existing legal systems of private law concerning torts and contracts, and beyond criminal law, which had both shown themselves unable to address the discriminatory exclusion from important social activities that is commonly experienced by vulnerable groups. Resorting to private law

⁵ *Canadian Human Rights Act*, RSC 1985, c H-6, s 2 [CHRA].

⁶ *Human Rights Code*, RSBC 1996, c 210, s 3(d) [BC *Human Rights Code*]. See also *The Human Rights Code*, SM 1987-88, c 45, Preamble [MB *Human Rights Code*].

mechanisms could, in some circumstances, provide corrective justice to an individual by providing damages. But these mechanisms were ineffective in circumstances of discrimination,⁷ and lacked the capacity to provide remedies that satisfied the public interest in non-repetition of discriminatory acts and in the evolution towards a society free from discrimination.

Thus Parliament (and all of its provincial and territorial counterparts), building on the post-World War II developments in international human rights law, began to enact legislation to advance the public interest in eliminating discrimination against vulnerable groups in essential spheres of human activity.⁸

C. Foundational Principles

Interpretive principles of human rights law have developed over the last thirty years, rooted primarily in the foundational principle that interpretation of human rights legislation requires a purposive approach. The Supreme Court of Canada has repeatedly affirmed that human rights legislation must be interpreted in a purposive and liberal manner that best ensures its goals will be realized.⁹ It is also well-established law that, because of the importance of its subject matter, human rights legislation is quasi-constitutional and has a natural paramountcy over other laws.¹⁰

Similarly, it is well recognized that because the goal of human rights legislation is remedial, not punitive, intent is not a necessary element of proving discrimination. The aim is not to determine fault or punish conduct but rather to identify and eliminate discrimination.¹¹ Because intent is not a requirement, individuals or groups adversely impacted by neutral rules are protected from discrimination.

However, despite early affirmation in the jurisprudence that it was the effect of discrimination, not its intent, that must drive legal analysis, it was not until the Supreme Court of Canada's decision in *Meiorin* that adverse effect discrimination and its manifestation in systemic forms of

⁷ See e.g. *Christie v The York Corporation*, [1940] SCR 139, [1940] 1 DLR 81.

⁸ See Shelagh Day and Gwen Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998) at 54–55.

⁹ *Insurance Corporation of British Columbia v Heerspink*, [1982] 2 SCR 145 at 157–58, 137 DLR (3d) 219 [Heerspink]; *Ontario Human Rights Commission v Simpsons-Sears Ltd*, [1985] 2 SCR 536 at 546, 23 DLR (4th) 321; *Action Travail des Femmes SCC*, *supra* note 2 at 1138; *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84 at para 8, 40 DLR (4th) 577 [Robichaud], La Forest J (“the Act must be so interpreted as to advance the broad policy considerations underlying it ... in a manner befitting the special nature of the legislation ... [and that such statutes] must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects”); *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*, 2000 SCC 27 at para 30, [2000] 1 SCR 665, L'Heureux-Dubé J (“[t]his Court has repeatedly stressed that it is inappropriate to rely solely on a strictly grammatical analysis, particularly with respect to the interpretation of legislation which is constitutional or quasi-constitutional in nature”).

¹⁰ *Heerspink*, *supra* note 9 at 158.

¹¹ *Robichaud*, *supra* note 9 at para 13.

discrimination was awarded its due place. Prior to *Meiorin*, when it came to remedies, adverse effect discrimination was still treated as a less important form of discrimination than direct, or overt discrimination. A bifurcated analysis had been applied so that a standard based on direct discrimination—for example, “No Blacks hired here”—would be struck down, but a facially neutral rule would be allowed to stand as long as those affected by it were, in some way, accommodated.

In *Meiorin*, human rights jurisprudence took a crucial step forward that is similar to what is needed now from tribunals and courts on the issue of systemic remedies. *Meiorin* stepped past what was comfortable, certain and traditional for tribunals and courts—that is, overt and individual-focused discrimination—to a more sophisticated analysis of how systems work, and how they can be changed.

In this case, a facially neutral rule was at issue. The employer used a fitness test that was based on male norms to determine eligibility for firefighting jobs. The test had the effect of disproportionately excluding women. It was held to be discriminatory, and the employer was directed—not to accommodate the women who were excluded—but to abandon the test and, if it created a new one, to ensure that it would not be based on discriminatory norms.

The Supreme Court rejected the bifurcation of intentional (or direct) discrimination and adverse effect discrimination, because it shielded systemic barriers from proper review and remediation. For a unanimous Court, Chief Justice McLachlin wrote:

It has also been argued that the distinction drawn by the conventional analysis between direct and adverse effect discrimination may, in practice, serve to legitimize systemic discrimination, or “discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination” ...

Although the practical result of the conventional [bifurcated] analysis may be that individual claimants are accommodated and the particular discriminatory effect they experience may be alleviated, the larger import of the analysis cannot be ignored. It bars courts and tribunals from assessing the legitimacy of the standard itself.¹²

Thus in *Meiorin*, the Court set out new steps for analyzing whether any standard is discriminatory. After *Meiorin*, to show that a discriminatory standard is justifiable, a respondent must show that it is impossible to accommodate those harmed by it without undue hardship.

In *Meiorin*, the Court reiterated its commitment to a liberal and purposive approach to human rights legislation and recognized that an interpretation that allows a standard or rule to be questioned only if it is directly discriminatory “undermines its promise of substantive equality and prevents consideration

¹² *Meiorin*, *supra* note 4 at paras 39, 41.

of the effects of systemic discrimination".¹³ The Court recognized that direct discrimination – the form of discrimination first recognized in Canada – was still being treated as though it was the “real” discrimination and adverse effect discrimination was a less important form that did not require striking down a rule, and the Court rejected this distinction.¹⁴

Significantly, *Meiorin* pushed the concept of accommodation beyond the sole duty to make individual after-the-fact exceptions, to require respondents to take an inclusive approach to the design of standards or rules and ensure that they promote inclusion on a systemic basis.¹⁵

In doing so, the Court affirmed that addressing systemic discrimination is integral to the purpose of contemporary human rights legislation. Consequently, a restrictive approach to the remedial authority of tribunals to address systemic discrimination must be rejected; it contradicts this finding and the new and transformative paradigm embraced by the Court in *Meiorin*.

D. A Purposive Approach to Remedies

Because human rights tribunals derive their remedial authority from their empowering legislation, the remedial provisions, like the rights, must be read purposively so as to permit tribunals to engage effectively with complex forms of deeply embedded systemic discrimination.

In general, remedies available to complainants include: a cease and desist order; a declaration that the conduct complained of is contrary to human rights legislation; an order to make available the opportunity that was denied; compensation for lost wages or expenses incurred; and compensation for injury to dignity. In addition, Canada’s Codes and Acts include remedial provisions which permit tribunals to order remedies designed to address, correct and eliminate systemic practices and barriers.

Section 53(2) of the *CHRA* provides that:

If at the conclusion of the inquiry ... the panel finds that the complaint is substantiated, the ... panel may, subject to section 54,¹⁶ make an order against the person found to

¹³ *Ibid* at para 41. For analysis of the Supreme Court of Canada decision in *Meiorin*, see Gwen Brodsky, Shelagh Day & Yvonne Peters, “Accommodation in the 21st Century” (March 2012) Canadian Human Rights Commission: Publications at 7, online: Canadian Human Rights Commission <www.chrc-ccdp.gc.ca/sites/default/files/accommodation_eng.pdf>.

¹⁴ *Meiorin*, *supra* note 4 at paras 50–53.

¹⁵ Brodsky, Day & Peters, *supra* note 8 at 9.

¹⁶ CHRA, *supra* note 5, s 54.1 (enacted in 1998): “(1) In this section designated groups has the meaning assigned in section 3 of the Employment Equity Act; and (groupes désignés) employer means a person who or organization that discharges the obligations of an employer under the Employment Equity Act. (employeur) (2) Where a Tribunal finds that a complaint against an employer is substantiated, it may not make an order pursuant to subparagraph 53(2)(a)(i) requiring the employer to adopt a special program, plan or arrangement containing (a) positive policies and practices designed to ensure that members of designated groups achieve increased representation in the employer’s workforce; or (b) goals and timetables for achieving that increased representation. (3) For greater certainty, subsection (2) shall not

... have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

- (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission ... to redress the practice or to prevent the same or a similar practice from occurring in future, including
 - (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
 - (ii) making an application for approval and implementing a plan under section 17.

Although the wording of federal, provincial and territorial human rights statutes varies, they all reflect the dual remedial purposes of addressing discriminatory harms to individuals and eliminating group patterns of inequality.¹⁷

Human rights tribunals have a duty under human rights legislation to provide remedies that are responsive to the broad public policy objectives of the legislation, including its goal of eliminating group patterns of discrimination.

In *Action Travail des Femmes*, which the Supreme Court of Canada referred to with approval in *Meiorin*,¹⁸ the Court concluded that a purposive approach to remedies was necessary to cure systemic discrimination.¹⁹ The evidence brought forward by *Action Travail* revealed that women were being

be construed as limiting the power of a Tribunal, under paragraph 53(2)(a), to make an order requiring an employer to cease or otherwise correct a discriminatory practice" [emphasis added]. In our opinion the implications of s 54.1(2) for the remedial authority of tribunals is negligible; section 54 was intended to harmonize the CHRA with the *Employment Equity Act* (SC 1995, c 44) to some extent, by reducing the burden of compliance potentially resulting from duplication, where there is an employment equity plan in place. The rules of statutory construction require that section 54(1) be narrowly construed. *Zurich Insurance Co v Ontario (Human Rights Commission)*, [1992] 2 SCR 321, 16 CHRR D/255 at 18; *Gibbs v Battlefords and Dist Co-operative Ltd*, [1996] 3 SCR 566, 27 CHRR D/87 at 18.

¹⁷ In other jurisdictions, tribunals also have powers to order systemic or programmatic remedies. See *BC Human Rights Code*, *supra* note 6, s 37(2): "[The Tribunal] (c) may order the person that contravened this Code to do one or both of the following: (i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice; (ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this Code". See also *The Human Rights Code in Manitoba*, *supra* note 6, s 43(2) (The Manitoba statute authorizes a tribunal to order a person who has contravened the Code to) "(a) do or refrain from doing anything in order to secure compliance with this Code, to rectify any circumstance caused by the contravention, or to make just amends for the contravention; ... (e) adopt and implement an affirmative action program or other special program of the type referred to in clause 11(b), if the evidence at the hearing has disclosed that the party engaged in a pattern or practice of contravening this Code". See also the *Human Rights Code*, RSO 1990, c H-19, s 45.2(1): the Tribunal is empowered to make "3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act. (2) For greater certainty, an order under paragraph 3 of subsection (1), (a) may direct a person to do anything with respect to future practices; and (b) may be made even if no order under that paragraph was requested". Further, if the Ontario Human Rights Commission initiates a complaint under section 35 of the *Human Rights Code*, and the Tribunal determines that rights have been infringed, the Tribunal can make any of the above-described orders (*ibid*).

¹⁸ *Action Travail des Femmes*, *supra* note 2 at para 41.

¹⁹ *Action Travail des Femmes* SCC, *supra* note 2 at 1138.

systematically discriminated against with respect to employment in blue-collar jobs with CN Rail (“CN”). Women were discriminated against at the time they applied for jobs. They were required to take discriminatory tests and have unnecessary qualifications.²⁰ If they were hired, they were harassed on the job.²¹ Some of the discrimination was overt, like the harassment. Some of it occurred through the operation of seemingly neutral requirements, such as tests that screened out a disproportionate number of women and were not job-related.²² The result was the virtual exclusion of women from blue-collar jobs at CN. When the Tribunal heard the case, only 57 women held blue collar jobs in the St. Lawrence region, representing 0.7 per cent of the region’s CN workforce.²³ The Court recognized that this combination of attitudes, policies and practices amounted to a systemic denial of equal employment opportunities to women.²⁴

In *Action Travail des Femmes*, the Supreme Court of Canada expressly acknowledged that the CHRA empowers a tribunal to compel a respondent to take positive measures to combat discrimination. The Court upheld the Tribunal’s order requiring CN to permanently cease some practices and to modify others. The Tribunal ordered CN to stop using discriminatory tests and to stop requiring women to take physical tests that were not given to men; to change its recruitment and interviewing practices; to stop its supervisory personnel from discriminating when hiring; and to take steps to prevent women from being sexually harassed on the job. In addition, it ordered CN to take a temporary special measure, namely, to hire one woman in every four new hires until the representation of women in blue-collar jobs in the region reached 13 per cent (to mirror the representation of women in similar jobs in the labour force at large). Finally, it ordered CN to report to the Canadian Human Rights Commission (“the Commission”) on a regular basis.

The Federal Court of Appeal struck down the hiring quota on the grounds that section 41(2)(a) of the *Canadian Human Rights Act* (1976–77)²⁵ only allowed

²⁰ *Ibid* at 1125–26.

²¹ *Ibid* at 1126.

²² *Ibid* at 1138.

²³ *Ibid* at 1123.

²⁴ *Ibid* at 1116. The Court also described systemic discrimination (*ibid* at 1138–39).

²⁵ SC 1976–77, c 33 [CHRA 1976–77]. Although the section has a different number, the wording of the current CHRA is very similar to the CHRA, 1976–77; CHRA, *supra* note 5, s 53(2) states: “If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate: (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1)”. Section 16(1) of the CHRA, *supra* note 5 states: “It is not a discriminatory practice for a person to adopt or carry out a special program, plan or

the Tribunal to order the adoption of a special program designed “to prevent the same or a similar [discriminatory] practice occurring in the future” and the hiring quota was a correction of past discrimination.²⁶

The Supreme Court of Canada reversed this decision, upheld the Tribunal order and rejected the distinction between past and future discrimination. The Court concluded:

To render future discrimination pointless, to destroy discriminatory stereotyping and to create the required “critical mass” of target group participation in the work force, it is essential to combat the effects of past systemic discrimination. In so doing, possibilities are created for the continuing amelioration of employment opportunities for the previously excluded group. The dominant purpose of [a special program] is always to improve the situation of the target group in the future ... Systemic remedies must be built upon the experience of the past so as to prevent discrimination in the future. Specific hiring goals ... are a rational attempt to impose a systemic remedy on a systemic problem.²⁷

In short, the Court made it clear that the Tribunal could, and in this case properly did, make an order that went far beyond ordering damages for the individual women who had been discriminated against and making a declaration that discrimination had occurred. The Court endorsed the Tribunal’s measures to both stop the entrenched practices of the past, and to improve future opportunities, holding that “it is readily apparent that, in attempting to combat systemic discrimination, it is essential to look to the past patterns of discrimination and to destroy those patterns in order to prevent the same type of discrimination in the future.”²⁸

At virtually the same time as the Supreme Court of Canada’s decision in *Action Travail des Femmes*, the Court issued its decision in *Robichaud* underlining its position on remedy. In *Robichaud*, the Court was asked to determine whether the Department of National Defence (DND) was liable for the sexual harassment of an employee. In this case, the Court held that Bonnie Robichaud was harassed by her supervisor at DND, Dennis Brennan. Drawing on its earlier decisions, the Court found that DND was liable for the harassment because only the employer can provide an *effective* remedy. The Court stated:

the [Canadian Human Rights] Act ... is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the *remedies must be effective*, consistent with the “almost constitutional” nature of the rights protected.

arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group”.

²⁶ *Action Travail des Femmes* FCA, *supra* note 2 at paras 7, 35.

²⁷ *Action Travail des Femmes* SCC, *supra* note 2 at 1145.

²⁸ *Ibid.*

...if the Act is concerned with the effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy – a healthy work environment. *The legislative emphasis on prevention and elimination of undesirable conditions, rather than on fault, moral responsibility and punishment, argues for making the Act's carefully crafted remedies effective.* It indicates that the intention of the employer is irrelevant, at least for purposes of s. 41(2). Indeed, it is significant that s. 41(3) provides for additional remedies in circumstances where the discrimination was reckless or willful (i.e., intentional). In short, I have no doubt that if the Act is to achieve its purpose, the Commission must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment.²⁹

Preventing recurrence was the approach taken by the Canadian Human Rights Tribunal in its 2010 decision in *Hughes v Canada (Elections Canada)*,³⁰ in which the issue was discriminatory barriers facing voters with disabilities. To address those systemic barriers, the Tribunal ordered Elections Canada to do various things: stop situating polling stations in locations that do not provide barrier-free access in any electoral district in Canada; implement a procedure within six months for verifying the accessibility of facilities on the day of an electoral event; review its Accessible Facilities Guide and Checklist; revise its standard lease for polling locations to include the requirement that leased premises provide level access and are barrier-free; provide sufficient and appropriate signage at elections; revise training materials concerning accessibility issues; implement a procedure for receiving, recording and processing verbal and written complaints about lack of accessibility; and report to the Tribunal at least once every three months on its progress in implementing the order. The order stipulated that the Canadian Human Rights Commission would monitor implementation. The Tribunal itself remained seized of the matter pending implementation.

Other useful examples of systemic remedies can be found in *Radek v Henderson Development (Canada) Ltd*³¹ and *Lepofsky v Toronto Transit Commission*.³² These complaints involved discrimination on the basis of indigeneity and disability by security officers in a mall, and discrimination against blind transit users. In both cases, the tribunals ordered remedies that required new policies and practices, re-training of personnel and supervision of the implementation of remedies.

E. Human Rights Remedies and International Human Rights Law

The duty of human rights tribunals to provide effective remedies is reinforced by international human rights law.

²⁹ *Robichaud*, *supra* note 9 at para 15 [emphasis added].

³⁰ 2010 CHRT 4, [2010] CHR D No 4 [*Hughes*].

³¹ 2005 BCHRT 302, 52 CHRR D/430.

³² 2007 HRTO 23, 61 CHRR D/511.

International human rights law has provided the foundation and inspiration for domestic human rights legislation. The language of equality and non-discrimination in human rights legislation mirrors the language in international treaties.

Further, human rights legislation is a primary means for giving effect to Canada's commitments under international human rights law to equality and non-discrimination. Canada consistently affirms this. For example, in Canada's May 1997 periodic report to the United Nations Human Rights Committee the federal government explained that Canada's federal, provincial and territorial human rights codes primarily implement the requirement in article 26 of the *International Covenant on Civil and Political Rights*³³ that the law prohibit discrimination.³⁴ In its 2004 report to the Human Rights Committee, concerning Canada's compliance with article 26 of the *ICCPR*, Canada emphasized that the Canadian Human Rights Commission and Tribunal have a broad mandate with respect to complaints alleging discrimination, and indicated that the *CHRA* provides for a range of remedies.³⁵ Consequently, it contradicts the undertakings Canada has given to international treaty bodies when governments in Canada appear before tribunals to make restrictive arguments concerning the remedial powers of human rights tribunals, with the intention of undermining their authority to provide effective remedies in systemic cases.

Repeatedly, Canada has held out the *CHRA* and its machinery, including the Tribunal and its remedial powers, as the means by which it fulfills its obligation under the Covenant to ensure equal rights and effective remedies. In its 2013 report, Canada addressed article 2 of the *ICCPR*—which pertains to equal rights and effective remedies—and Canada stated that “[w]here the CHRT, an independent administrative tribunal exercising quasi-judicial powers, finds that a discrimination complaint is substantiated, it has a broad authority to order an effective remedy.”³⁶ We agree with the Canadian Human Rights Tribunal in the *FNCF Caring Society* case which stated that “Canada’s statements and commitments, whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric.”³⁷

In their reports and observations, Canada and international human rights treaty bodies agree that human rights legislation is a primary means

³³ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

³⁴ Canada, *Fourth periodic reports of States parties due in 1995: Addendum: Canada*, CCPR, 15 October 1997, UN Doc CCPR/C/103/Add.5 at paras 21–28, 277–78.

³⁵ Canada, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Fifth Periodic Report, Canada*, 18 November 2004, CCPR, UN Doc CCPR/C/CAN/2004/5 at para 11.

³⁶ Canada, *Consideration of reports submitted by States parties under article 40 of the Covenant: Sixth periodic reports of States parties due in October 2010: Canada*, 28 October 2013, UN Doc CCPR/C/CAN/6 at para 12.

³⁷ *FNCF Caring Society* 2016 CHRT, *supra* note 1 at para 454.

of implementing Canada's obligations under international human rights instruments.³⁸ In addition, it has long been recognized that the values and principles enshrined in international human rights law³⁹ are a "relevant and persuasive source" for the interpretation of domestic legislation.⁴⁰

A central principle of international human rights law is the presumption of conformity which holds that the legislature is presumed to comply with the "values and principles" of international human rights law, which "form part of the legal context in which legislation is enacted and read ... [i]n so far as possible, therefore, interpretations that reflect these values and principles are preferred."⁴¹

The courts have applied international human rights norms to interpret the *Canadian Charter of Rights and Freedoms*,⁴² the common law, administrative law and human rights legislation.⁴³

Relevant international human rights law has also been used to guide the exercise of administrative discretion in cases such as *Baker v Canada (Minister of Citizenship and Immigration)*. In *Baker*, the Supreme Court of Canada held that, as Canada had ratified various international instruments recognizing the rights of the child, these rights should have been considered when an

³⁸ See e.g. Committee on the Rights of the Child, *General Comment No. 2: The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child*, CRC, 32nd Sess, UN Doc CRC/GC/2002/2 (2002) at paras 1, 9; Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6)*, CRC, 34th Sess, UN Doc CRC/GC/2003/5 (2003) at para 65 [CRC No 5]; Committee on Economic, Social and Cultural Rights, *Draft General Comment No. 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, UNESCOR, 19th Session, UN Doc E/C.12/1998/25 (1998) at paras 3–4; Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UNESCOR, 42nd Sess, UN Doc E/C.12/GC/20 (2009) at paras 36–37.

³⁹ The sources of international human rights law include human rights treaties (also referred to as covenants or conventions), the jurisprudence of UN bodies and international courts, and customary law. Treaty body jurisprudence includes decisions on cases, interpretive comments and concluding observations. The Ontario Court of Appeal has stated "that there are two required elements of customary international law. A proponent must establish: (1) a practice among States of sufficient duration, uniformity and generality; and (2) that States consider themselves legally bound by the practice". *Mack v Canada (AG)*, 60 OR (3d) 756 at para 22, 217 DLR (4th) 583. An accepted example of customary law is the *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) [UDHR], which is referred to as a foundational document in, for example, *The Human Rights Code in Manitoba*, *supra* note 6, Preamble.

⁴⁰ *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para 57, 38 DLR (4th) 161. See also *R v Hape*, 2007 SCC 26 at paras 35–39, 53–56, [2007] 2 SCR 292; *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 22–28, [2013] 3 SCR 157 [Divito]; *R v Sharpe*, 2001 SCC 2 at paras 175, 178, 194 DLR (4th) 1.

⁴¹ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 70, 174 DLR (4th) 193.

⁴² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (UK)*, 1982, c 11 [Charter].

⁴³ See *Canadian Odeon Theatres Ltd v Human Rights Commission (Sask) and Huck*, 6 CHRR 2682, 18 DLR (4th) 93 at 18; *Québec (Commission des droits de la personne et des droits de la jeunesse) c Maison des jeunes À-Ma-Baie Inc*, 33 CHRR D/263 at paras 40–42, 69, [1998] RJQ 2549; *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 919–20, 75 DLR (4th) 577; *RB v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 349–351, 122 DLR (4th) 1; *Divito*, *supra* note 40 at paras 26–27; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 154–60, [2015] 1 SCR 245.

administrative decision-maker – in this case, an immigration officer – decided to deport a mother to Jamaica but did not consider the best interests of her Canadian children.⁴⁴

This Supreme Court of Canada jurisprudence requires that the values and principles intrinsic to defining Canada's international human rights obligations must be taken into account in interpreting the scope and content of a domestic human rights tribunal's remedial authority. A human rights tribunal is an administrative decision-maker, functioning in a quasi-judicial capacity. Tribunal decisions about remedy entail the interpretation and application of legislation, and the exercise of quasi-judicial discretion.

Another central principle of international law, informing all ratified treaties, is that when a right has been violated the state must provide an effective remedy.⁴⁵ And on the issue of what constitutes an effective remedy, all of the international treaties that are binding on Canada articulate the obligation of state parties as one of "ensuring" the rights or "fulfilling" and "promoting" the rights, in addition to respecting and protecting the rights. The obligation to "ensure" or "fulfill and promote" rights to non-discrimination and equality goes beyond merely refraining from discrimination. Rather, it entails positive measures to ensure that the rights are realized. The Office of the United Nations High Commissioner on Human Rights explains it this way:

International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfill human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. *The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights.*⁴⁶

To grant remedies that will be effective in securing the respect, protection and fulfillment of human rights, tribunals must be permitted to direct governments to take positive action. Compensation and bare declarations will not necessarily lead to governments taking the positive steps required to

⁴⁴ *Baker*, *supra* note 41 at paras 69–71.

⁴⁵ See e.g. Responsibility of States for Internationally Wrongful Acts, GA Res 56/83, UNGAOR, 56th Sess, UN Doc A/RES/56/83 (2002) at 7; CRC No 5, *supra* note 38 at para 24; ICCPR, *supra* note 33, art 2(3); Committee on Economic, Social and Cultural Rights, General Comment No. 9: The Domestic Application of the Covenant, UNESCOR, 19th Sess, UN Doc E/C.12/1988/24 (1998) at paras 2–3; International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 UNTS 195, art 6; UDHR, *supra* note 39, art 8; Human Rights Council, *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, Catarina de Albuquerque, UNGAOR, 7th Sess, UN Doc A/HRC/27/55 (2014) at para 78 [*Special Rapporteur Report*].

⁴⁶ "International Human Rights Law", Office of the High Commissioner for Human Rights (2017), online: <www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [emphasis added].

ensure and fulfil these rights.

The principle of effectiveness may require a range of remedial responses in cases of systemic discrimination in particular. Where the breach of a human rights obligation raises structural or systemic issues—such as longstanding police practices that discriminate against Indigenous women—the underlying violations must be addressed at the structural or systemic level, as explained by the United Nations Special Rapporteur on violence against women:

Since violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization, *measures of redress need to link individual reparation and structural transformation ... reparations should aspire, to the extent possible, to subvert, instead of reinforce, pre-existing patterns of cross-cutting structural subordination, gender hierarchies, systemic marginalization and structural inequalities that may be at the root cause of the violence that women experience*⁴⁷

Similarly, the United Nations Special Rapporteur on the human right to safe drinking water and sanitation has explained that:

the notion of restorative remedies for violations, whereby the status quo ante is restored, may fall short of addressing the underlying violations at the structural or systemic level. Consequently, transformative remedies, which aim not only to correct direct violations but also the underlying structural conditions, are required in order to provide comprehensive remedies to structural and systemic violations.⁴⁸

A leading example from the arena of international human rights law of a systemic remedial response to a systemic problem is the 2015 ruling of the United Nations Committee on the Elimination of Discrimination against Women (“the CEDAW Committee”) following its inquiry into the murders and disappearances of Indigenous women in Canada under article 8 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*.⁴⁹ After hearing and amassing evidence and concluding that the issues are systemic, the Committee made 38 recommendations in nine different areas, including that Canada establish a national public inquiry into cases of missing and murdered Indigenous women and girls and develop an integrated national plan of action and coordinated monitoring mechanism in consultation with representatives of the aboriginal community.

The CEDAW Committee’s report followed the 2014 report of the Inter-American Commission on Human Rights, *Missing and Murdered Indigenous*

⁴⁷ *Advancement of Women: Note by the Secretary-General*, UNGAOR, 66th Sess, UN Doc A/66/215 (2011) at para 71 [emphasis added].

⁴⁸ Special Rapporteur Report, *supra* note 45 at para 78.

⁴⁹ Committee on the Elimination of Discrimination against Women, *Report of the Inquiry Concerning Canada of the Committee on the Elimination of Discrimination against Women Under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW, UN Doc CEDAW/C/O P.8/CAN/1 (2015) at 219–20.

Women in British Columbia Canada,⁵⁰ which also made systemic remedial recommendations. Whereas the jurisdiction of the CEDAW Committee over Canada flows from Canada's ratification of the *Convention on the Elimination of All Forms of Discrimination against Women*, the Inter-American Human Rights Commission has jurisdiction over Canada by virtue of Canada's membership in the Organization of American States (OAS).

The Inter-American human rights system – which consists of a Commission and a Court – has also produced various decisions setting out detailed systemic remedial recommendations and orders to compel governments to prevent the repetition of violence against women. For example, in the landmark *Cotton Field* decision the Inter-American Human Rights Court⁵¹ found that Mexico violated the rights of hundreds of women and girls who were murdered in Juárez and ordered Mexico to take numerous steps to provide reparations to the families and to prevent more disappearances and murders.⁵² Domestic human rights tribunals, when confronted with cases of multi-faceted and long-standing entrenched discrimination, should look to examples like these for direction and inspiration.

Thus, the purposes of human rights legislation, which are underpinned by Canada's obligations under international human rights law, confirm the authority of Canadian human rights tribunals to grant remedies that will result in the fulfillment of the substantive rights of individuals and groups to live free from discrimination.

III. The Opposition of Government Respondents to Systemic Remedies

A. Introduction

Although it is well established that Parliament and the legislatures intend human rights legislation to address systemic discrimination, when governments are in the role of responding to human rights complaints, they make arguments intended to defeat that purpose.

While non-government respondents also challenge the authority of

⁵⁰ OAS, *Inter-American Commission on Human Rights, Missing and Murdered Indigenous Women in British Columbia, Canada*, OR OEA/Ser.L/V/II. Doc 30/14 21 (2014). Regarding systemic remedies, see 123–25. For an explanation of the legal obligations that attend Canada's membership in the OAS, see 11–13.

⁵¹ The Inter-American Court, as distinct from the Inter-American Commission, does not have jurisdiction over Canada. However, the jurisprudence of the Court is relevant to the Canadian legal context because it flows primarily from the *American Declaration of the Rights and Duties of Man*, which constitutes a source of legal obligation for all member states of the OAS, including states like Canada that have not ratified the *American Convention on Human Rights*.

⁵² *Gonzales et al ("Cotton Field") v Mexico* (2009), Inter-Am Ct HR (Ser C) No 205. See 115–31 for "guarantees of non-repetition" and 147–51 with regard to systemic remedies.

human rights tribunals to hear systemic complaints and issue systemic remedies, a significant volume of human rights complaints are complaints against governments. These complaints, and the approach too often taken by government respondents, pose a particular concern because governments have responsibilities for public services that are crucial to the health and well-being of vulnerable groups. These services include social benefit schemes, prisons, schools, and services on Indian reserves. Further, in the area of public services, complaints against governments are almost always systemic. And, because of the frequency of their appearances, government respondents have multiple opportunities to influence human rights jurisprudence.

Government respondents make various arguments calculated to immunize them from the goals of human rights legislation.⁵³ Typically, those arguments revolve around comparator group analysis, standing, justiciability and remedies. There is an overlap in these underlying themes, especially with regard to standing, justiciability and remedies. Arguments made by governments seeking to constrain the remedial authority of tribunals are part of a larger attempt by some governments to immunize their services from scrutiny under human rights legislation. However, the arguments concerning remedies are also somewhat distinct.

The central arguments made by government respondents to oppose systemic remedies are identifiable and familiar. In practice, the arguments tend to be inter-connected and clumped. For ease of analysis, we have organized them as: competence and legitimacy, and the presumption that bare declarations or damages are sufficient.

B. Arguments Made by Governments Opposing Systemic Remedies

i. Competence and Legitimacy

Replicating arguments that are made to constrain the remedial discretion of courts in *Charter* litigation, government respondents contend that human rights tribunals lack the expertise to fashion orders mandating systemic changes. Bare declarations and, possibly, damages are to be preferred. In short, it is argued that government knows best how to correct any discrimination detected by a tribunal.

Government arguments about competence are related to arguments about legitimacy. These arguments, sometimes referred to as “separation of powers” arguments, are also taken from *Charter* litigation. Such arguments contend that it is not legitimate for the judiciary to trench on the authority

⁵³ See Gwen Brodsky, “Governments as Interpreters and Shapers of Human Rights” in Shelagh Day, Lucie Lamarche & Ken Norman, eds, *14 Arguments in Favour of Human Rights Institutions* (Toronto: Irwin Law, 2014) 55 [Brodsky, “Interpreters”].

of the executive to manage the budget, and the authority of the legislature to make legislation. By necessary implication, human rights tribunals cannot grant orders prescribing steps that must be taken to remove discrimination from governmental institutions, laws, policies and programs. It is argued that such orders would interfere with the prerogative of the executive to make fiscal decisions, and or cast the tribunal in a legislative role.

ii. Presumption of sufficiency of bare declarations or damages

Competence and legitimacy arguments are concerned with the propriety of courts telling governments what to do. But governments also argue that bare declarations or, possibly, damages will be sufficient. The presumption that declarations and damages will be sufficient is drawn from a private law corrective theory of justice, which consecrates the reestablishment of the *status quo ante* as the sole appropriate remedy. If this presumption is accepted, it follows that orders prescribing positive measures for systemic reform are unnecessary or redundant because governments will comply with declarations and this will ensure that discrimination is not repeated. In our view, these arguments are unpersuasive, for the reasons set out below.

iii. Moore: The Prototype

The prototype for post-*Charter* government argumentation seeking to preclude human rights tribunals from granting systemic remedies, and to restrict their remedial role to assessing whether or not there has been discrimination, is *Moore v British Columbia (Education)*.⁵⁴ For well over a decade, and at multiple levels of adjudication, the Province of British Columbia and the North Vancouver School District repeatedly attacked the jurisdiction of the British Columbia Human Rights Tribunal to grant systemic remedies to make public education accessible to students with severe learning disabilities.

For example, before the Tribunal, the respondents in *Moore* argued it was beyond the jurisdiction of the Tribunal to grant the systemic orders requested to remedy systemic discrimination against students with severe learning disabilities because of “the separation of powers between the judicial and legislative branches of government,” and its constraint on remedies in *Charter* jurisprudence.⁵⁵

⁵⁴ 2012 SCC 61, [2012] 3 SCR 360 [*Moore* SCC], rev’g 2010 BCCA 478, 326 DLR (4th) 77, aff’g 2008 BCSC 264, [2008] 10 WWR 518, rev’g 2005 BCHRT 580, 54 CHRR D/245 [*Moore* BCHRT].

⁵⁵ In *Moore* BCHRT, *supra* note 54 at paras 1009–10, the Tribunal apparently endorsed the respondent’s submissions:

Following *Mahe*, the Supreme Court of Canada has repeatedly warned against the judiciary encroaching on the domain of policy making bodies.... For example, in *Reference re Public*

Ultimately, *Moore* was appealed to the Supreme Court of Canada. A review of the factums filed in the Court reveals continuing resistance by the Province and School District to the Tribunal's exercise of systemic remedial discretion. The Province argued that the Tribunal's remedial powers are limited by principles of constitutional law and, more particularly, that the Tribunal failed to leave the question of how to remedy the discrimination to the Province. "The proper role of the Tribunal is limited to assessing whether or not there is discrimination", asserted the Province.⁵⁶

To similar effect, the School District argued that the Tribunal exceeded its jurisdiction by giving direction to the School District on how to deliver its educational programs and allocate its budgetary resources to eliminate systemic discrimination against students with severe learning disabilities. The School Board contended that such "orders set a dangerous precedent and interfere with the function of elected school boards, particularly in light of their limited financial and educational resources."⁵⁷

It should also be noted that in human rights litigation even claims for damages against governments have generated opposition and claims of Crown immunity. The decision of the Tribunal in *Moore*⁵⁸ provides an example of this pattern. In its decision, the Tribunal documents that the Province argued that they were immune from liability for damages arising from the exercise of their legislative and policy functions, and that the Tribunal had no jurisdiction to award damages against it. Similarly, the School District argued that, given the nature of the public policy issues this case raised, no damages should be awarded against it after a finding of discrimination.

Schools Act (Man.), the Court said:

[t]his Court should be loath ... to detail what legislation the Government of Manitoba must enact to meet its constitutional obligations.

Further, in *Eldridge*, the Court said that there was a "myriad [of] options available to the government" to rectify the breach of the appellants' s. 15 rights, but it was not the Court's role to dictate how that rectification should be accomplished.

The respondents in *Moore* also relied on a 2003 decision of the British Columbia Supreme Court in *British Columbia (Minister of Health Planning) v British Columbia (Human Rights Tribunal)*, 2003 BCSC 1112, 47 CHRR D/510, reviewing a decision of the Tribunal. In that case the Province successfully persuaded the Court that government should be accorded flexibility in addressing a finding of discrimination, that it was an error for the Tribunal to assume that role and that emerging *Charter* case law mandated a deferential approach to remediation (*ibid* at paras 20–28). The Tribunal concluded in *Moore* BCHRT, *supra* note 54 at para 1012 that:

The general principle which can be derived from these cases is that courts and tribunals are to identify violations of *Charter* or *Code* rights, but should generally leave the precise method of remedying the breach to the Legislature or other body charged with responsibility for implementation of the order.

⁵⁶ *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360 (Factum of the Respondent, Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Education) at para 115.

⁵⁷ *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360 (Factum of the Respondent, The Board of Education of School District No 44 (North Vancouver)) at para 117 [*School District FOR*].

⁵⁸ *Moore* BCHRT, *supra* note 54.

Both respondents relied on a line of *Charter* cases.

The government of British Columbia unsuccessfully made similar arguments to the Tribunal in *Bolster v British Columbia (Ministry of Public Safety and Solicitor General)*⁵⁹ and *Hutchinson v British Columbia (Ministry of Health)*.⁶⁰ The government sought judicial review of both Tribunal decisions. In both cases the reviewing court rejected the government's submissions.⁶¹

In their factums filed in the Supreme Court of Canada in *Moore*, the Province and the School District again argued that, in the absence of a finding of conduct that was clearly wrong, in bad faith or an abuse of power, they were immune from damages. The School District argued against the imposition of damages on the basis that "[t]he District is a policy-making body that must balance various concerns, including multiple educational policy issues, limited and finite resources and prioritization of delivering various educational programs, including special education services."⁶² We return to a more fulsome discussion of *Moore*, and the decision of the Supreme Court of Canada, later in this paper.

In the end, the order of damages against the School District was upheld. The Tribunal's systemic remedies were not upheld. The Ministry was completely excused from liability.

The arguments about the competence and legitimacy of tribunals issuing systemic remedies are not confined to this case. Particularly, in the wake of the Supreme Court of Canada decision in *Moore*, when confronted with human rights complaints of systemic discrimination it is common for government to take the position that human rights tribunals lack the jurisdiction to grant systemic remedies.⁶³

C. The *First Nations Child and Family Caring Society* Litigation

*FNCF Caring Society*⁶⁴ provides a case study and a significant current example of government opposition to systemic remedies, on the purported grounds of competence and legitimacy. This case also illustrates the need for such remedies and, so far, serves as a promising example of Tribunal effectiveness and innovation in the exercise of remedial discretion.

Beginning in 2007 when the case started, the Government of Canada made repeated efforts to block the complaint from being heard, first by

⁵⁹ 2004 BCHRT 32, 49 CHRR D/101.

⁶⁰ 2004 BCHRT 58, (2004), 49 CHRR D/348.

⁶¹ *Ibid.*

⁶² *School District FOR*, *supra* note 57 at para 121.

⁶³ See for example *Desmarais v Correctional Service of Canada*, 2014 CHRT 5, 78 CHRR D/363 [*Desmarais*]. This observation is also confirmed by Frances Kelly based on extensive experience as human rights litigation counsel, and by confidential interviews conducted by Gwen Brodsky with legal counsel based in various jurisdictions in Canada, during April 2016–February, 2017.

⁶⁴ *FNCF Caring Society* 2016 CHRT, *supra* note 1; FNCF No 16, *supra* note 1; FNCF No 18, *supra* note 1.

opposing its referral for hearing, and then by filing a succession of motions and appeals at the Canadian Human Rights Tribunal and both levels of the Federal Court. In 2013, Canada was criticized by the Tribunal for its failure to disclose documents.⁶⁵ In 2015, the Tribunal ruled that the Ministry of Aboriginal Affairs and Northern Development Canada (AANDC, now Indigenous and Northern Affairs Canada (INAC)) had retaliated against Cindy Blackstock, the Executive Director of the First Nations Family and Child Caring Society, because she had filed a human rights complaint.⁶⁶ After years of obstruction and procedural maneuvering by AANDC, the complaint was eventually heard.

The Tribunal determined in January 2016 that the complaint of systemic discrimination in the under-funding of child welfare services for on-reserve children was substantiated. The complainant, the Commission and the intervenors requested various forward-looking systemic remedies, both immediate and long-term, with a view to achieving programmatic reforms to ensure equitable levels of service and the necessary funding for First Nations child and family welfare services on reserve.⁶⁷ The government disputed the Tribunal's authority to grant the requested systemic remedies based on competence and legitimacy arguments, invoking *Moore*.⁶⁸

The Tribunal decision summarizes Canada's arguments on remedy:

AANDC submits that, while the Tribunal may order amendments to policy and provide guidance on the shape of amendments, it *cannot prescribe the specific policy* that must be adopted. According to AANDC, this is particularly appropriate in this case where the policy at issue is a *complex scheme* that takes into account *competing priorities* and must fit within broader governmental policy approaches. Such decisions are entitled to some considerable degree of *deference* and margin of reasonableness. Furthermore, AANDC argues the proposed remedy would *intrude into the executive branch* of government's role to establish public policy and direct the spending of public funds in accordance with *fiscal priorities*. AANDC is also concerned that some of the proposed *reform measures are over-broad and beyond the scope of the complaint*. As such, it views aspects of the *methodology* proposed by the Complainants to be *beyond the power of the Tribunal* or any other court to order.⁶⁹

Confronted with the government's submissions on remedy, the Tribunal acknowledged that, beyond directing the government to reform its program and policy to conform to human rights principles, it had questions about what additional orders would be fair and appropriate.⁷⁰

⁶⁵ *Ibid.* See also Brodsky, "Interpreters", *supra* note 53 at 59–66 for analysis of the governments' mirror arguments in *Moore* and *FNCF Caring Society* regarding the "service in question" and "comparator group analysis". In both cases, these arguments were made in an effort to prevent the systemic complaints from succeeding and from even being heard.

⁶⁶ *First Nations Child and Family Caring Society of Canada v Canada (AG)*, 2015 CHRT 14, 81 CHRR D/274.

⁶⁷ *FNCF Caring Society* 2016 CHRT, *supra* note 1 at paras 468–70, 474–79.

⁶⁸ *Ibid* (Written closing arguments, Attorney General of Canada).

⁶⁹ *FNCF Caring Society* 2016 CHRT, *supra* note 1 at para 480 [emphasis added].

⁷⁰ *Ibid* at paras 483–84.

Rather than simply deferring to the government or ignoring the government's objections, however, the Tribunal retained jurisdiction and invited the parties to make submissions to answer its questions. The Tribunal explained:

[m]ore than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice ... That said, given the complexity and far-reaching effects of the relief sought, the Panel wants to ensure that any additional orders it makes are appropriate and fair ... While a discriminatory practice has occurred and is ongoing, the Panel is left with outstanding questions about how best to remedy that discrimination. The Panel requires further clarification from the parties on the actual relief sought, including how the requested immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis.⁷¹

The Tribunal held a further hearing on remedy a few months later. Only after considering submissions from the parties about how its orders could best be implemented in a practical, meaningful and effective way, did the Tribunal order INAC to take certain implementation measures immediately. The Tribunal ordered INAC to provide a comprehensive report indicating how the Tribunal's findings were being addressed, and ordered that immediate relief be provided for First Nations children. The Tribunal expressed concern about government inertia in addressing proven discrimination, stating:

there is still uncertainty... as to how the Federal government's response to the *Decision* addresses the findings ... The Panel appreciates that some reforms to the FNCFS Program will require a longer-term strategy; however, it is still unclear why or how some of the findings above cannot or have not been addressed within the three months since the *Decision*.⁷²

In a second decision on remedy issued in September 2016, the Tribunal again expressed concern about government inertia in addressing proven discrimination. In particular, the Tribunal noted that assumptions and flaws in the First Nations program were still in place. Thus, in addition to the previous orders, the Tribunal made detailed orders for additional systemic measures, including orders in relation to formulas for determining the budget for First Nations agencies.⁷³ The Tribunal also ordered INAC to provide additional information to the Tribunal on various matters related to funding, consultation and participation of the parties in the ongoing legal process, within a set time frame, and to provide a detailed compliance report by a fixed date.⁷⁴

As this case illustrates, concerns about competence and legitimacy are best dealt with on a situational, case-by-case basis, rather than, as AANDC/

⁷¹ *Ibid* at paras 482–83.

⁷² FNCFS No 16, *supra* note 1 at para 21 [emphasis in original].

⁷³ FNCFS No 18, *supra* note 1 at para 160.

⁷⁴ *Ibid*.

INAC claimed, by categorizing certain kinds of remedies as suspect or off limits.

With regard to competence, it must be recognized that all institutions are to some extent incompetent.⁷⁵ Concerns about tribunal competence need to be balanced with countervailing concerns about the competence and inertia of particular government respondents. In human rights adjudication, a tribunal only exercises its remedial discretion *after* a finding of discrimination has been made. In other words, the issue of remedy only arises if and when the respondent has, in some sense, been found incompetent at preventing discrimination.

As *FNCF Caring Society* illustrates, situations arise in which human rights tribunals have questions about the details of how to effectively remedy the discrimination that has been substantiated. In such situations, deference is not always the appropriate solution. Instead, the Tribunal should explore whether there are ways of having its questions answered.⁷⁶

With regard to legitimacy concerns in the *FNCF Caring Society* case, the Tribunal's stipulation of detailed systemic orders, ongoing supervision and reporting requirements appears to have been well justified. The Tribunal addressed a post-decision pattern of government failure to move forward to implement the Tribunal's orders. As well, there is a long history of the government failing to take effective measures to respond to public reports documenting various deficiencies of the First Nations program, which the Tribunal documented.

The Tribunal found that the First Nations Program had been examined in multiple reports over an extended period: the First Nations Child and Family Services Joint National Policy Review, in 2000; three related studies from 2004-2005; and, two Auditor General of Canada reports in 2008 and 2011, along with follow-up reports by the House of Commons Standing Committee on Public Accounts. The Tribunal found that these reports had all identified shortcomings in the funding and structure of the First Nations program resulting in inadequate and inequitable access to child welfare services by First Nations children resident on reserve. In other words, government had been aware of the concerns raised by the complaint for a long period of time.

Another crucial factor that points to the appropriateness of the systemic remedies in this case is the extreme vulnerability of the children who are the primary victims of the discrimination, for whom continued delay has serious consequences. In our view, having regard to the specific features of this case,

⁷⁵ We are indebted to David Wiseman for this insight. Conversation with David Wiseman, Spring 2016.

⁷⁶ See "Remedial Innovation and the Transformative Goals of Human Rights", below, for further mention of the *FNCF Caring Society* case and the need for innovative remedies to address the systemic discrimination identified by the Tribunal.

the Tribunal would have been justified in granting detailed, prescriptive orders at the outset, that is, even before delay in implementing the orders had become apparent.

Furthermore, because of the particularities of a human rights tribunal's legislated mandate, the separation of powers doctrine does not provide as compelling a rationale to limit a human rights tribunal's jurisdiction as it might for a court engaged in constitutional adjudication.

D. Human Rights Tribunals are Different from Courts Engaged in Constitutional Adjudication

The source of government arguments about tribunal competence and legitimacy is not human rights legislation, but rather a 19th century version of constitutionalism that rests on a conception of rights as checks on governmental excess, lacking in positive content. In this conception of constitutional rights government is viewed as a threat to freedom and not an enabler of it.⁷⁷ The role of courts is to constrain government action, not to compel it. Equality rights are individual and formal, not group-based and substantive. This version of constitutionalism is neither good nor necessary, and yet judges applying the *Charter* are stalked by it. It is a drag on the evolution of *Charter* equality rights jurisprudence and, by now, should have been abandoned.

This antiquated 19th century version of constitutional rights has had an influence on the approach of the courts to *Charter* remedies.⁷⁸ An indication of this is the paucity of *Charter* cases applying the majority decision in *Doucet-Boudreau v Nova Scotia (Minister of Education)*,⁷⁹ in which the Supreme Court of Canada confirmed the availability of directive supervisory remedies under the *Charter*. There are also earlier decisions that confirm the availability of positive remedies under the *Charter*.⁸⁰ However, because *Doucet-Boudreau* was decided on the basis of a five-four split, in subsequent *Charter* cases,

⁷⁷ See e.g. *Gosselin v Quebec (AG)*, 2002 SCC 84, [2002] 4 SCR 429 (welfare rights and discrimination); *Tanudjaja v Canada (AG)*, 2014 ONCA 852, [2014] OJ No 589, leave to appeal to SCC refused, 36283 (25 June 2015) (housing rights and discrimination) [*Tanudjaja*].

⁷⁸ See Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2013) (loose-leaf revision No 28, September 2016), ch 13 [Roach, *Constitutional Remedies*].

⁷⁹ 2003 SCC 62, [2003] 3 SCR 3 [*Doucet-Boudreau*].

⁸⁰ See e.g. *Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1; *Order: Manitoba Language Rights*, [1985] 2 SCR 347, 26 DLR (4th) 767; *Mahe v Alberta*, [1990] 1 SCR 342, 68 DLR (4th) 69; Roach, *Constitutional Remedies*, *supra* note 78, ch 13 at 47. In *Charter* equality rights cases the courts have also, in effect, directed governments to extend the benefit of under-inclusive benefit schemes, and acknowledged that equality is not simply a negative right. At the same time, courts' remedial orders have typically been declaratory. See *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1; *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385; *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*]. The remedy in *Eldridge* was considered ineffective because the government and hospitals did not take adequate steps to remove barriers to access to health care services for deaf and hard of hearing people.

government respondents have pointed to the dissenting judgment to promote judicial discomfort with injunctive and supervisory remedies.

In our view, the courts' approach to *Charter* remedies, notwithstanding the majority decision in *Doucet-Boudreau*, has been overly restrictive.⁸¹ Too often, exaggerated and under-analyzed concerns about competence and legitimacy have been permitted to outweigh the principle of effective remedy.⁸²

In general, court-generated *Charter* jurisprudence is not a particularly rich interpretive source. It is not fully caught up with contemporary understandings about the positive content of human rights and the nature and extent of state obligations to fulfill human rights. Although there have been some positive developments under the *Charter*, jurisprudence concerning rights such as equality and security of the person is less developed than statutory human rights jurisprudence. In many instances, statutory human rights jurisprudence, particularly tribunal decisions, will be more useful to *Charter* interpretation than the other way around.⁸³

It is therefore fortunate that the limiting remedial considerations that have held sway in the context of *Charter* litigation, which are wielded to preclude the judiciary from granting more innovative and positive remedies, are not transferable to the unique statutory human rights context.

In contrast to *Charter* jurisprudence – which, it must also be acknowledged, is still young and in an evolutionary state – it is settled in statutory human rights jurisprudence that rights to non-discrimination and equality have positive content. As noted earlier, it is also clear from the explicit remedial provisions of human rights statutes that legislatures intend human rights tribunals to have powers to make orders for positive systemic remedies, including orders directing respondents to take measures to “redress the practice or prevent the same or similar practice from recurring in the future”.⁸⁴

⁸¹ We are not alone in our view that the courts' approach to remedies has been overly restrictive. See e.g. Kent Roach's criticism of the Supreme Court of Canada's refusal to provide injunctive relief in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120. Roach, *Constitutional Remedies*, *supra* note 78, ch 13 at 48–52. For additional case examples, see *supra* note 80. As David Wiseman has pointed out, in *Charter* case law, particularly in cases involving claims to substantive equality rights and claims to social rights, concerns about competence and legitimacy have figured throughout the stages of adjudication: to justify a limit on the scope of judicial review, to lower the standard of justification under section 1 and to resist the imposition of positive remedial obligations. See David Wiseman, “Taking Competence Seriously” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 263.

⁸² Wiseman has argued, with regard to competence concerns, that judicial analysis of incompetence has been inadequate, particularly in the treatment of anti-poverty claims. Wiseman, *supra* note 81. We agree with Wiseman's analysis. See e.g. *Tanudjaja*, *supra* note 77.

⁸³ The Supreme Court of Canada looked to statutory human rights law to inform its approach to section 15 interpretation in the case of *Eldridge*, *supra* note 80. Interestingly, Kent Roach recommends human rights tribunal jurisprudence as a resource for developing more innovative *Charter* remedies. Roach, *Constitutional Remedies*, *supra* note 78, ch 13 at 77–82 (see especially ch 13 at 81–82).

⁸⁴ *CHRA*, *supra* note 5, s 53(2)(a) [emphasis added].

i. The Unique Position of the Statutory Human Rights Scheme

Human rights tribunals and commissions operate under legislation that has the transformative goal of eliminating systemic barriers to equality. Innovative remedies may be required to ensure that this transformative goal is realized.

Consequently, in considering the remedial function of tribunals, it is helpful to contextualize them in the scheme of administrative justice and government. Government respondents often urge an approach to the remedial powers of tribunals that assumes that the statutory human rights scheme is the same as the *Charter*. However, that premise is not valid. The position of human rights tribunals and commissions is unique in our system of government. They operate under a comprehensive and specialized legislative scheme established to address discrimination. The protections offered under the statute are not replicated through the common law,⁸⁵ nor has the *Charter* replaced them. The ability of tribunals to award systemic remedies is express in the legislation and central to its purpose.

ii. Human Rights Tribunals Have a Legislative Mandate to Make Systemic Orders

Parliament has equipped the human rights system with the necessary tools to achieve its goals. The federal human rights machinery is comprised of an adjudicative body and a Commission. Both are essential to the remedial function of the legislation.⁸⁶

The Canadian Human Rights Commission has the ability to investigate, mediate and refer complaints to the Tribunal. The Commission plays an important public interest role: it can conduct research; monitor systemic patterns and practices; prepare reports; provide conciliation; and provide and approve special programs to assist vulnerable groups.⁸⁷ It plays a significant role in educating the public on human rights, and reducing and discouraging discrimination through “persuasion, publicity or any other means”.⁸⁸

The breadth of the Commission’s public interest role is also reflected in

⁸⁵ *Honda Canada Inc v Keays*, 2008 SCC 39, [2008] 2 SCR 362 (see especially paras 63–64, 118).

⁸⁶ Every jurisdiction, except British Columbia and Nunavut, has both a Commission and a Tribunal, or Adjudication Panel. In both British Columbia and Nunavut, strong recommendations have been made to governments to create or reinstate a Human Rights Commission. Gwen Brodsky & Shelagh Day, “Strengthening Human Rights: Why British Columbia Needs a Human Rights Commission”, *Vancouver: The Poverty and Human Rights Centre and Canadian Centre for Policy Alternatives – BC Office* (December 2014), online: <<https://www.policyalternatives.ca/bchumanrights#sthash.5CdOmFXL.dpuf>>; Gwen Brodsky & Shelagh Day, *Strengthening the Nunavut Human Rights System: A Report for the Government of Nunavut* (Iqaluit: Government of Nunavut, 2012), online: <<http://assembly.nu.ca/library/GNedocs/2012/000707-e.pdf>>.

⁸⁷ CHRA, *supra* note 5, ss 16–17, 27, 47, 61.

⁸⁸ *Ibid*, s 27(1).

the power of the Commission to initiate its own complaint⁸⁹ or participate in hearings.⁹⁰ When it does participate in hearings, it acts to protect the public interest.⁹¹

As discussed earlier, the Canadian Human Rights Tribunal, like other human rights tribunals, has express authority to make systemic orders. The *CHRA* not only gives the Tribunal broad authority to make these orders, but also allows it to engage the Commission in implementing systemic remedies through the adoption of special programs or otherwise.⁹²

In *Hughes*, when the Tribunal awarded a systemic remedy to address the discriminatory exclusion of voters with disabilities, it also designated the Canadian Human Rights Commission to oversee implementation of the order issued against the Electoral Commission to make voting accessible within a certain time frame.⁹³ The Tribunal described this specialized role of the Human Rights Commission under section 53(3) as follows:

[r]emedial orders also may include the involvement of the human rights commission or other parties in terms of consultation, or the appointment of a monitor for the implementation of the orders. Such involvement of other actors recognizes that the courts and tribunals have an adjudicative role and formal process that do not translate well into the technical or task-specific aspects of the implementation of orders often affecting the day-to-day operations of a governmental or corporate respondent.⁹⁴

In light of the *CHRA*'s express statutory powers, the claim of government respondents that it is offensive to the legislative branch of government for the Tribunal to make systemic orders is simply not convincing.

iii. Tribunals are Not Courts and Their Functions are Not Purely Judicial

Tribunals perform a quasi-judicial but not a purely judicial function. The Supreme Court of Canada recognized the difference between courts and tribunals in *Ocean Port Hotel Ltd v British Columbia*,⁹⁵ a case in which the independence of tribunals was under consideration. The Court confirmed that administrative tribunals are uniquely situated in our system of government. They span the divide between the judiciary and the executive, and exist to implement government policy:

[t]his principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the

⁸⁹ *Ibid*, s 40(3).

⁹⁰ *Ibid*, s 50(1).

⁹¹ *Ibid*, s 51.

⁹² *Ibid*, s 53.

⁹³ *Hughes*, *supra* note 30 at para 100.

⁹⁴ *Ibid* at para 51.

⁹⁵ 2001 SCC 52, [2001] 2 SCR 781 [*Ocean Port*].

provincial courts ... Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges – both in fact and perception – by insulating them from external influence, most notably the influence of the executive ...

Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government.⁹⁶

Recognizing that *Ocean Port* involved a particular administrative scheme, and that our focus is on human rights tribunals, the point of referring to *Ocean Port* is not to propose that human rights tribunals should be held to lower standards of independence than courts. Rather, the point is to illustrate the validity of the general proposition that a tribunal constituted under human rights legislation differs from a court because it exists as part of an administrative system with a prescribed purpose. Here, the legislated purpose is to grant forward-thinking systemic remedies when discrimination occurs.

It is open to the legislature to prescribe the functions of administrative bodies, which may be different from courts. The primary responsibility of the executive branch of government concerns the vindication of certain public social policies, rather than the resolution of private conflicts. Administrative tribunals may have particular expertise in certain public matters and, as a consequence of that expertise and in order to achieve social purposes, they may be enabled by statute to deal with claims that are broader than those dealt with by courts; to grant forward-looking systemic remedies to deal with policy issues and further social goals and to remain seized of matters longer than courts.⁹⁷

⁹⁶ *Ibid* at paras 23–24.

⁹⁷ Cristie L Ford, “Dogs and Tails: Remedies in Administrative Law,” in Colleen M Flood & Lorne Sossin, *Administrative Law in Context* (Toronto: Edmond Montgomery Publications Ltd, 2008) 45 at 49–51. Ford describes it this way:

Many administrative bodies are explicitly charged with managing complex and often “polycentric” problems in a comprehensive manner. The Supreme Court of Canada has recognized this, pointing out that “while judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems [assigned to tribunals by their enabling statutes] require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties.” This has a few implications. First, it means that administrative tribunals have stronger theoretical justifications for remaining seized of a case over a longer period of time. Second, it means that administrative tribunals may try to develop remedies that address underlying structural or systemic problems, in a forward-looking rather than retrospective, rights-oriented way. This is not to say that courts do not also craft systemic, forward-looking remedies. Indeed, Chayes’s point is that they do. However, relative to courts, administrative tribunals may be especially well-placed to develop and implement novel remedies thanks to their subject-specific expertise, their field sensitivity, and their particular statutory mandates (*ibid*) [citations omitted].

Conceived in this way, tribunals and commissions can be seen as assisting the executive in reaching its public policy goals. Here, that important policy goal is the elimination of discriminatory barriers, which in some cases will require that systemic remedies be granted and implemented. Governments should not be hostile to human rights tribunals and their obligation to deal with systemic discrimination. Instead, governments should think of tribunals as engaged in a common enterprise with governments. Tribunals exist to assist government in achieving the important goal of eliminating systemic discrimination.

iv. The Remedial Function of Human Rights Tribunals is Different from the Remedial Function of a Court Addressing a Constitutional Violation

In considering the arguments about competence and legitimacy advanced by government respondents in human rights cases, it is important to remember that there are some significant differences between human rights legislation and the *Charter*, as sources of decision-making authority. One important difference is that human rights tribunals operate under an express legislative mandate that codifies the grounds of discrimination and the statutory defenses.⁹⁸

There are also important differences between the remedial function of a human rights tribunal presiding over a statutory human rights complaint and a court addressing a constitutional violation. In particular, a human rights tribunal operates under a legislative scheme to assist the legislature and executive in achieving important policy goals. As the Supreme Court of Canada explained in *Tranchemontagne v Ontario (Director, Disability Support Program)*,⁹⁹ when the tribunal exercises its remedial function it is acting in accordance with legislative intent:

This primacy provision has both similarities and differences with s. 52 of the *Constitution Act, 1982*, which announces the supremacy of the Constitution. In terms of similarities, both provisions function to eliminate the effects of inconsistent legislation. At the end of the day, whether there is a conflict with the [Ontario *Human Rights*] Code or the Constitution, the ultimate effect is that the other provision is not followed and, for the purposes of that particular application, it is as if the legislation was never enacted. But in my view, the differences between the two provisions are far more important. A provision declared invalid pursuant to s. 52 of the *Constitution Act, 1982* was never validly enacted to begin with. It never existed as valid law because the legislature enacting it never had the authority to pass it. But when a provision is inapplicable pursuant to s. 47 of the Code, there is no statement being made as to its validity. The legislature had the power to enact the conflicting provision; it just so happens that the legislature also enacted another law that takes precedence.

Thus whether a provision is constitutionally permissible, and whether it is consistent

⁹⁸ See *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 175, 56 DLR (4th) 1.

⁹⁹ 2006 SCC 14, [2006] 1 SCR 513.

with the Code, are two separate questions involving two different kinds of scrutiny. When a tribunal or court applies s. 47 of the Code to render another law inapplicable, it is not “going behind” that law to consider its validity ... It is not declaring that the legislature was wrong to enact it in the first place. Rather, it is simply applying the tie-breaker supplied by, and amended *according to the desires of, the legislature itself*. The difference between s. 47 of the Code and s. 52 of the *Constitution Act, 1982* is therefore *the difference between following legislative intent and overturning legislative intent*.¹⁰⁰

In summary, there are remedial powers that flow from human rights legislation because that is what the legislature intended. Those powers, vested in human rights tribunals, are quite apart from whatever remedial powers may be available to courts under the *Charter*. Government arguments that certain categories of remedial orders by a tribunal would offend the separation of powers by treading on the legislative or executive functions are misplaced. Tribunals and commissions are creatures of statute with important legislated roles. In fulfilling those roles, they assist the legislature and the executive in implementing human rights policy and meeting legislative goals in accordance with the desires of legislature itself.

E. The Private Law Model of Corrective Justice is Not Adequate to the Task of Human Rights Legislation

Government respondents also claim that bare declarations and damages are presumptively sufficient. This presumption of sufficiency is grounded in the premise that human rights legislation is exclusively backward-looking and corrective, a premise that is not sustainable.

Human rights legislation is meant to be corrective to some extent, that is, to restore the individual victim to the position that she or he would have been in but for the discrimination. However, human rights legislation is also concerned with groups, the eradication of entrenched patterns of discrimination experienced by members of disadvantaged groups, and the removal of systemic barriers to equality. It is meant to bring about structural change. Traditional private law corrective remedies such as damages, restitution and one-shot declarations can play a role in realizing the goals of human rights legislation. But systemic, prospective remedies, including orders setting out detailed measures, also have a crucial role to play in achieving transformative justice.

The premise that human rights are exclusively corrective, as distinct from transformative and preventative, flows from an old private law model of rights and a “received remedial tradition” of corrective justice that has been superseded by contemporary human rights legislation.¹⁰¹ The received

¹⁰⁰ *Ibid* at paras 35–36 [emphasis added].

¹⁰¹ “Received remedial tradition” is a term used by Kent Roach who has written about the deficiencies of this tradition as it operates in both the Canadian and South African constitutional law contexts. Kent Roach, “The Challenges of Crafting Remedies for Violations of Social, Economic and Cultural Rights” in

remedial tradition of corrective justice is out of touch with the realities of modern government bureaucracies, and not a fit for the systemic goals of human rights legislation. It is based on the assumption that a return to the *status quo ante* is an adequate remedy. In cases of systemic discrimination, this is never true.

At bottom, the goal of corrective justice is to remedy the discrete harms suffered by the individual victim, and not to eradicate discrimination that can be embedded in the systems of large public institutions such as prisons, border security services, benefit schemes and funding arrangements through which public benefits are provided. Because the corrective theory of justice lacks the capacity to deal with group-based patterns of discrimination and systemic barriers to justice, it cannot meet the remedial purpose of human rights legislation and therefore fails to fulfill the legislatively prescribed duty of tribunals and commissions to deal with systemic discrimination.

To some extent, the corrective theory of justice also falsely dichotomizes individual and systemic discrimination. The typical human rights complainant is an individual, not a group, including in cases against governments. Nevertheless, the reality and nature of modern government is such that to provide a meaningful remedy for an individual victim will often require systemic measures. For example, addressing the discrimination inherent in the placement of a prisoner with a mental disability in solitary confinement will probably require systemic, institutional reform, including changes in institutional policies and procedures, and re-training of guards and other personnel.

F. Moore and its Implications for the Authority of Human Rights Tribunals to Make Systemic Orders

Unfortunately, the Supreme Court of Canada's decision in *Moore* illustrates both the presumption of the sufficiency of damages and declarations in operation, and the invalidity of the presumption.

Moore was a complaint against the School District of North Vancouver and the Province of British Columbia about the treatment of students with severe learning disabilities. The case began as a complaint before the British Columbia Human Rights Tribunal ("the BC Tribunal"). The situation of Jeffrey Moore exemplified the plight of roughly three hundred students with severe learning disabilities who were adversely affected by the closure of the School District's Diagnostic Centre, which provided specialized services for students with severe learning disabilities.

Malcolm Langford, ed, *Social Economic Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) 46 at 46. See also Abram Chayes, "The Role of the Judge in Public Law Litigation" (May 1976) 89:7 Harv L Rev 1281.

The School District advised Jeffrey Moore's family that Jeffrey needed the intensive remediation services of the Diagnostic Centre to learn to read. And yet, when the School District was confronted with provincial funding cuts, which were combined with a new unconditional block funding scheme and the loss of the ability to raise funds from local taxes, the School District closed the Diagnostic Centre, without considering alternatives.

In the absence of the Diagnostic Centre, the School District was unable to provide Jeffrey with the services he needed to learn to read. In the view of the British Columbia Human Rights Tribunal, the case was one of individual *and* systemic discrimination. The BC Tribunal found the Province and the School District liable for individual and systemic discrimination, and issued individual and systemic remedies.

The findings of liability against the Province flowed from the fact that the Province funds education and is responsible for educational standards for the province as a whole, whereas each school district is responsible for funding allocations and service delivery. However, the Supreme Court of Canada upheld only the finding of liability against the School District and only for the individual award of compensation, not the systemic remedies.

Moore is a story of missed remedial opportunities. The Supreme Court of Canada's decision in *Moore* is a stark reminder that the private law model of rights adjudication can exert a powerful and destructive backwards pull on the courts, even at the highest level.¹⁰²

i. Missed Opportunities

In *Moore* the Supreme Court of Canada missed several opportunities. The Court missed a valuable opportunity to hold the Province responsible for monitoring the School District's human rights compliance. The Court also missed an opportunity to hold the School District responsible for establishing mechanisms for self-monitoring.

The systemic remedies at issue at the Supreme Court of Canada required that the Province: (1) allocate funding for students with learning disabilities on the basis of actual incidence levels of students with learning disabilities instead of capping the funding based on estimates of how many such students there would, or should, be; (2) establish mechanisms ensuring that accommodations for Severe Learning Disabilities students are appropriate and meet the stated goals in legislation and policies; and (3) ensure that districts have a range of services to meet the needs of Severe Learning

¹⁰² However, because *Moore* turns on the Court's particular view of the claim and the evidence, we do not conclude that it is an obstacle to advancing claims for systemic remedies in appropriate cases. We argue that *Moore* is distinguishable on its facts, as they were understood and characterised by the Supreme Court of Canada.

Disabilities students.¹⁰³

The School District was required to: (1) establish mechanisms to ensure that its delivery of services to Severe Learning Disabilities students meet the stated goals in the Province's legislation and policies; and (2) ensure that it had a range of services to meet the needs of Severe Learning Disabilities students.¹⁰⁴ The BC Tribunal remained seized of the matter to oversee the implementation of its remedial orders.¹⁰⁵

The Court offered remoteness to explain why the Province was not liable, and redundancy to explain why the BC Tribunal's systemic remedies against the School District were unreasonable. The remoteness point may have a modicum of validity in that the impugned provincial funding cap did not affect Jeffrey Moore because it was removed in 1991 at the same time that block funding was instituted. Further, it was not established that the Ministry's actions directly caused the District to close the Diagnostic Centre and deny services to Jeffrey Moore or other students with disabilities. The District had choices about which cuts it would make to deal with its budgetary shortfall.

However, it can be said that the Province contributed to the School District's financial problems and that the Ministry of Education failed to take steps to ensure that the District had an appropriate range of services to meet the needs of students with severe learning disabilities like Jeffrey Moore. Evidently, this was not sufficient for the Court to find that the Province had discriminated against Jeffrey Moore or other students with severe learning disabilities in a similar position to Jeffrey.

But it would not have been difficult for the Court to conclude otherwise. To find the Province liable, the Court could have built on its jurisprudence in *Robichaud*¹⁰⁶ establishing the liability of employers for workplace sexual harassment. This approach, applied to the context of discrimination in the provision of public services, would recognize that a provincial level of government that has responsibilities for funding and educational standards for the province cannot turn a blind eye to discrimination carried out by a school district. Analogously, in *Robichaud* the Court explained,

It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions.¹⁰⁷

However, the Court chose not to build on *Robichaud*, even though the

¹⁰³ See *Moore* SCC, *supra* note 54 at para 57.

¹⁰⁴ *Ibid* at para 65.

¹⁰⁵ *Ibid* at para 57.

¹⁰⁶ *Robichaud*, *supra* note 9.

¹⁰⁷ *Ibid* at para 17.

argument was made that it should.¹⁰⁸ Instead, the Court explained that the Province is entitled to use block funding as a tool to transfer funds to school districts, provided that it does not violate human rights. The Court failed to grasp the point that in British Columbia the effect of unconditional block funding from the Province to school districts is to transfer to the parents of each student the Herculean task of holding school districts to account for providing services that fulfill their human rights obligations.

The Court's disparaging and misguided remark that the BC Tribunal believed itself to be a "Royal Commission"¹⁰⁹ rather than an adjudicative body reflected the Court's lack of understanding of the degree of control that the Province has over school districts, "to take effective action to remove undesirable conditions".¹¹⁰ This underlines the fact that the law on the responsibility of senior levels of government for the discrimination carried out by public authorities, over whom they exercise a substantial degree of control, is desperately in need of development. The Supreme Court of Canada issued a ringing declaration that "Adequate special education ... is not a dispensable luxury. For those with severe learning disabilities, it is the ramp that provides access to the statutory commitment to education made to *all* children in British Columbia."¹¹¹

But the Court did not provide any remedial assistance to ensure that "the ramp" is actually in place and does not have to be constructed, and reconstructed, one child at a time.

The Court in *Moore* also sidestepped the opportunity to hold the School District responsible for self-monitoring. The Court's explanation of redundancy does not stand up to scrutiny. The essence of the redundancy idea, as articulated by the Court, is that a direction for self-monitoring would essentially tell the School District to comply with the *Human Rights Code*, an obligation which it can be presumed to respect. The Court further reasoned that if the School District wishes to avoid similar claims it will have to ensure that it provides a range of services for special needs students. This reflects the Court's presumption of the sufficiency of damages, a central feature of the corrective theory of justice.

The *Moore* case also concretely illustrates why this presumption is not valid. In reality, the problem of students with disabilities being denied meaningful access to education and the lack of effective mechanisms to ensure that requirements for accommodation are properly addressed persists throughout British Columbia.

The personal remedy of compensation for the *Moore* family, which was upheld

¹⁰⁸ See *Moore* SCC, *supra* note 54 (Factum of the Appellant at paras 99, 145, 194).

¹⁰⁹ *Moore* SCC, *supra* note 54 at para 64.

¹¹⁰ *Robichaud*, *supra* note 8 at para 17.

¹¹¹ *Moore* SCC, *supra* note 54 at para 5 [emphasis in original].

by the Supreme Court of Canada, has not had the “broad remedial repercussions for how other students with severe learning disabilities are educated” that the Court counted on.¹¹² There is an abundance of anecdotal evidence that the post-*Moore* situation is no better than the pre-*Moore* situation.¹¹³

In the absence of monitoring mechanisms at the level of the Province and the school districts, it is extremely difficult for parents to hold the school districts to account. It should be clear in the wake of *Moore* that courts and tribunals should take great care not to overestimate the impact of individual remedies on the functioning of established and complex systems, especially when the deterrent effect of small compensation awards can be negligible and the cost of re-litigation prohibitive. It is also essential to recognize the “life time” that is lost when other children and their families have to relitigate the same issue in order to gain their own opportunities to be educated adequately. It is simply not fair to expect more people to devote decades of their lives, as Jeffrey Moore’s parents did, litigating human rights problems that could be fixed by effective systemic remedies.

There are other cases in which broad statements of principle and analytical direction have served to change the face of the law. A prime example is *Meiorin*¹¹⁴ which marked a radical shift in the analysis of defences to discrimination by finding the public employer’s fitness standards were discriminatory. The effect of the ruling was to send the employer back to the drawing board.

In that case, it was not necessary for the Court to assist the respondent in developing a new fitness standard, for several reasons. Firstly, there was a union to keep up the fight with the government employer and to hold its feet to the fire. Secondly, the government employer wanted to have a fitness standard and the Court had effectively struck it down; this was not a case of the employer being ambivalent about extending the benefits of an under-inclusive system, such as might be the case with a school system or funding for on-reserve child welfare services.

When it comes to remedial considerations, questions about how detailed an order needs to be and whether the Tribunal needs to remain seized, “access to justice” factors should come into play. It is important for tribunals and courts to know whether there is a union or other institution that has the capacity and mandate to keep up the fight if a respondent’s implementation of a remedy is lacking.

Ultimately, the effect of *Meiorin* was to transform the practice of

¹¹² *Ibid* at para 63.

¹¹³ Frances Kelly, counsel to the Moore family in this case, has knowledge of numerous situations of students with learning disabilities not enjoying meaningful access to education, in many school districts in British Columbia.

¹¹⁴ *Supra* note 4.

accommodation in workplaces all across Canada, that is, the workplaces where there is a union that works to protect the rights of employees. In many other cases, and *Moore* is one of them, there is not a well-resourced advocacy body that can keep up the fight. This makes it all the more important that a human rights tribunal's remedy for systemic discrimination is detailed enough to give clear direction to the respondent and that the tribunal remain seized to assist if there are problems in implementation.

In *Moore*, in order to prevent a recurrence of discrimination for other students and to respect the knowledge of a respondent about its own operations, it made sense for the BC Tribunal to remain seized of the matter so that the District—which was resistant to being told what to do—could report back on the self-monitoring mechanisms it had devised. Indeed, the BC Tribunal took care to give the School District room to apply its special expertise to the design of the mechanisms.¹¹⁵ The BC Tribunal demonstrated acute sensitivity to the different competencies of the BC Tribunal and the District. In our view, the Court's determination that there was no need for the Tribunal to remain seized was wrong.¹¹⁶

A third explanation offered by the Court for why the systemic remedies granted by the Tribunal were unreasonable is that they did not flow from Jeffrey Moore's claim. The Supreme Court of Canada said that defining the scope of the inquiry so as to include the role of the Province and the resulting systemic orders expanded it beyond Jeffrey's claim. This explanation lacks persuasive force.

Up until the Supreme Court of Canada appeal, it was always clear to the parties and everyone connected to the *Moore* case that the complaint had both individual and systemic dimensions. It was obvious that Jeffrey's was not an isolated case of one individual falling through the cracks. Jeffrey Moore was the victim of systemic discrimination in that the School District chose to deal with its budgetary shortfall by closing the Diagnostic Centre, without considering other options. This decision affected not only Jeffrey but also many other children.

The problem at the heart of the case was that the School District had rendered the education system for the entire School District incapable of accommodating students with severe learning disabilities. It was not that the requested remedies did not flow from Jeffrey's claim. In our view, that was simply wishful thinking on the part of the Court because the effects of the requested remedies would have been systemic.

¹¹⁵ *Moore* BCHRT, *supra* note 54 at paras 1012–17.

¹¹⁶ For purposes of future litigation and adjudication, it must be borne in mind that in *Moore* the Supreme Court of Canada was only concerned with remedying the discrimination against Jeffrey, and he had finished school by the time the appeal reached the Supreme Court of Canada. Clearly, *Moore* is not a bar to tribunals remaining seized in appropriate cases.

Moore floundered in the Supreme Court of Canada not only because of perceived deficiencies in the framing of the claim or the evidence, but because the Court lacked the conviction to hold the respondents to account for the full extent of their human rights obligations. Instead, the Supreme Court of Canada succumbed to the backwards pull of a private law corrective theory of justice that is at home with claims that are focused exclusively on individual harms, damages and one-shot negative injunctions, but uncomfortable with the broad public policy purposes of human rights legislation and remedies designed to further those objectives. In the result, opportunities to realize the goals of human rights legislation were missed and further litigation will be necessary.

ii. *Lessons from Moore*

Although the potential of the corrective theory of justice to undermine the goals of human rights legislation is exemplified by the Court's decision in *Moore*, its significance as precedent is limited. *Moore* cannot be interpreted as precluding systemic discrimination claims, nor does *Moore* preclude human rights tribunals from granting systemic remedies. Furthermore, *Moore* does not restrict the breadth and scope of the evidence that may be adduced to substantiate a claim of systemic discrimination. In future cases, *Moore* can and should be confined to its facts, as the facts were understood and characterised by the Supreme Court of Canada. It is immaterial that we do not share the Court's view of the claim or the evidence.

The Court's express understanding was that the complaint as framed was not adequate to encompass the allegations of systemic discrimination considered by the BC Tribunal. A lesson for future strategic litigation is that the framing of systemic discrimination complaints must be very carefully considered from the outset. From the Court's point of view, there was a lack of evidence about precisely how other severely learning-disabled students, who were enrolled in the Diagnostic Centre, were affected by its closure.¹¹⁷

The evidence, in the Court's view, was centred on Jeffrey. Furthermore, the claim was 15 years old by the time the appeal reached the Supreme Court of Canada, and certain aspects of the provincial scheme had changed. This point was highlighted by the Province in its response to the application for leave to appeal in the Supreme Court of Canada.

However, the refusal of the Court in *Moore* to deal with the systemic aspects of the case is not a reason for commissions to be timid about advancing

¹¹⁷ It is encouraging that in three post-*Moore* SCC cases government respondents have been unsuccessful in using *Moore* to strike out systemic claims by way of preliminary applications. All are individual prison cases which raise systemic components: see *British Columbia (Ministry of Public Safety and Solicitor General) v Mzite*, 2014 BCCA 220, 79 CHRR D/377; *Desmarais v Canada (Correctional Service)*, *supra* note 63; *Starblanket v Canada (Correctional Service)*, 2014 CHRT 29, 2014 TCDP 29.

systemic discrimination claims and innovative remedies. Commissions are well situated to adduce evidence of systemic discrimination and to overcome the limitations of what an individual complainant's situation may illustrate. The Canadian Human Rights Commission has a statutory duty to make submissions in the public interest when it participates in a hearing,¹¹⁸ and it is clearly in the public interest for the Commission to advance and fully defend requests for systemic remedies.

A troubling feature of the *Moore* case is that the complainant was disadvantaged by the fact that the British Columbia Human Rights Commission ("the BC Commission") was abolished during the BC Tribunal hearing. Up to that point the BC Commission was a party to the hearing. Had the BC Commission been involved throughout the *Moore* litigation to make submissions in the public interest, and to supplement the evidence of adverse effects on other students with disabilities, the final outcome of *Moore* may well have been different.

Recognizing that anxieties about systemic remedies influenced the Court in *Moore* does not support concluding that systemic litigation strategies should be avoided. Rather, *Moore* should be seen as creating opportunities for advocacy to further develop the jurisprudence to elaborate on the availability of systemic remedies in appropriate cases. In particular, commissions need to confront rather than bend to arguments advanced by government lawyers that challenge the authority of tribunals to grant systemic remedies against governments. Courts and tribunals must recall key insights about systemic discrimination and effective remedies embodied in decisions such as *Action Travail des Femmes*, *Robichaud* and *Meiorin*,¹¹⁹ none of which have been overruled by *Moore*.

IV. Remedial Innovation and the Transformative Goals of Human Rights

Different circumstances warrant different remedies. Government respondents sometimes argue that an entire category of order is "off limits" to tribunals. However, detailed, positive orders should not be relegated to a category marked "rarely issued." Rather, the question of whether such an order is appropriate should be asked in all cases that raise systemic concerns.

A tribunal needs to be able to make whatever order is required to address the particular circumstances in front of it. An effective and appropriate remedy may need to be future-based, detailed and supervisory. Above all,

¹¹⁸ CHRA, *supra* note 5, s 51.

¹¹⁹ *Action Travail des Femmes* SCC, *supra* note 2; *Robichaud*, *supra* note 9; *Meiorin*, *supra* note 4.

the approach needs to be flexible, practical and result-oriented. There are a number of factors to be taken into account when considering when detailed remedies are appropriate and how to fashion them to be effective.

A. A Declaratory Order

As discussed, a declaratory order is the “go to” order requested by governments where a determination of systemic discrimination has been made. The tribunal should tell the government if there is discrimination. Full stop. Government respondents argue that this is the best order as it leaves it entirely up to the government entity to decide how to fix the discrimination, and it also exemplifies the deference necessary to maintain the distinct functions of government and the tribunal.

In our view, while a declaratory order may be sufficient in some cases, it will not necessarily be sufficient in all cases. For example, such an order may not be appropriate in cases where government actors may be reluctant or unclear about what they are required to do to cure the discrimination. Further, under a declaratory order, without more, there is no ability to monitor compliance, which can be a problem if there is delay or resistance to implementation. It is then left up to the litigants to re-litigate the matter if there is non-compliance, which is an unfair burden for those who are affected by the discrimination.

B. Government Inertia: A Barrier to Systemic Reform

One of the obvious reasons for going beyond a declaratory order in cases of systemic discrimination is that a significant barrier to creating change is inertia. Bureaucracies are challenging when it comes to systemic reform; they are change averse and move slowly at the best of times. A declaratory order will not necessarily be effective in challenging bureaucratic inertia.¹²⁰ Government institutions may fail to act effectively, or at all, without an order setting out sufficient detail and clear expectations. In these circumstances, a remedy will only be effective if it builds in measures to ensure accountability, responsiveness and sufficient particularity to show the respondent what needs to be done.

In some cases, tribunals have evidence before them of incompetence, inattentiveness to human rights, ignorance or intransigence, that is, evidence that the respondent had clear knowledge, sometimes over many years, of the

¹²⁰ See discussion of *FNCF Caring Society* case, “The Opposition of Government Respondents to Systemic Remedies”, above. In our view this is an example of a case in which the record demonstrates that it would be unwise to assume that an order that focuses only on immediate relief will be effective in managing bureaucratic inertia. Short-term increases in funding for services will not address the systemic discrimination in the scheme. To ensure that the problem of systemic discrimination in the scheme is adequately addressed, systemic remedies are required.

problem and its manifestations, yet failed to take effective action to address it. *Action Travail*, *FNCF Caring Society* and *McKinnon v Ontario (Ministry of Correctional Services)*¹²¹ are such cases. In his discussion of systemic orders in the Canadian and South African constitutional law contexts, Kent Roach argues that systemic orders are frequently necessary in cases of entrenched social problems.¹²²

i. The Focus on Impact and Vulnerability in the Remedial Process

In statutory human rights cases, a more detailed order may also be appropriate if there has been a history of delay—whether caused by inertia, incompetence, intransigence or non-compliance—where that delay exposes the victims of discrimination to ongoing harm. A detailed order may also be justified in cases where there is no demonstrable history of delay, but any potential delay could result in harmful consequences for the complainants.

Given the effects-based purpose of human rights legislation, in cases where already vulnerable complainants will face further harm if government respondents fail to act, a detailed order is justified. In such circumstances, a detailed order can provide the respondent government with sufficient clarity and direction to ensure that further harmful impact is minimized.¹²³ In our view, *FNCF Caring Society* is a case in which detailed systemic orders would

¹²¹ *FNCF Caring Society* 2016 CHRT, *supra* note 1; *Action Travail des Femmes* SCC, *supra* note 2; *McKinnon v Ontario* (Ministry of Correctional Services), [1998] OHRBID No 10, 32 CHRR D/1 [*McKinnon*]. The complaint in *McKinnon* was filed in 1996. The Tribunal found in favour of the complainant in 1998 (*ibid*). This case was finally settled more than fifteen years after it was commenced. *McKinnon v Ontario (Ministry of Correctional Services)*, 2011 HRTO 591, [2011] OHRTD No 578. The Tribunal had made more than twenty rulings, including findings of persistent and uncorrected discrimination. See e.g. *McKinnon v Ontario (Ministry of Correctional Services)*, 2007 HRTO 4, 59 CHRR D/89.

¹²² Kent Roach & Geoff Budlender, “Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?” (2005) 122:2 SALJ 325. Roach and Budlender propose that courts apply a cascading model of increasingly directive orders, depending on the conduct of the government respondent. The cascading model begins with a declaratory order where the issue is government ignorance, to stronger relief where it is government incompetence or inertia, to the strongest orders for detailed injunctive relief being reserved for situations where government intransigence has been demonstrated to ensure that government can be punished for its actions if it does not comply (*ibid* at 345–51). We find this proposal insightful but it is not directly transferable from constitutional law decision-making by courts to decision-making by tribunals in statutory human rights cases. In particular, in statutory human rights cases the availability of systemic remedies cannot be made contingent on proof of respondent intransigence. Requiring proof of government intransigence before positive supervisory orders can be issued is inappropriate in the context of statutory human rights because it imports intention and focuses on the actions of government instead of the impact on the complainants. It is well established that the focus of human rights legislation is effects-based and remedial and it is not intended to be punitive. Proof of intention is not required; the situations where detailed relief may be warranted should not therefore be limited to cases where there is evidence of government intransigence in the context of human rights. The search for an appropriate remedy should not focus on the actions of the respondent government, but on fixing the discrimination and meeting the needs of the affected victims.

¹²³ See discussion of *FNCF Caring Society* case, “The Opposition of Government Respondents to Systemic Remedies”, above.

have been justifiable immediately following the submissions of the parties on remedy, based solely on the factors of urgency and vulnerability.¹²⁴

An international example of this kind of order, from South Africa, is *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*.¹²⁵ In this case, the South African Constitutional Court issued a mandatory order setting out in detail what the government had to do to protect vulnerable individuals and prevent serious future harm.¹²⁶ It ordered the government to provide medication for pregnant women to avoid transmission of HIV to their unborn babies.¹²⁷ Delay in these circumstances would clearly have resulted in serious and irreparable consequences for the women and their children.¹²⁸ The Court built in some flexibility to allow the government to vary the order if circumstances changed.¹²⁹

A detailed order may also be justified in cases involving prison authorities. The vulnerability of prisoners and their total reliance on prison authorities to meet all of their critical needs are supportive contextual factors for directive orders.

Prisoners with mental disabilities are often denied treatment and locked up in segregation instead of receiving treatment.¹³⁰ Segregation can exacerbate mental illness. One human rights complaint described how a mentally ill prisoner who was repeatedly thrown into segregation engaged in head banging to the point that he suffered brain damage.¹³¹ Another complaint described how a prisoner was repeatedly denied his HIV medication despite repeated requests from his doctor.¹³² Women in prison are also denied access to important protections and programs, and, as primary caregivers, they experience the disproportionate hardship of being denied access to their children.¹³³ In Canada, numerous reports on the mistreatment of certain prison

¹²⁴ *Ibid.*

¹²⁵ [2002] ZACC 15, 2002 (5) SA 721 (CC). See Roach, “Mandatory Relief”, *supra* note 122, and *infra* note 129 referring to more recent decisions of the SA Constitutional Court involving supervisory remedies.

¹²⁶ *Ibid.* at para 135.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* at para 131.

¹²⁹ *Ibid.* at para 135.

¹³⁰ See *Desmarais*, *supra* note 63.

¹³¹ *Tekano v Canada (Attorney General)*, 2010 FC 818, [2010] FCJ No 1132.

¹³² *British Columbia (Ministry of Public Safety and Solicitor General) v Mzite*, 2014 BCCA 220, 79 CHRR D/377. This and the case referred to at *supra* note 131 are preliminary decisions and have not proceeded to hearing and remedy. If the facts alleged proved discrimination such cases would cry out for a detailed supervisory remedy.

¹³³ See Canadian Human Rights Commission, *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (December 2003), online: <www.caefs.ca/wp-content/uploads/2013/05/fswen.pdf>; Canadian Association of Elizabeth Fry Societies Chair, Centre for Indigenous Governance, Ryerson University, and Canadian Feminist Alliance for International Action, *Report to the Committee on the Elimination of Discrimination against Women on the Occasion of the Committee's Eighth and Ninth Periodic Review of Canada, Reply to Issues 2, 3, 16 & 18: Indigenous Women and Women in Detention* (October 2016), online: <http://internet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/INT_CEDAW_NGO_CAN_25420_E.pdf>.

populations, combined with the extreme vulnerability of these populations, arguably justify detailed supervisory orders.

An effects based remedial analysis requires consideration of the vulnerability of victims of discrimination, and of the impact they can suffer if delay causes further discriminatory treatment.

ii. A Dialogic Approach

Where a declaratory order is insufficient, a dialogic approach, like the one that has developed in the *FNCF Caring Society* case, may be helpful. Dialogic processes are regularly used by international human rights bodies that require state parties to report back on the steps they have taken to comply with their findings. It is a process that relies on dialogue and persuasion to achieve the appropriate remedy.

There are distinct advantages to a dialogic approach. The parties may be in an ongoing relationship. Implementation may be complex and additional information may be required. Dialogue allows the parties to participate in finding a solution by providing further information. This allows both sides to be better informed and “own” the process. This increases the likelihood of a more effective remedy that will work for everyone in the long term.

iii. Detailed Supervisory Orders with Specialized Requirements Including Reporting

Detailed supervisory orders can be part of a dialogic process. Requiring government respondents to come back within a certain time frame and demonstrate how they propose to implement an order can help to finetune it, allowing government room to fashion the specifics of a reform plan and to identify problems and realistic timeframes.

In the *FNCF Caring Society* case, the Tribunal approached remedy in a creative manner, by adjourning the case after a finding of liability to allow the parties to provide further submissions on remedy. This is a good example of an innovative procedure that gives the parties full opportunity to explore solutions. This also gives the parties time to consult each other and try to come up with an agreed solution.

Similarly, the Tribunal issued a detailed supervisory order in *Hughes*,¹³⁴ remaining seized of the order until compliance was demonstrated. The Tribunal ordered that the Commission be involved in implementation, as well.

In *Hughes*, the Tribunal also required consultation with representatives of the affected group. This kind of dialogue can enhance the process and may improve the ultimate remedy as the respondent will be acting from

¹³⁴ *Hughes*, *supra* note 3 at para 100.

an informed perspective.¹³⁵ In the constitutional jurisprudence of the South African Constitutional Court, meaningful engagement is a recognized remedy. As Sandra Liebenberg explains, the remedy of meaningful engagement was pioneered in eviction disputes involving the housing rights provision of the Constitution, to stimulate the state to engage with rights beneficiaries, experts and other stakeholders to design an effective remedial action plan.¹³⁶

In our domestic human rights case law, *Abbey v Ontario (Community and Social Services)*¹³⁷ is also relevant. In this ongoing case, the Ontario Human Rights Tribunal ordered the government to undertake a review of self-employment policy directives associated with Ontario's Disability Support Program within the next six months to ensure conformity with the Ontario *Human Rights Code*. The government will file a report with the Tribunal and the applicant within six months from the date of the decision, describing its compliance with this order. The Tribunal remained seized with respect to the order associated with the review of the self-employment policy directives.

V. Conclusion

We are at a critical time in Canadian jurisprudence. The systemic issues Canada faces with respect to discrimination against women, Indigenous peoples, prisoners and people with disabilities will not be addressed without effective remedies. In many systemic cases mere declaratory relief will not achieve the goal of substantive equality.

Human rights tribunals can and should make detailed systemic orders when cases before them call for such orders. Arguments made by government respondents, raising abstract concerns about competence and legitimacy, do not justify fettering the remedial discretion of statutory human rights tribunals to provide systemic remedies. The received remedial tradition of

¹³⁵ A possible objection to tribunals maintaining a supervisory role through commissions is one of capacity. Courts may worry about capacity for ongoing supervision. However, the human rights commission model is a special feature of the human rights system created to help government respondents to implement effective and appropriate remedies. It is the responsibility of governments to ensure that human rights institutions have the capacity to fulfill their duties. With regard to the remedial authority of a federal tribunal to make orders such as that made in *Hughes, supra* note 30 at para 100, requiring the respondent to engage more broadly, it may be beneficial for section 53 of the *Human Rights Act* to be amended to explicitly authorize the Tribunal to make orders mandating broader engagement.

¹³⁶ S Liebenberg, "Remedial Principles and Meaningful Engagement in Education Rights Disputes" (2016) 19 *Potchefstroom Elec LJ* 1. See e.g. *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*, [2008] ZACC 1, 2008 3 SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*, [2009] ZACC 16, 2010 3 SA 454 (CC); *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality*, [2012] ZACC 26, 2013 1 SA 323 (CC); *Pheko and Others v Ekurhuleni Metropolitan Municipality*, [2011] ZACC 34, 2012 2 SA 598 (CC).

¹³⁷ 2016 HRTO 787, [2016] OHRTD No 782.

corrective justice must also be rejected as inadequate to the goals of human rights legislation. Rather, the exercise of human rights tribunals' remedial discretion must be grounded in the overriding principle of effective remedy, as well as the unique character of human rights legislation.