Filling the "Charter Gap": Human Rights Codes in the Private Sector

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Filling the "Charter Gap": Human Rights Codes in the Private Sector

Abstract
The author considers the capacity of the federal and provincial human rights codes to deal with human rights abuses in the private sector. He compares the social democratic potential of the codes, with the classical liberalism of Charter jurisprudence, which shields the private sector from constitutional scrutiny. Four case studies are used: the definition of "offered to the public," mandatory retirement, the rights of the poor, and systemic discrimination. It is concluded that there are important similarities between the codes and the Charter, both at an institutional design and a doctrinal level. As a result, the codes have been unable to redress significantly the problem of inequality in the private sector.

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L'auteur considère la capacité des codes de droits humains fédéraux et provinciaux de s'adresser aux abus des droits humains dans le secteur privé. Il compare le potentiel social-démocrate des codes avec le libéralisme classique de la jurisprudence de la Charte, qui protège le secteur privé de l'examen constitutionnel. Quatres études de cas sont présentées: la définition de «offert au public», la retraite obligatoire, les droits des pauvres, et la discrimination systémique. L'auteur conclut qu'il existe d'importantes ressemblances entre les codes et la Charte, au niveau de la conception institutionnelle, ainsi qu'au niveau textuel. En conséquence, les codes n'ont pu redresser de manière significative le problème de l'inégalité dans le secteur privé.

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I. INTRODUCTION

The operation of human rights codes in the private sector has been a source of intense judicial and academic activity in the Charter era. The question of whether human rights should apply in the private sphere is not only an important interpretative issue, but is also linked to a larger debate about the exercise of power and the allocation of resources. The juridical resolution to this question has been increasingly regarded as significant in framing the attitude of the state to imbalances in social and economic power. There is a crucial choice to be made in this context about the ends that human rights should serve, which can be posed as the choice between the ideal types of classical liberalism and social democracy. In broad terms, these differing visions of human rights can be linked to laissez-faire free-market economics on the one hand, and to interventionism in the pursuit of equality on the other. At the constitutional level of the Charter, the debate has generally been resolved in favour of classical liberalism. This paper considers whether it is possible to advance a social democratic conception of human rights by adopting a different (and non-constitutional) institutional design, and proceeds by an analysis of the often neglected operation of the federal and the various provincial human rights codes in the private sector.

Part II of this paper outlines the pre-eminence of classical liberalism at the constitutional level, and then discusses why human rights legislation might be expected to promote a more social democratic conception of human rights. Part III analyzes the operation of human rights legislation in the private sector, looking in particular at issues of

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mandatory retirement, the housing of the poor, and systemic
discrimination, and concludes that despite their ostensible advantages,
human rights legislation is unable to redress the balance in favour of the
socially and economically weak. Part IV considers why this is so, and
concludes that under closer scrutiny, there are more institutional and
doctrinal similarities than differences between human rights acts and the
Charter, and attempts to explain why the former seems incapable of
fulfilling its social democratic potential.

II. CLASSICAL LIBERAL CONSTITUTIONALISM: THE
"CHARTER GAP" AND THE PROSPECTS FOR
LEGISLATIVE SOCIAL DEMOCRACY

The battleground between the classical liberal and social
democratic visions of human rights at the constitutional level has been
section 32 of the Charter, which limits its application to the federal and
provincial legislatures and governments. This section was first construed
in RWDsu v. Dolphin Delivery as limiting the potential application of the
Charter to private action by removing the enforcement of court orders
based on the common law from the reach of the Constitution. In
McKinney v. University of Guelph the limited nature of constitutional
rights was further clarified when the Court held that an institutional link
with government was necessary to invoke the Charter, and so the action
against the defendant university was not able to proceed. More recently
in Young v. Young, L'Heureux-Dubé J. has drawn a distinction between
"public" and "private" rights so that, even if a court order has its basis in
legislation, the Charter will not apply if the legislation deals with private
rights, as in the case of the Divorce Act. Although these judgments

3 An extended discussion of the concepts underlying these ideal types is set out in J.C. Bakan
67. Their application at the Charter level is discussed in G.W. Anderson, "The Limits of
Constitutional Law: The Canadian Charter of Rights and Freedoms and the Public/Private Divide"
in C. Gearty & A. Tomkins, eds., Understanding Human Rights (Herndon, Va: Books International,
1996) 529.


7 R.S.C. 1985, c. 3 (2d Supp.).
have been attacked as internally contradictory, they make sense when measured against a classical liberal conception of rights which relies on a negative conception of freedom, and have at their core the protection of atomized individuals from state interference, especially if their rights to private property are under threat. Central to this approach is the idea that governmental power is the greatest potential threat to rights and freedoms, and this has resulted in the Court’s erection of a public/private divide, thus removing some areas of private life from political interference.

The ascendancy of classical liberalism means that, at least at the constitutional level, the alternative social democratic vision of human rights is firmly rejected. The social democratic approach rests on a different conception of the goals of the state, one in which positive intervention in the name of achieving greater equality may in fact be more conducive to the best protection of freedom: human rights should serve redistributive ends, and the courts should accept that there is equal potential for abuse of human rights by private bodies. It has been suggested that there are two principal strategies available to try to effectuate social democratic constitutionalism: either expand the class of bodies against whom rights are available; or expand the class of rights contained in the Constitution to include positive social and economic rights, such as the right to housing, education, and health care. The Supreme Court of Canada has emphatically renounced the former course, and the latter came to grief in the Charlottetown Accord referendum. It would appear that, at present, it is the classical liberal vision of human rights that predominates in constitutional practice. This is reflected in the fact that the classical liberal goal of increasing the area of economic freedom is preferred to the social democratic aim of promoting the capacity for the constitutional protection of equality.

In spite of the prevailing constitutional orthodoxy, there remains a genuine concern that the social democratic conception of human rights should not be abandoned entirely. Not surprisingly, this view is expressed most strongly by critics of the Court’s Charter jurisprudence;

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9 See M.V. Tushnet, “Living with a Bill of Rights” in Gearty & Tomkins, supra note 3 at 1.
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Allan Hutchinson, for example, emphasizes that the effect of the Supreme Court's decisions is to exclude from Charter scrutiny "the major source of inequality in our society: the maldistribution of economic wealth and political power." However, these sentiments about the dangers to human rights from private concentrations of power are also echoed by the Court and its supporters. In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*, La Forest J.—who subsequently wrote the leading judgment in *McKinney*—expressed concern that threats to civil liberties could still come from private institutions beyond the reach of democratic politics. In a similar vein, Peter Hogg, who considers that the Court's section 32 jurisprudence is "not only technically correct ... but is also sound as a matter of constitutional policy," agrees that in the context of equality rights, the real danger is not legislation or governmental action. Instead, the threat comes from "discrimination by private persons, such as employers, trade unions, landlords, realtors, restaurateurs and other suppliers of goods and services," and that in these situations "economic liberties of freedom of property and contract, which imply a power to deal with whomever one pleases, come into direct conflict with egalitarian values."

The question is therefore whether, given the constitutional predilection for classical liberalism, there are any means available to give concrete effect to a social democratic notion of human rights. The Court and its supporters have suggested that a solution is possible, and this takes the form of the various federal and provincial human rights codes. The solution rests on a distinction between the constitutional and legislative protection of rights: while classical liberal constitutionalism

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13 *Ibid.* at 534-35:

The courts in Canada ... cannot remain oblivious to the concrete social, political and economic realities within which our system of constitutional rights and guarantees must operate. In particular, we must recognize that the Charter alone cannot secure that full portion of individual freedoms to which we aspire. Effective regulation of the many private and democratically unaccountable institutions which are capable of exercising virtually coercive powers within their sphere of operations is also crucially important. We cannot allow our commitment to the former to preclude our further reliance on the latter.


will not countenance regulation of economic freedom at the (higher) level of constitutional law, such regulation is perfectly permissible at the level of ordinary legislation. Moreover, the existence of human rights acts and their operation in the private sector are important factors that help justify section 32 Charter jurisprudence. Thus, Hogg notes that in all Canadian jurisdictions, economic liberties have been subordinated to egalitarian values by the enactment of human rights codes,¹⁶ and that this "fills a gap in the Charter."¹⁷ The purpose of this paper is to test the validity of the claim that, by operating in the private sector, human rights legislation "fills the Charter gap" by advancing a social democratic conception of human rights. A serious commitment to social democratic values would entail not merely overcoming the jurisdictional issue of whether human rights legislation is applicable to private bodies, but also of using this legislation to redress the acknowledged imbalances in social and economic power outlined above. Before turning to the operation of human rights legislation in practice, however, it is important to consider why this particular institutional choice might be better placed to deliver a social democratic approach to human rights adjudication.

A. Comparison of the Text, History, and Structure of the Charter with Human Rights Legislation

Although the Charter experience might show how human rights can be used to promote classical liberal values at the expense of equality, this need not lead to the conclusion that there is no potential for using human rights to further egalitarian values. Prima facie, the federal and provincial human rights acts encourage the possibility of furthering social democratic ends because they appear to address directly many of the deficiencies perceived in the Charter: they operate at the ordinary political and legislative (not the constitutional) level; their primary means of enforcement is the (executive) mechanism of commissions, and not the (judicial) mechanism of the courts; and their anti-discrimination focus embodies a more egalitarian conception of human rights. While these presumptions should not necessarily be accepted at face value, a more detailed comparison of the text, history, and structure of human rights legislation suggests that they possess many potential advantages over the Charter.

¹⁶ Ibid. at 1149.
¹⁷ Ibid. at 771.
The critique of the Charter's failure to deal with abuses of private power falls under three headings: first, that the Charter is a liberal document designed to protect rather than disturb private power; second, that this is partly achieved by elevating the issue to the abstract level of constitutional law, which mystifies issues of social inequality; and third, that conceiving of the issue in legal terms before a judicial forum preserves the status quo of social power. Turning to the first charge, there would probably be considerable agreement that, from reading the text and history of section 32, it was never intended that the Charter should apply to private actors. When one considers human rights legislation, examination of the history and text points in the opposite direction. The main political motivation of the supporters of the initial anti-discrimination legislation was the inability of the common law (and the Civil Code of Quebec) to deal with the more visible inequalities of social power, on anything other than a formal basis. The movement which sought the enactment of anti-discrimination legislation in the 1940s rejected ideas of social laissez-faire, and was instead committed to protecting "a social right against discrimination in the private domain, including employment, housing and the provision of goods and services." This movement led to the enactment of the first anti-discrimination law in the Ontario Racial Discrimination Act of 1944, followed shortly thereafter by the Saskatchewan Bill of Rights. This ideological commitment to the broader operation of human rights legislation is reflected in the textual absence of any equivalent to section 32 in the cumulative codes and acts which consolidated the earlier specific statutes.

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19 See, for example, Christie v. York Corp., [1940] S.C.R. 139 at 142, where a tavern owner's refusal to serve a black man was upheld on the grounds that the "general principle of the law of Quebec [was] that of complete freedom of commerce." For a more detailed discussion of the relevant case law, see W.S. Tarnopolsky, "Discrimination in Canada: Our History and our Legacy" in W.S. Tarnopolsky, J. Whitman & M. Ouelette, eds., Discrimination in the Law and Administration of Justice (Montreal: Thémis, 1993) 1.


21 S.O. 1944, c. 51.


23 Any application sections that do exist are for the purpose of making it clear that the Crown is bound by the acts as well as the private sector (Ontario Code, supra note 2, s. 47; and CHRA, supra note 2, s. 66). The Quebec Code, supra note 2, s. 55, perhaps because it contains fundamental freedoms in addition to anti-discrimination provisions, is slightly reminiscent of section 32 of the
It is also useful to note the reaction of the right and the business community to these developments. Since the initial anti-discrimination statutes in the 1940s and 1950s, the trend has been toward codification and the creation of specific administrative agencies to enforce the operation of the Acts. The prohibited grounds for discrimination now include the receipt of public assistance\(^2\) and social condition,\(^2\) which (as will be seen in Part III, below) cannot be meaningfully interpreted without imposing some positive obligations on government to alleviate inequality. These trends have provoked considerable opposition from the private interests threatened with increasing regulation. For example, in Ontario, 1981 legislative reforms—which *inter alia* expanded the grounds of discrimination and incorporated the idea of systemic discrimination into the *Code*—were met with considerable opposition from the Ontario Chamber of Commerce and the Canadian Manufacturer's Association. This opposition was mainly because of the proposals' potential incompatibility with more traditional liberal individual negative rights.\(^2\) Academic reaction has also been generally more hostile to some of the recent developments.\(^2\) Ian Hunter attacked the 1981 reforms in Ontario as subordinating freedom of contract, freedom of property, and the freedom to choose one's tenants, to the goal of achieving equality of result which, in Hunter's view, makes too great an incursion into human liberty.\(^2\) Although perhaps of no final probative worth, the relative absence of a similar line of critique from the right with respect to the *Charter*\(^2\) tends to reinforce the idea that human rights legislation is potentially a much more serious threat to the unimpeded exercise of private power when this power endangers basic notions of equality.

The second charge against the *Charter* is one of mystification, that is, it portrays intensely political issues in abstract legal terms and

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2. *Ontario Code*, supra note 2, s. 2 (with respect to accommodation).

2. *Quebec Code*, supra note 2, s. 10.

2. Howe, *supra* note 20 at 797-98.


29 R. Knopff & F.L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992) is perhaps the academic exception that proves the rule.
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cloaks its decisions in the legitimacy of constitutional authority.\textsuperscript{30} Thus, by treating the public/private issue as a matter to be decided by the correct interpretation of section 32, the Charter is unable to deal with the inequalities in social power that underlie this distinction.\textsuperscript{31} Human rights codes are not quite as susceptible to these objections. First, they operate at a much greater level of specificity, which is seen to be one of the advantages of keeping the Charter out of the private sphere:

Legislation [such as particular human rights law] can be tailored to deal with the tension between privacy rights and equality or that between freedom of expression and hate literature. It can expressly limit the applicability of equality guarantees to services or to areas open to the public, or specify the right to set \textit{bona fide} job qualifications. The Charter is not so refined and provides no guidelines for its application.\textsuperscript{32}

The increasingly detailed grounds of discrimination and situations in which they apply are evident from reading the relevant legislation. It is also difficult to say that human rights codes disguise the operation of political concerns. First, the genesis of the codes was itself the result of political struggle for legislative action,\textsuperscript{33} and second, their very political nature has been reflected in the ongoing contest over the scope and content of the acts. Thus, in Ontario, there has been continuous debate and reassessment since the first anti-discrimination statute in 1944, leading sometimes to gains for human rights activists, such as the expansive 1981 reforms, but also to some setbacks, most recently in the form of Premier Mike Harris’s announcement of the abolition of employment equity and the intended scaling back of pay equity.\textsuperscript{34}


\textsuperscript{31} See Hutchinson, supra note 11, c. 5.


\textsuperscript{33} See Howe, \textit{supra} note 20 at 787-90.


The current Human Rights Act came into effect in 1984. It replaced the 1973 Human Rights Code. The Human Rights Commission that had been responsible for administering the Code was dismantled and the staff dismissed. A new enforcement
The third charge against the *Charter* is that judges, given their background, training, and institutional position, are always more likely to find in favour of the interests of economic liberty.\(^{35}\) Again one finds human rights legislation in an apparently advantageous position. Swinton argues that the issue of institutional choice is another factor that rightly limits the *Charter*’s application, as the administrative structure of most human rights commissions is designed to encourage conciliation, which in itself can have an educative effect on the parties involved.\(^{36}\) Thus, there may be a more flexible and less adversarial process involved in a human rights complaint. There are other ways in which the influence of legalism is mitigated: the lack of legal qualifications to serve as a commissioner means that the people at the administrative head of the enforcement systems come from a more diverse background than most lawyers, and so their attitudes and actions are less likely to be framed by the institutional legal morality of freedom of contract, the right to private property, privacy, and so on. Even when lawyers become more involved at the level of sitting on boards or tribunals of inquiry, statistical evidence suggests the type of people selected (including human-rights law professors) are more than likely to find in favour of a complainant.\(^{37}\) In Quebec, the creation of a specialist tribunal whose members are required to demonstrate "notable experience and expertise in, sensitivity to and interest for matters of human rights" is a further move away from narrow legalism.\(^{38}\) However, while human rights legislation possesses a number of ostensible improvements on the *Charter*, it is important to discover how this translates into practice. This analysis will provide the focus of the remainder of the paper.

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\(^{35}\) Mandel, *supra* note 30 at 46-60; and Bakan, *supra* note 30 at 173-76.

\(^{36}\) Swinton, *supra* note 32 at 48.


\(^{38}\) Quebec *Code*, *supra* note 2, s. 101. It seems that the new tribunal is more likely to find in favour of complainants: see Commission des Droits de la Personne du Quebec, *Le traitement des plaintes a la Commission des droits de la personne 1994* (Montreal: La Commission des Droits de la Personne du Quebec, 1995).
III. HUMAN RIGHTS LEGISLATION IN THE PRIVATE SECTOR

The next section considers whether the human rights codes in fact “fill the Charter gap” by considering their operation vis-à-vis the private sector in the concrete setting of four case studies. The first two—the meaning of the term “service available to the public,” and the issue of mandatory retirement—afford a direct comparison of the treatment of similar issues in both regimes. The final two—the rights of the poor to adequate housing, and the problem of systemic discrimination—confront head-on the ability of human rights codes to improve the lot of the economically and socially disadvantaged. It will become clear that human rights codes fail to live up to their social democratic potential in several important respects.

A. The Applicability of Human Rights Legislation: Defining “The Public”

The experience of the Charter tells us that overcoming the threshold jurisdictional issue of applicability is a necessary condition to promoting social democratic aims in the private sector.39 There is no textual equivalent to section 32 in human rights legislation, but this simply means that threshold issues manifest themselves in different ways. The importance of the terms “public” and “private” in limiting the potential application of the human rights codes was considered by the Supreme Court in University of British Columbia v. Berg.40 The case involved a complaint by Janice Berg, a graduate student, who alleged that she had been discriminated against on the grounds of mental disability when she was refused a key to use the research and computer facilities, and also a rating sheet needed to apply for a hospital internship. The key in question was regularly issued to graduate students in Ms Berg’s situation and, as her previous history of mental illness was known to the university, she complained that she had been discriminated against in terms of section 3 of the British Columbia Human Rights Act.41 Section 3 provided that “no person shall deny to [or discriminate against] a person ... with respect to any service or facility

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39 It is not, however, necessarily a sufficient condition. Obiter dicta in both Dolphin Delivery, supra note 4; and McKinney, supra note 5, consider what the result would have been had the Charter applied to the respondent body in question. In each case, the Court would still have found against the appellants.


41 Supra note 34.
customarily available to the public, because of the mental disability of that person.” The member-designate of the B.C. Human Rights Council found in Ms Berg’s favour. However, in judicial review both the B.C. Supreme Court and Court of Appeal held that the member-designate had no jurisdiction to make that determination because, in terms of section 3, the provision of the key and rating sheet were not services customarily available to the public. The case was appealed to the Supreme Court of Canada.

The Court’s decision focused on the meaning of “public.” The argument that won in the lower courts was that there was a distinction between having the right to be admitted to a service, such as admission to a university, and the rights that one enjoyed once the threshold of admission was overcome, such as the right to receive a key to selected areas within a university. The Supreme Court of Canada had earlier approved of this distinction in Gay Alliance Toward Equality v. The Vancouver Sun,\(^4\) where it was held that the availability to the public of advertising space in a newspaper (the threshold issue) was subject to the right of the newspaper to have editorial control over the content of that advertising, even if that control was administered in a discriminatory manner.\(^4\) In Berg, the Supreme Court rejected the logic in Gay Alliance, which required admitting students to university on a non-discriminatory basis, but appeared to sanction discriminating against them once admitted.\(^4\) Lamer C.J.’s approach to the definition of “public” was to repudiate what he called a “quantitative analysis” as it would be difficult “to see how anything less than all citizens can be said to be ‘the public’ of a given municipality, province, or country.”\(^4\) Accordingly, for Lamer C.J., it was important to realize that any service would only be available to a subset of the public, but that once that subset is identified in terms of the threshold availability of a service, it remains “the public” with respect to all aspects of the performance of that service. To determine whether the Human Rights Act\(^4\) applied, a principled approach was required that considered the relationship between the service provider

\(^4\) [1979] 2 S.C.R. 435 [hereinafter Gay Alliance].


\(^4\) See Berg, supra note 40 at 377-78, where Lamer C.J.’s observation that the designation of universities as “private” for the purposes of the Charter (and the absence of a tort of discrimination) may have influenced his decision.

\(^4\) Ibid. at 382.

\(^4\) Supra note 34.
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and the service user under the particular service. In the present case, applying this relational approach resulted in holding that the key and rating sheet were part of the public relationship between the university and its students, and the appeal was upheld.

The existence of a similar qualification of prohibited discrimination in every code with the exception of Ontario's meant that the Court had avoided replicating the Dolphin Delivery problem under human rights legislation. The decision was generally welcomed in academic circles, and certainly if the human rights legislation is to be serious in its attempts to deal with discrimination, the reasoning in Berg is preferable to the narrow legalism of Gay Alliance. That is not to say that Berg is not without its difficulties; as has been observed, Lamer C.J. provides little guidance as to how his relational rather than quantitative approach would make the initial differentiation between public and private in a more complex instance than the university/student setting, and the relational approach itself "reintroduces ... an internal public/private dichotomy." The last point is well put, and is in many ways confirmed by Lamer C.J.'s discussion of the purpose of the Human Rights Act with reference to the wording of section 3:

Thus, the legislature demonstrated an intention to restrict the application of the Act to what may be described, subject to considerable refinement below, as accommodations, services or facilities provided in the 'public' sphere ... the basic motivation behind such limiting words is clear: the legislature did not wish human rights legislation to regulate all of the private activities of its citizens.

47 Berg, supra note 40 at 384; see also D. Greschner, "Why Chambers is Wrong: A Purposive Interpretation of 'Offered to the Public" (1988) 52 Sask. L. Rev. 161, where a similar approach was advanced to support the argument that all governmental services should be covered by the phrase "services offered to the public." Although Greschner's comments are not specifically directed to services offered by non-governmental actors, at 185, she warns against using the relational approach to erect a form of public/private divide, stating that any "allegation by a non-governmental provider of services that a relationship is private ought to be greeted with suspicion."

48 Supra note 4.


50 In Berg, supra note 40 at 387, Lamer C.J. observed that "if a university is not as ‘public’ an institution as the government, it surely is very close to the ‘public’ end of the spectrum." Compare McKinney, supra note 5.

51 Crane, supra note 49 at 353.

52 Berg, supra note 40 at 362.
As one examines Berg more closely, one finds that, despite the much broader disposal of the threshold issue, there are many similarities with Charter jurisprudence in the framework of analysis adopted by the Supreme Court. Threshold questions in both systems are informed by the idea that it is possible to separate a reified public from a reified private sector, and that this can be done by the proper application of forensic exegesis: hence the preference for a principled approach to the task. This attachment to the possibility of a public/private divide results in the Court's analysis, no less than in the Charter context, being riddled with a number of arbitrary distinctions. Thus, while Dolphin Delivery rests on an artificial distinction between compulsive and permissive statutes, which minimizes the complicity of the state, one finds a similar sense of unreality in much of Berg. Thus, how small does a subset of the public need to be before it becomes private? How does a principled approach enable one to make this form of distinction? When does a relationship in a service situation, which might be "public" under the principled approach, become "private" under the relational approach (and does this not reintroduce the threshold/use distinction that Lamer C.J. sought to eschew earlier in the judgment)? The point is not that these questions are without answer, or that the distinctions

53 Ibid. at 363 (this is despite Lamer C.J.'s admission that the terms "public" and "private" have no self-evident meaning).

54 See Hutchinson, supra note 11 at 123ff.

55 Compare the difference of opinion among supporters of a formal public/private divide in the Charter context as to whether a principled or functional test is more appropriate: see Constitutional Law, supra note 15 at 841; and J.D. Whyte, "Is the Private Sector Affected by the Charter?" in L. Smith ed., Righting the Balance: Canada's New Equality Rights (Saskatoon: Canadian Human Rights Reporter, 1986) 145 at 153.

56 The fact that several questions are left open about the application of the relational approach in practice is demonstrated in the recent decision of Gould v. Yukon Order of Pioneers, [1996] 1 S.C.R. 571 at 607 [hereinafter Gould], La Forest J., where the Court grappled with the major issue left open by the Berg decision, supra note 40, viz. how "public relationship" is to be defined. The case centred on whether the appellant, who had been denied membership in the defendant Order on the grounds that she was female, could rely on s. 8(a) of the Yukon Human Rights Act, R.S.Y. 1986, (Supp.), c. 11, which states that "[n]o person shall discriminate when offering or providing services, goods, or facilities to the public." The Court divided along gender lines, holding by 7-2 that s. 8(a) did not apply to this situation: La Forest J., at 612-13, drew a distinction between membership of the Order and its activity of collecting historical data, neither of which was a service offered to the public, and the providing of such data to the public, which was. L'Heureux-Dubé J., at 646, and McLachlin J., at 656, position themselves differently in terms of applying the relational approach, finding that membership and the collection of data were services offered to the public, and so came under the umbrella of s. 8. Although the Court may have clarified some of the doctrinal issues outstanding from Berg, the case reinforces the argument that the distinctions being drawn remain artificial within their own terms, without some external point of reference.
cannot be made, but rather that the answer requires some external point of justification. Lamer C.J. comes (perhaps surprisingly) close to stating what this would be in the passage quoted above\textsuperscript{57} and this is where the similarity between both systems is striking: the basis of the threshold analysis in each case is that there is an area of activity which human rights legislation ought not to regulate.\textsuperscript{58} In other words, Charter and human rights jurisprudence share a commitment to the principle that different sets of values should be applied to different social situations. That this can result in a different disposition of the threshold issue in human rights cases should not disguise the similarity, and one should be alert to the possibility of a public/private divide insulating private power arising in a more substantive manner. It is to this question that we now turn our attention.

B. Mandatory Retirement

This issue affords a useful comparison of the operation of human rights in the private sector in both Charter and human rights regimes. Cases of alleged discrimination on grounds of age have been litigated in this context in each system, and it is also a comparison explicitly drawn by the Supreme Court. The Court’s position vis-à-vis the Charter was made clear in McKinney.\textsuperscript{59} At issue was whether the plaintiff professors could rely on the Charter’s section 15 equality provisions to challenge the mandatory retirement policy of the defendant university. The Court disposed of the question by invoking the threshold issue of application: the University of Guelph’s considerable autonomy, in the Court’s opinion, meant that there was no institutional link with government sufficient to invoke the Charter. However, while there was no relief in the present instance, the Court made it known that it was not unaware of the danger to equality from of the unchecked operation of private power. In the following passage from his judgment in McKinney, La

\textsuperscript{57} Supra note 52 and accompanying text.

\textsuperscript{58} This is confirmed to some extent by obiter comments of La Forest J. in Gould, supra note 56 at 607-11, where he surveys the relevant American jurisprudence. Although he notes that the American approach focuses on the nature of the organization, he considers, at 611, that factors considered by American courts “in determining which organizations are sufficiently private to warrant constitutional protection of their intimate association” are relevant to the Canadian relational approach. This is consistent with Lamer C.J.’s implicit assumptions in Berg, supra note 40, and comes close to admitting that Canadian courts are engaged in human rights cases, as in Charter cases, to undertaking a “private-public distinction analysis.”

\textsuperscript{59} Supra note 5.
Forest J. seems to suggest that the existence of human rights legislation fills the *Charter* gap, and thus mitigates the impact of his ruling in this case:

The exclusion of private activity from the *Charter* was ... a deliberate choice which must be respected. ... Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only Government requires to be constitutionally shackled to preserve the rights of the individual. Others, it is true, may offend against the rights of the individual. This is especially true in a world in which economic activity is largely left to the private sector [and] where powerful private institutions are not directly affected by democratic forces. But Government can either regulate these or create distinct bodies for the protection of human rights and the advancement of human dignity.60

Whether the human rights codes do fill the *Charter* gap and advance a more social democratic conception of human rights is therefore an open question. The fact that overcoming the threshold issue might not be sufficient by itself to act as a check on private power is evident in some *obiter* comments made by La Forest J. in *McKinney*. Speculating on the result of the section 15 equality claim given the hypothetical premise that the *Charter* did apply to the university, La Forest J. held that what was an *ex facie* breach of the section 15 guarantee of equality was saved as a reasonable limit under section 1.61 It is accordingly necessary to examine the substantive treatment of equality rights in this context even if the formal issue of application is overcome.

The opportunity to do precisely that has been afforded by the Supreme Court's decision in *Dickason v. University of Alberta*.62 At issue was whether the university's policy of mandatory retirement at age sixty-five for tenured faculty offended the *Individual's Rights Protection Act*.63 The relevant provisions were section 7(1)(b), which provided that “[n]o employer or any person acting on behalf of an employer shall discriminate against any person with regard to ... any term of employment because of the ... age ... of that person,” and section 11.1, which allowed an otherwise discriminatory act to be saved by stating that:

A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

60 Ibid. at 262.
61 Ibid. at 276-79.
63 R.S.A. 1980, c. I-2 [hereinafter *IRPA*].
In terms of the Charter, of course, the university was a private actor and the only available anti-discrimination challenge to its policy was under IRPA. However, unlike McKinney, the legislation being impugned contained no limitation on the definition of age as ending at age sixty-five, and because the policy was quickly found to be in breach of section 7(1)(b), the sole question was whether the retirement policy could be justified under section 11.1 of IRPA.

Cory J., for the majority, made explicit reference to the fact that the university was a "private" body. First, he was keen to make the point that although the Court had disposed of a similar case in McKinney, that case's result did not automatically transfer to the present instance. Cory J. stated that there were important distinctions between the Charter and human rights legislation:

[I]t must be remembered that there is a crucial difference between human rights legislation and constitutional rights. Human rights legislation is aimed at regulating the actions of private individuals. The Charter's goal is to regulate and, on occasion, to constrain actions of the state.

Accordingly, the obiter remarks of La Forest J. in McKinney should be seen clearly in the context of government policies and not elevated above their worth: whether "a mandatory retirement policy in a private employment setting" could be justified under section 11.1 of IRPA remained unanswered. As far as justifying such a policy was concerned, Cory J. was anxious to underline La Forest J.'s warning in McKinney that private power could be an equal, if not a more potent, threat to human rights than governmental action. Commenting on the deference shown by La Forest J. in McKinney to a putative government retirement policy, Cory J. was of the view that a similar attitude would be entirely inappropriate in this case:

To adopt a deferential attitude to ... private aims [of increasing the profit or efficiency of a business] would undermine the professed goal of human rights legislation to guarantee the rights of minority groups, women and individuals against arbitrary and abusive treatment. Legislation aimed at abolishing or reducing discrimination should be given a

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64 The Alberta legislation, somewhat ironically in view of the Supreme Court's later decision in McKinney, supra note 5, had been amended to remove a previous limitation of the definition of age in the same terms as that in Ontario and British Columbia legislation with the express purpose of complying with the equality sections of the Charter coming into force that year: see S.A. 1985, c. 33.

65 Dickason, supra note 62 at 1127-28.

66 Ibid. at 1122.

67 Ibid. at 1128.
liberal and generous reading. It follows that any legislated defence to acts of
discrimination should be construed narrowly. 68

This meant that although there was a superficial resemblance
between section 1 of the Charter and section 11.1 of IRPA, and that it was
agreed inter partes that the Oakes 69 test employed in Charter cases would
be useful guidance here, this must be applied "without any trace of
deference to a private defendant." 70 Thus, there is a higher standard of
justification imposed on a private employer in this kind of case
compared to government, one which could only be discharged by
objective proof that the discriminatory policy constituted only a minimal
impairment of the right impugned. 71

Applying section 11.1 to Dickason, Cory J. stated that the
university had to demonstrate that its discriminatory practice furthered a
substantial objective and was proportionate to that objective, and that
given the private nature of the defendant, no deference would be given
to its policy choices in this regard. 72 He then considered the significance
of the collective agreement implementing the policy. While
acknowledging that parties should not generally be able to contract out
of human rights obligations, he did consider that collective agreements
could themselves be probative of the reasonableness of an ostensibly
discriminatory practice. According to Cory J., age differs from other
more suspect categories of discrimination in that it will affect everyone.
He was thus satisfied that this particular collective agreement was not an
abuse of the employer's power, and could be relied on to attest to the
reasonableness of the policy. Having so found, it was not surprising that
he agreed that flexibility in resource allocation and faculty renewal were
substantial objectives, and that the policy of mandatory retirement was
proportional to that objective. 73 In other words, the classical liberal
result and reasoning of McKinney could be transferred after all, with the
result that human rights were not used in defence of (even a formal
conception of) equality. Direct comparison of the treatments of
mandatory retirement under both the Charter and human rights

68 Ibid. at 1123.
70 Dickason, supra note 62 at 1124.
71 Ibid. at 1128-29.
72 Ibid. at 1129.
73 Ibid. at 1133-38.
legislation further diminishes the prospect that the latter might fill the gap left by the former.

C. Housing and the Rights of the Poor

The rights of poor people to an adequate standard of housing provide a relevant setting in which to test human rights legislation’s ability to confront inequalities in social power. Whether poor people seeking accommodation are being discriminated against on the grounds of their inability to pay a rent in excess of their income is variously addressed in the codes: the Ontario and Quebec Codes prohibit discrimination on the grounds of one being in receipt of public assistance, and one’s social condition respectively,\(^7\)\(^4\) and in Quebec this is bolstered by the social right to “an acceptable standard of living.”\(^7\)\(^5\)

This is another situation where the mere fact of applicability (important because it is in a predominantly private rental market) will be insufficient in itself to further social democratic ends. The substantive problem of lack of adequate shelter faced by the homeless (whatever the causes may be) is ultimately enforced through the sanctioning by the state of the institution of private property (which, of course, be in public or private ownership), and the state’s threat to repel any challenge to the rights created thereunder. Any attempt to redress the situation of the homeless accepts that intervention is necessary with respect to the operation of the rental market,\(^7\)\(^6\) and the key question becomes not whether formal rights are available against landlords in both public and private sectors, but rather if it is possible to rely on human rights legislation to enter into the relationship of landlord and tenant.

In their 1993 joint submission to the United Nations Committee on Economic, Social, and Cultural Rights, the National Anti-Poverty Organization and the Charter Committee on Poverty Issues highlighted two distinct advantages that human rights codes appear to possess

\(^7\)\(^4\) Ontario Code, supra note 2, s. 2; and Quebec Code, supra note 2, s. 10.

\(^7\)\(^5\) Quebec Code, supra note 2, s. 45.

\(^7\)\(^6\) That is not, of course, to suggest that the private housing market is entirely unregulated, but that those tenant protections which do exist, e.g., landlord and tenant legislation, generally apply once one is able to enter into the relationship demanded by the law. Of course, landlords’ formal freedom to contract with whomever they please has been limited in very important ways by human rights legislation, but the question that remains is whether there is any substantive circumscription of their right to discriminate on the basis of ability to pay.
here. First, their commitment to enforcing social and economic rights requires positive intervention to serve the goal of social justice, rather than a negative emphasis on non-interference with various individual claims. This (as in Quebec) may take the form of the specific enumeration of social and economic rights, but is also inherent in the ideal of equality underpinning the anti-discrimination provisions. Second, a broader vision of social and economic rights has been given teeth in various tribunal (or board) and court decisions which have required remedial action on the part of (often private) employers to offset the impact of historical discriminatory practices with regard to various groups. Given this background, NAPO suggests that "[r]emedying economic disadvantage is well within the purview of human rights remedies." 

There are two preliminary points to make. First, despite human rights codes' undeniable potential to alleviate poverty, there has been very little activity in this area. NAPO notes that, in Ontario, the prohibition of discrimination with respect to recipients of social assistance has rarely been invoked by poor people to force positive action. This may in itself give some general indication of the relative importance of human rights measures; it also attests to problems of information and accessibility concerning the underprivileged. Second, the manner in which complaints are raised is revealing. There are two principal avenues open to a complainant trying to overcome the imbalance in social power: ask the court to order the state (the government) to elevate the complainant to a level that would be on equal terms with the landlord; or, try to bring the landlord down to the level at which the complainant is able to enter into the landlord-tenant


78 NAPO, ibid. at 81, cites by way of example the Ontario Code, supra note 2, s. 11, which requires positive measures to correct the consequences of "a requirement, qualification or factor ... that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination."


80 Ibid.

81 Ibid.

82 See Black Report, supra note 34 at 16, regarding the perception of human rights tribunals as being another unhelpful arm of government.
relationship. The former approach is invariably preferred, and it is important to note the form in which the issue is addressed. Given the common law’s creation and maintenance of the laws of property, it should not be surprising that complaints are not brought directly against landlords because it is difficult to imagine a tribunal or court undermining the institution of private property (even if it had the power to do so) to the extent of ordering a rent to be halved. And yet it is crucial to ask why this strategy is adopted, because this might suggest that there are limitations of form which may be imposed on the enforcement of rights in this context.

When one turns to actual cases, the record is not encouraging. The Quebec Code gives (textually) the strongest protections, particularly its inclusion of specific social and economic rights. This part of the Code is not routinely enforced in the first instance through the Commission des Droits de la Personne; instead actions can be raised directly in the courts, although the courts have been reluctant to apply anything more than a programmatic interpretation to these provisions. In Gosselin v. Quebec (Procureur General) a social assistance recipient complained in an action against the province that her $170 monthly allowance was inadequate to cover her rent, and that this infringed section 45 of the Quebec Code guarantee of the right to “financial assistance ... susceptible of ensuring such person an acceptable standard or living.” The court held that this guarantee was merely a “policy statement” and that it could not therefore impugn the Social Aid Act. The inability of the Charter to impose a duty on the Quebec Government (here to elevate Ms Gosselin to the level where she could pay an adequate rent) perhaps underscores the difficulties inherent in bringing an action directly against the landlord: if the Charter does not bind the government, it seems unlikely that it would impose a greater obligation on private actors. Where the poor have been able to use human rights provisions, the tendency has been to extract financial damages from landlords found guilty of discriminatory conduct such as refusing to rent to someone on the grounds of their social status.

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84 Quebec Code, supra note 2.
86 See Quebec (Commission des Droits de la Personne) v. Whittom (1993), 20 C.H.R.R. D/349 (T.D.P.Q.), where an award of $1,000 was made against landlords who had refused to rent accommodation to the complainant on the grounds of her social condition and civil status, contrary to the Quebec Code, supra note 2, s. 10; see also D’Aoust v. Vallieres (1993), 19 C.H.R.R. D/322 (T.D.P.Q.), where an award of $500 was granted against the landlords in similar circumstances.
The potentialities and limitations of the anti-discrimination provisions in human rights codes to assist poor people in gaining adequate housing are revealed in the ongoing case of Wiebe v. Ontario. This complaint was lodged with the Ontario Human Rights Commission by Elizabeth Wiebe, who lived with her husband and five children aged nine to thirteen in Leamington, Ontario. Their annual income at the time was $17,478 and they could not afford a rent of more than $500 per month, but were unable to find any accommodation at that price suitable for a family of seven. Living variously in a garage and a Salvation Army hostel, Mr. and Mrs. Wiebe had to consent to their four youngest children becoming wards of the Children's Aid Society. Mrs. Wiebe subsequently launched a complaint against the Ontario Government on the basis that the inadequacy of the income assistance provided to her family resulted in their exclusion from adequate housing in the private market. She claimed that this infringed the “constructive discrimination” provision of the Ontario Code, since it resulted in the “exclusion, restriction or preference of a group of persons identified by a prohibited ground of discrimination,” namely public assistance recipients and persons in a parent and child relationship.

The creeping progress of the case underlines the difficulties a complainant may encounter. Although the complaint was filed in 1989, at the time of writing the process had only reached the stage of the complainant making submissions in response to the Ontario Commission's case analysis with a view to having the case referred to a board of inquiry. In the complainant's opinion, this delay has resulted in the failure to test one of the most serious systemic human rights issues facing society, namely the increased vulnerability of families on social assistance.

87 Ontario Human Rights Commission Complaint No. 20-106S (30 June 1989) [pending] [hereinafter Wiebe].

88 This figure was $20,672 short of the poverty level of $38,105 set in 1989 through the office of Sen. D.A. Croll. The figure was provided to the author as an update to Canada, Senate Special Committee on Poverty, Poverty in Canada: Report of the Special Senate Committee on Poverty (Ottawa: Queen's Printer, 1971) (Chair: D.A. Croll) at 8.

89 Ontario Code, supra note 2, s. 11(1).

90 The major respondent, the Ontario Ministry of Community and Social Services, had argued that social assistance is a special programme in terms of the Ontario Code, ibid. s. 14, that benefit levels were raised in 1990, and that the Ontario Human Rights Commission initially considered that the case was beyond its jurisdiction. The case was eventually investigated by the Commission, but Mrs. Wiebe has complained that the probe was flawed in many aspects, including the investigation of matters not raised in the complaint and omitting to investigate some important elements, such as the Ministry's defence outlined above. See Wiebe, supra note 87: “Complainant's Submissions in Response to the Case Analysis” (14 July 1995) [unpublished].
assistance to discriminatory social policy, and this itself has led to adverse comments in the United Nations' Committee on Economic, Social and Cultural Rights 1993 Report.91

As well as these possible procedural shortcomings, Wiebe also reveals more serious limitations in human rights legislation's capacity to redress imbalances in social power. It is important to remember the limitations of form in which poverty issues can be addressed. As Martha Jackman observes, although the receipt of social assistance is a prohibited ground of discrimination in Ontario, such is not the case in every province.92 Similarly, had the Wiebes been subsisting on a low wage income rather than social assistance, it would have been more difficult to invoke the Ontario Code.93 It is also significant to consider the best case scenario in the Wiebe complaint. Assuming the complaint is upheld, like the Quebec cases noted above, the remedy sought is damages for the complainant and her family, and while this could make a large difference to the Wiebes' ability to find adequate accommodation, it is still a decision a quo, whose precedential value in the present case could be diminished to the extent that the complaint also relies on family status. However, a more systemic remedy is requested in addition, which would give the board of inquiry jurisdiction for three years from this decision to review any changes to social assistance rates for evidence of their impact on homelessness among families. How easily this could be enforced remains to be seen, but it is important to recognize that the attack on systemic inequality mounted in Wiebe is not aimed at undermining the substantive protection of private power—which will still be in place following the Wiebe decision—but rather at mitigating its worst effects. That is not to say that cases like Wiebe should not be raised: anti-poverty campaigners in the present political climate in Ontario have little other means of challenge, and a positive decision in Wiebe might lead to a change in attitudes and practices. However, given the resistance and delay that Mrs. Wiebe has met, it seems difficult to argue that the inequalities highlighted by La


93 Ibid. at 116.
Forest J. and Hogg at the outset are being adequately addressed by existing human rights legislation.

D. Systemic Discrimination, Employment, and Pay Equity

The problem of systemic discrimination provides another apposite environment in which to assess human rights legislation's ability to confront abuses of private power. The term systemic discrimination is used here to denote the phenomenon whereby historical discriminatory practices and attitudes have resulted in *de facto* disadvantage being visited upon certain groups; for example, where past and continuing identification of certain lower-skilled and lower-paid jobs as being women's jobs has resulted in the present wage gap between women and men. Although these past practices and attitudes may well have been quite intentional, systemic discrimination stands in contrast to direct discrimination whereby the victim of discrimination suffers from a (relatively contemporaneous) specific intentional act on the part of, for example, an employer. While a detailed assessment of the meaning, causes, and rectification of systemic discrimination is beyond the scope of this paper, legislatures and courts have recognized systemic discrimination as a problem to be addressed in the human rights context. Several codes provide for the operation of special programmes designed to eliminate or reduce past disadvantages, and in some jurisdictions this principle has been extended to include employment and pay equity.

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94 *Supra* note 13.

95 *Constitutional Law, supra* note 15.


97 It can also be contrasted with indirect discrimination, which refers to a narrower concept of non-intentional discrimination whereby an employment requirement or condition has an adverse affect on an employee by reason of a prohibited ground of discrimination; see, for example, *Bhinder v. Canadian National Railway Co.* [1985] 2 S.C.R. 561 [hereinafter *Bhinder*]. To the extent that systemic discrimination attributes larger societal explanations to continuing discrimination, it can be seen as a broader conception of indirect discrimination.

98 The question of what constitutes systemic discrimination, its causes, and the most effective way to eradicate it have been the subject of extended and intense scholarly debate which it is beyond the scope of this paper to rehearse in any detail. For a representative sample of the literature on the subject, see *Just Wages, supra* note 96; and Knopf, *supra* note 27, c. 6.

99 See, for example, *CHRA, supra* note 2, s. 16; *Ontario Code, supra* note 2, s. 14; and *Quebec Code, supra* note 2, ss. 86-92.
schemes (either by amendment to the code\textsuperscript{100} or the enactment of specific legislation\textsuperscript{101}). The courts have accepted that this form of legislation will require positive measures to achieve its goals.\textsuperscript{102} How this is put into effect raises important questions about how far human rights legislation can succeed in redressing inequalities in social and economic power.

Systemic discrimination arises in the context of the public/private divide in at least two ways. First, to the extent that it is a societal problem, and that the private sector is (increasingly) a significant component of society, systemic discrimination occurs in the private sector. That much is obvious, but figures show that in some settings the symptoms of systemic discrimination are heightened when one is dealing with the private sector.\textsuperscript{103} Second, any legislative attempt to deal with systemic discrimination is itself recognition that abuse of private power contributes to continuing inequality. Any intervention to correct this accepts that, for example, women's subordinate position in terms of the wage gap is not the result of "neutral market forces," but "the result of a cumulative history of discrimination and bias"\textsuperscript{104} and that non-interference in these aspects of political and economic life attributes to men and women formal equality devoid of that historical discrimination, and thus perpetuates its effects. Legislation that confronts systemic discrimination must therefore attack many of the traditional privileges enjoyed by private power to be effective.

The courts have agreed that positive remedial measures will be necessary to achieve the social democratic aims of this legislation. In the context of employment equity, \textit{Action Travail}\textsuperscript{105} reveals the strengths and weaknesses of the judicial process in dealing with systemic discrimination. A complaint was raised by the Action Travail des Femmes Syndicat alleging that Canadian National (CN) was guilty of discriminatory hiring practices under section 10 of C\textit{HRA} in respect of hiring women for specific blue collar jobs. A tribunal had ordered CN to desist from the discriminatory practices, and required that the railway

\textsuperscript{100} See, for example, \textit{CHRA}, supra note 2, ss. 7 and 11.

\textsuperscript{101} See, for example, Pay Equity Act, S.O. 1993, c. 4, as am. by \textit{Savings and Restructuring Act}, 1996, S.O. 1996, c. 1, Schedule J [hereinafter Pay Equity Act].

\textsuperscript{102} See \textit{Action Travail}, supra note 79. In the context of indirect discrimination, see \textit{Bhinder}, supra, note 97; and \textit{O'Malley}, supra note 79.

\textsuperscript{103} See \textit{Just Wages}, supra note 96 at 8.

\textsuperscript{104} Ibid. at 4.

\textsuperscript{105} Supra note 79.
work toward the goal that at least 13 per cent of workers in these jobs (being the average percentage for these positions in the Canadian workforce) should be women. It also ordered CN to hire one woman in four for each new position until that goal was attained. The decision was appealed on the grounds that it was outside the jurisdiction of the tribunal, and in particular questioned whether section 41(2)(a) of CHRA, which provides for a tribunal to order a respondent to “take measures ... to prevent the same or a similar [discriminatory] practice occurring in the future,” could be used to address historic discrimination. The order was unanimously upheld by the Supreme Court, with Dickson C.J. stating it was an “uncontradicted fact that the hiring and promotion policies of CN ... amounted to a systematic denial of women’s equal employment opportunities.”

His judgment was rendered in terms that appear to allow for considerable intervention to remedy historical discrimination:

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 employment equity programmes 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.

To what extent is this doctrine translated into practice through human rights legislation? Passing on why 13 per cent was readily accepted as an adequate percentage of women in blue-collar jobs, it is crucial to note that eight years after this case, the percentage of women in blue-collar jobs at CN had still not reached that mark. That is not to suggest that CN deliberately obfuscated the process: the railway complied with the one in four hiring requirement and dutifully submitted reports on their progress to the Canadian Human Rights Commission as ordered. However, at a time of recession and retrenchment, the trend has been to downsize the workforce, and reaching the goal would require the dismissal of male employees for that reason alone. Thus, an attempt to eradicate systemic discrimination by means of a proactive employment equity scheme, even one applied and operated in good faith, can be seen as having limited effectiveness. Action Travail shows that employment equity schemes operate subject to broader forces, for

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106 Ibid. at 1141.
107 Ibid. at 1145.
example, how the market is affecting employment opportunities and the economic performance of the corporation, which may be beyond their scope and ability to change: perhaps their importance in transcending systemic discrimination should not be exaggerated.

As stated above, the wage gap between men and women has been identified as one of the enduring manifestations of systemic discrimination. The legislative response to this problem in a number of jurisdictions has been to extend the anti-discrimination principle of the human rights codes by the enactment of specific pay equity laws. Among these, Ontario’s Pay Equity Act\textsuperscript{108} deserves special mention, not only because of its political saliency in light of the election of the Conservative government, but also because it was considered to be potentially the most far-reaching statute of its kind.\textsuperscript{110} This is principally because it was the first instrument of its type to apply in both public and private employment sectors which, given the fact that that the wage gap is wider in the private sector, is viewed as an important concession.\textsuperscript{111} As such, it signalled a political willingness to interfere with aspects of the employer/employee relationship traditionally regarded as private and thus unregulated, and therefore provided a benchmark for measuring the efficacy of human rights-based legislation to displace historical imbalances in social power resulting from systemic discrimination.

Although it goes further than similar legislation in Canada and elsewhere, Ontario’s Pay Equity Act has nonetheless been subjected to extensive criticism that focuses on flaws in its structure. If the object of pay equity is to break the cycle of identifying certain menial and low-paid jobs with women, then it is imperative that comparisons are made between predominately male and female sectors of the workforce, which will often involve assessing the comparative worth of very different occupations. However, the Ontario statute is structured so that comparisons are made only within a particular employer’s workforce, and many women in traditional female jobs are outside the ambit of the

\textsuperscript{108} See, for example, Pay Equity Act, S.M. 1985, c. 21; and Act to Provide for Pay Equity, S.N.S. 1988, c. 16.

\textsuperscript{109} Supra note 101.


\textsuperscript{111} See Just Wages, supra note 96 at 8.
It has been suggested that, as a result, almost 50 per cent of female workers are unable to claim pay adjustments precisely because they work in “female jobs” (e.g., child care centres and garment factories) which lack appropriate male comparators. This inevitably means that the main beneficiaries are not those women working in low-paid “women’s” jobs, but those who have been accepted into the male sector of the market and who are thus relatively well-off. It has also been observed that the proactive element of the Act requiring the filing of equity plans applies only to employers with at least 100 employees, and that workers in smaller firms have to rely on the reactive process of lodging a complaint. In smaller firms, however, particularly in rural communities, there may be considerable pressure (despite statutory protections against retaliation) not to be seen as the whistle-blower.

Although these criticisms are directed toward the legislative drafting, it is important to remember that technical decisions have political consequences, and arguably in this context this has meant that despite the acceptance of the systemic causes of the wage gap, there has been a “shift of focus from the gender based wage gap to a process whereby each individual group seeks its own equity.” In other words, there has been a shift of focus toward non-systemic remedies. As with the case of poverty, the role of human rights and related legislation vis-à-vis systemic discrimination has been one of alleviating certain symptoms of the phenomenon, but not of dealing with the underlying causes.

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112 See “Limiting Equity,” supra note 110 at 558.
115 Limiting Equity, supra note 110 at 558, n. 4.
116 See Black Report, supra note 34 at 15.
119 Ontario’s Pay Equity Act, supra note 101 was substantially amended by the Savings and Restructuring Act, 1996, S.O. 1996, c. 1, Schedule 1. Among other changes, the “proxy method of comparison” has been repealed, while other provisions of the 1993 Act have been watered down. However, to the extent that it was the most far reaching Canadian measure yet adopted, the comments that are offered herein suggest that is indicative of a general approach to systemic discrimination found in other relevant legislation, and so are relevant in terms of any future attempt to enact legislation of this type.
IV. COMPARING THE CHARTER AND HUMAN RIGHTS CODES: MORE SIMILARITIES THAN DIFFERENCES?

The four case studies outlined in Part III, above, appear to suggest that despite the potential of human rights codes to realize a more social democratic vision of society, they do not in fact fill the Charter gap, in the sense that they fail to redress imbalances in social and economic power in the private sector. How, therefore, does one explain their inability to utilize their ostensible advantages? The answer seems to be that the more closely one examines the Charter and human rights regimes, the more they appear to have in common. In particular, they are both individual complaints-based systems enforcing liberal rights, and this builds into both systems a number of features that militate against implementing social democracy. These features arise in two key areas. First, the institutional structure of the enforcement mechanisms of the human rights codes prevents an effective challenge to established patterns of inequality. Second, the doctrinal framework within which both regimes operate is committed to removing certain private issues from regulation in the name of equality, revealing an adherence to a substantive conception of the public/private divide under human rights legislation. This framework provides stronger protection for private power than the formal question of applicability. The final section will analyze how an understanding of both of these aspects helps to explain the ascendancy of classical liberal values over social democratic ones in both Charter and human rights cases.

A. Similarities of Institutional Design: The Limits of Individuated Justice

At an institutional level, both the Charter and human rights codes are essentially systems based on individual complaints, existing for the redress of alleged discrimination. This builds limitations into each system in terms of their ability to reach the structural causes of inequality. Many of the issues canvassed above, such as the rights of the poor to adequate housing, and overcoming the wage gap between men and women, are singularly incapable of being solved by focusing on specific instances of discrimination. Black summarizes these limits in his report on human rights in British Columbia:

No single complaint ... could cover all aspects of a problem that involves the interaction of different parts of government plus organizations in the private sector. ... Even where a single organization is responsible for the inequality, a complaints-based system will often be inadequate by itself. ... A complaints-based system is least effective in dealing with the
subtle effects of seemingly neutral policies and practices. Often, no one has the
information needed to file a complaint about such practices.120

This adverts to a second problem which is that the individual
complaints structure itself contributes to the idea that individual acts are
the exception to an otherwise non-discriminatory private housing market
or private employment sector. The difficulty here is a system that
focuses on those individual complaints that happen to reach the hearing
stage, and so only addresses some more visible or high profile aspects of
discrimination and therefore leaves in place other discriminatory
practices which may be equally, if not more, invidious.

Linked to this shared emphasis with the Charter on individual
complaints is the fact that threshold-type issues do surface in human
rights legislation which restrict the number of cases that can be heard.
That issue is the filtering role of the various human rights commissions
in deciding how far complaints should proceed.121 In every system
(except Quebec's), this is the only means by which a complaint can be
brought to a hearing,122 and the codes often provide only vague criteria
to commissions on how to exercise this discretion, such as "having regard
to all the circumstances of the complaint, [whether] an inquiry into the
complaint is warranted."123 Two major recent reports on the workings
of the human rights bodies in British Columbia124 and Ontario,125 have
revealed considerable disquiet among those active in this area.
Ontario's Cornish Report disclosed that complainants were in many

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120 Black Report, supra note 34 at 15 and 17.

121 The general rule is that complaints are brought, in the first instance, to the attention of the
commission, which decides whether the complaint is one which falls within its competence. If the
claim is competent, the commission conducts an investigation, and attempts to mediate between the
parties to reach a settlement. If unsuccessful, the commission has the discretion to refer the matter
for a hearing to a board or tribunal for its ultimate disposition.

122 In Quebec, individuals can raise actions through the ordinary courts with respect to all
aspects of the Quebec Code, supra note 2, including fundamental freedoms, social rights, and anti-
discrimination provisions. Complaints may be referred to the commission only with respect to the
final category, and even if the Quebec Commission declines to proceed, it will still be open to the
complainant to initiate court proceedings.

123 CHRA, supra note 2, s. 49(1).

124 See Black Report, supra note 34.

Human Rights Reform (Toronto: Ontario Policy Services Branch, Ministry of Citizenship, 1992)
(Chair: M. Cornish) [hereinafter Cornish Report]. For a consideration of how the Quebec
Commission has used its more limited power, see L. LaMarche & F. Poirier, Le Régime Québécois
de Protection et de Promotion des Droits de la Personne: Elements de Réflexion pour un Bilan
(Cowansville, Quebec: Yvon Blais, 1996).
cases unhappy with the treatment they received from that province's Human Rights Commission during the investigation of complaints, and the report concluded that too few cases were in fact proceeding to hearings by a board of inquiry. The *Wiebe* case highlights the very real difficulties that complainants may encounter in advancing their claims under this procedure, and shows that the threshold issue in human rights legislation may be as serious an obstacle as section 32 in *Charter* cases.

Discussion of the filtering role of the human rights commission underscores a third limitation of institutional design in terms of confronting private power. Human rights commissions operate within a political environment, and there may be pressures that affect how they execute their functions, as can be observed in the recent history of the Ontario Human Rights Commission. The pattern of cases referred to Boards of Inquiry in the 1990s is one of a considerable increase in numbers from 1990 to 1992, followed by a period of retrenchment. This can be seen as reflecting the initial enthusiasm of the Ontario New Democratic Party (NDP) government for proactive use of human rights machinery, and the appointment of commissioners who would implement that agenda, followed by a commitment to fiscal restraint and strict adherence to budgetary management in the public sector. These policy trends are indicated by the commissioning of the Cornish Report to "make recommendations for a fair and practical system for the enforcement of human rights in Ontario." But the report was given a lukewarm reception in the province's Standing Committee on the Administration of Justice. The principal recommendations of the Cornish Report were never implemented during the NDP government's term of office. The elimination of its considerable backlog is currently one of the main priorities of the Ontario Commission (which the

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126 See Cornish Report, *supra* note 125 at 17-18. In his report on human rights in British Columbia, Black observes that within the existing structure there may be reasons why a serious human rights abuse may not lead to a hearing or remedial action. The focus of the codes on individual complaints can mean that there may be no incentive for the commission to proceed with a complaint if its investigation reveals grounds for dismissal, (e.g., that the complainant was justifiably rejected for a job), and there may never be an investigation into the underlying fairness of the selection process. Similarly, the pressure to settle a case may cut short the lifespan of an erstwhile investigation, and may leave more systemic causes of discrimination undisturbed. See Black Report, *supra* note 34 at 16.

127 *Supra* note 87.

Commission itself acknowledges in a recent Annual Report,\textsuperscript{129} and some human rights activists worry that this leads to an emphasis on dismissing complaints if at all possible rather than the prioritization of investigating more serious abuses. The concern is that the needs of the administration are driving the Ontario Commission's approach to human rights complaints, rather than vice versa.

Bearing in mind these three factors of institutional design—the inability to address structural causes of inequality on a systematic basis, the use of the filtering process to restrict access to hearings, and the pressures of the relationship between those administering the human rights codes and their political overseers—the similarities to the Charter become more obvious. Accordingly, it should now be less surprising that human rights legislation is unable to mount a more potent threat to the established interests of private power. However, institutional design can always be reformed; the shared characteristic that is perhaps more deadly to the aspirations of social democracy is the doctrinal harmony between both systems in terms of their adherence to preserving a public/private divide. How this adherence serves to protect private power from political interference under human rights legislation will now be explored.

B. The Formal and Substantive Aspects of the Public/Private Divide

The difficulty that presents itself in the context of Charter and human rights cases is how to explain the similarity of outcome despite first, the acknowledgement of the oppressive potential of private power in the latter regime, and second, its consequent application to the private sector. A clue to the answer comes from obiter comments in Charter cases such as Dolphin Delivery\textsuperscript{130} and McKinney\textsuperscript{131} which show that even if the threshold issue of applicability is crossed, there is no guarantee that human rights can be successfully prosecuted against abuses of private power. This suggests that there may be a number of ways in which the public/private divide can be created, and that perhaps the issue of applicability is in many ways a red herring.

The most helpful way to analyze the operation of human rights legislation in the private sector appears to distinguish between the

\footnotesize{\textsuperscript{129} See Ontario Human Rights Commission, \textit{Annual Report 1991-92} (Toronto: The Commission, 1992) at 17-20.}

\footnotesize{\textsuperscript{130} Supra note 4.}

\footnotesize{\textsuperscript{131} Supra note 5.}
formal and substantive elements of the public/private divide. The
former relates to threshold questions, such as the class of persons to
which the Charter applies, or the filtering roles of the human rights
commissions. The formal aspect is a necessary condition to overcome in
order to challenge private power, and if this is interpreted restrictively,
as with the Supreme Court's section 32 Charter jurisprudence, this will
be sufficient to defeat many such challenges at the initial stage. The
substantive divide arises if the threshold is successfully crossed, and
protects private power not through procedural means, but by structural
devices embedded in legal doctrine, such as private property and privity
of contract.\textsuperscript{132} Hester Lessard argues that a substantive public/private
divide (which is premised on formal values) is implicit in the liberal
concept of discrimination that informs the Charter and that “assumes an
ideal world where discrimination consists of isolated deviations from the
norm rather than dealing with the real world whose starting point is a
widespread historically determined imbalance.”\textsuperscript{133} The same conclusion
could equally be applied to human rights legislation, and once this
insight is appreciated, the overarching similarities between the two
systems fall into place.

Thus, in Dickason,\textsuperscript{134} equality rights get further across the
threshold than in McKinney\textsuperscript{135} where they perished at the hands of the
formal divide. However, crossing the threshold is not sufficient in itself
to ensure the vindication of equality rights because of the Court's
attachment to the substantive public/private divide (and so proves that
this is in fact a more serious obstacle to overcome). This is the only way
to make sense of the inconsistencies within the Dickason judgment. In
fact, it is difficult to reconcile the abnegation of deference towards
private defendants lest this interfere with the professed goal of human

\textsuperscript{132} See J.A. Fudge, “The Public/Private Distinction: The Possibilities of and the Limits to the

general level, the substantive divide is reinforced when the interpretation of particular rights retains
the idea that there are some areas that remain “private” and thus unregulated, for example, when
equality rights make distinctions between those forms of discrimination that are outlaw and those
that are not: see Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143; and
Schachtschneider v. Canada, [1994] 1 F.C. 40 (C.A.); or when some forms of association receive
protection and others do not: see Hunter v. Southam Inc., [1984] 2 S.C.R. 145; and Reference Re
Public Sector Employees Relations Act (Alberta), [1987] 1 S.C.R. 313; or when some agreed-upon
limitations of rights can nonetheless be “demonstrably justified as reasonable in a free and
democratic society”: see McKinney, supra note 5.

\textsuperscript{134} Supra note 62.

\textsuperscript{135} Supra note 5.
rights legislation, viz. the protection of minorities with the probative weight accorded the collective agreement where the minority under threat in this case, those over age sixty-five, can suffer double jeopardy at the hands of both their employers and their younger union colleagues. Similarly, the ranking in terms of objectionableness of various forms of discrimination, with age coming below race or religion, on the grounds that, unlike the latter categories, age will affect everyone, seems to escape the fact that it will not happen to everyone at the same time. Moreover, those over sixty-five still constitute a minority, and possibly a more vulnerable minority than those younger and employed, who can rely on a number of statutory protections against dismissal. These distinctions make more sense in terms of the operation of a substantive public/private divide which seeks to protect various private interests from the regulatory aspirations of public law.

Similarly, in poverty cases, the fact that complaints can be brought against private landlords is to a large extent irrelevant when measured against the unwillingness and/or inability of the courts and tribunals to undermine the institution of private property. In this context, following a strategy that uses rights to bring the poor up to the level of the landlord rather than to reduce rents makes sense: to request a court to enforce the latter strategy is asking it to attack a fundamental element of private power, an approach which subscription to the substantive divide renders almost inconceivable. The various attempts to use human rights type legislation to deal with systemic discrimination also affirms the resilience of the substantive divide. As Fudge observes, despite the operation of the Ontario pay equity legislation with respect to private employers, many of the substantive elements of discrimination are left firmly in place:

For the majority of women workers in Ontario, their success in using the pay equity legislation to increase their wages will depend upon decisions beyond their control: the sector in which they are employed; whether or not they are unionized; the existence of an appropriate male comparator; the size of their employer’s labour force; and whether or not they are employed on a casual or a temporary contract basis. And it is precisely these factors, which strongly correlate with low pay, that are beyond the scope of the Ontario Pay Equity Act to remedy.136

136 “Limiting Equity,” supra note 110 at 557.
V. CONCLUSION

The experience of the human rights codes in the private sector indicates that they do not "fill the Charter gap" because they fail to implement a more social democratic vision of human rights. The institutional choice of legislative codes instead of the Charter does not seem to make it easier to use rights discourse in order to advance egalitarian values and outcomes. The tendency in both Charter and human rights regimes is to identify rights with either the formal or substantive aspects of the public/private divide, with the result that in each case private power is protected from social democratic intervention. That is not to say that these characteristics are necessarily inherent in the structure of rights discourse. However, in the absence of significant mobilization articulating a different political purpose for human rights—one that has at its centre the goal of remedying the ongoing and widespread discrimination suffered as a result of inequalities in private social and economic power—the inability of rights discourse to deliver social democratic goals is all too evident. This is unlikely to change so long as there is judicial and academic support for the view that human rights legislation does "fill the Charter gap." Such a gap clearly does still exist, and requires more than the formal application of human rights against private bodies before one can assert with confidence that the concerns of social democracy are adequately addressed in Canadian society.