

**Supreme Court of Canada**  
**Seneca College v. Bhadauria, [1981] 2 S.C.R. 181**  
**Date: 1981-06-22**

The Board of Governors of the Seneca College of Applied Arts and Technology  
(*Defendant-Respondent*) *Appellant*;

and

Pushpa Bhadauria (*Plaintiff-Appellant*) *Respondent*.

1981: May 12, 13; 1981: June 22.

Present: Laskin C.J. and Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Torts—Civil rights—Discrimination—Racial origin—Denial of employment opportunity—The Ontario Human Rights Code—Whether or not a tort at common law; whether a civil right of action flowed directly from a breach of the Code—The Ontario Human Rights Code, R.S.O. 1970, c. 318—Ontario Rule 126.*

Discrimination by way of repeated denial of an employment opportunity on the alleged ground of racial origin does not give rise to a common law tort, especially when *The Ontario Human Rights Code* provides for an administrative inquiry and remedial relief and allows a wide appeal to the Court on both law and fact. It was open to the plaintiff to invoke the procedures of the Code and her failure to do so did not entitle her to sue at common law or to found a right of action on alleged breach of the Code.

*Held:* The Ontario Court of Appeal erred in supporting a tort action of discrimination and the appeal must accordingly be allowed and the action dismissed.

*Halifax & South Western Railway v. Schwartz* (1913), 47 S.C.R. 590; *Paskivski v. Canadian Pacific Ltd.*, [1976] 1 S.C.R. 687; *Monk v. Warbey*, [1935] 1 K.B. 75; *Loew's Montreal Theatres Ltd. v. Reynolds* (1919), 30 Que. K.B. 459; *Franklin v. Evans* (1924), 55 O.L.R. 349; *Christie v. The York Corporation*, [1940] S.C.R. 139; *Rogers v. Clarence Hotel*, [1940] 2 W.W.R. 545; *Constantine v. Imperial London Hotels, Ltd.*, [1944] 2 All E.R. 171; *Rothfield v. North British Railway Co.*, [1920] S.C. 805; *Ashby v. White* (1703), 2 Ld. Raym. 938, distinguished; *Re Drummond Wren*, [1945] O.R. 778; *Re Noble and Wolf*, [1949] O.R. 503; *Noble and Wolf v. Alley*, [1951] S.C.R. 64, considered.

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APPEAL from a decision of the Court of Appeal for Ontario<sup>1</sup>, allowing an appeal and setting aside the order of Callaghan J. striking out the statement of claim for not disclosing a reasonable cause of action and dismissing the action. Appeal allowed.

*Douglas K. Gray and John C. Murray, for the appellant.*

*J.B. Pomerant, Q.C., and M.Z. Tufman, for the respondent.*

The judgment of the Court was delivered by

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<sup>1</sup> (1979), 105 D.L.R. (3d) 707, 27 O.R. (2d) 142.

THE CHIEF JUSTICE—The issue in this appeal is whether this Court should affirm the recognition by the Ontario Court of Appeal of a new intentional tort. The tort was recognized to protect a plaintiff against unjustified invasion of his or her interest not to be discriminated against in respect of a prospect of employment on grounds of race or national origin. The case was argued in the Ontario Court of Appeal on the alternative footing that a civil right of action flowed directly from a breach of *The Ontario Human Rights Code*, R.S.O. 1970, c. 318, as amended by 1971 (Ont.), c. 50, s. 63; 1972 (Ont.), c. 119 and 1974 (Ont.), c. 73. Wilson J.A., having found that the tort arose at common law through the invocation of the public policy expressed in the Code as supplying applicable standards, refrained from addressing the alternative argument.

In this Court, considerable emphasis, pro and con, was laid on the question whether a breach of the Code could itself be sufficient to establish civil liability without calling in aid common law principles relating to intentional invasions of legally protected interests. It is common ground that there is no known case in this country, at least in common law jurisdictions, where such a tort is recognized on either of the two grounds on which it was posited by the plaintiff-respondent; nor were counsel able to produce any instance in a com-

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parable foreign jurisdiction.

In my opinion, the attempt of the respondent to hold the judgment in her favour on the ground that a right of action springs directly from a breach of *The Ontario Human Rights Code* cannot succeed. The reason lies in the comprehensiveness of the Code in its administrative and adjudicative features, the latter including a wide right of appeal to the Courts on both fact and law. I will come to the provisions of the Code shortly. For the moment, and for the purposes of this case, it is enough to say that the naked legal question which is raised here came before the courts below and is before this Court on a motion by way of demurrer under Ontario Rule 126. The facts alleged in the statement of claim are to be taken, therefore, as provable according to their recitation. Of course, no statement of defence has as yet been delivered.

The facts alleged disclose that the plaintiff is a highly educated woman of East Indian origin with an earned Ph.D. degree in mathematics. She holds a valid Ontario teaching certificate and has had seven years' teaching experience in the field of mathematics. In response to newspaper advertisements placed by the defendant College, the plaintiff made some ten separate applications for a teaching position in the period between June 28, 1974 and May 19, 1978. Although letters were sent to her by the College

in response to her applications, telling her she would be contacted for an interview, she was never given an interview nor any reason for the rejection of her applications. She alleged that the positions for which she applied were filled by others without her high qualifications but who were not of East Indian origin. She claimed that there was discrimination against her because of her origin and that the College was in breach of a duty not to discriminate against her, and also in breach of s. 4 of *The Ontario Human Rights Code*, as amended. She claimed damages for being deprived of teaching opportunities at the College in which she was still interested and for being deprived of the opportunity to earn a teaching salary. Moreover, she

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suffered mental distress, frustration, loss of self-esteem and dignity, and lost time in repeatedly applying for advertised positions for which she was denied the opportunity to compete.

*The Ontario Human Rights Code*, in its present form, is the culmination of a successive series of enactments beginning with *The Racial Discrimination Act, 1944*, 1944 (Ont.), c. 51, and continuing with *The Fair Employment Practices Act, 1951*, 1951 (Ont.), c. 24, and with *The Fair Accommodation Practices Act, 1954*, 1954 (Ont.), c. 28. These enactments, addressed, respectively, to notices or signs or advertising, to employment, and to places of public accommodation were designed to eliminate discriminatory treatment of a person on grounds selected by the Legislature as being irrelevant to the substantive considerations involved and as being, objectively, criteria that were offensive and violative of equality before the law. In *The Racial Discrimination Act, 1944*, the prohibited criteria were race or creed; in *The Fair Employment Practices Act, 1951*, they were race, creed, colour, nationality, ancestry or place of origin; and the same prohibited criteria were specified in *The Fair Accommodation Practices Act, 1954*. In 1962, these Acts and some others (*The Female Employees' Fair Remuneration Act, The Ontario Human Rights Commission Act and The Ontario Anti-Discrimination Commission Amendment Act, 1960-61*), were gathered up and incorporated into a Code, entitled *The Ontario Human Rights Code, 1961-62*. The present Code is a more elaborate version of the 1961-62 Code which did not contain any provisions for an appeal from a decision or order of a board of inquiry.

The present *Ontario Human Rights Code* contains a declaration of policy in its preamble (being the same declaration that was in the original Code), as follows:

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and

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peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin;

AND WHEREAS these principles have been confirmed in Ontario by a number of enactments of the Legislature;

AND WHEREAS it is desirable to enact a measure to codify and extend such enactments and to simplify their administration;

Part I of the Code sets out the prohibition of discrimination on the grounds of race, creed, colour, sex, marital status, nationality, ancestry or place of origin. The prohibitions are directed to (1) notices, signs, symbols, emblems or other representations (s. 1); (2) denial of or discrimination respecting access to accommodation, services or facilities in any place to which the public is customarily admitted (s. 2); (3) occupancy of commercial units and housing accommodation (each defined in s. 19), subject to an exception in respect of sex as to housing accommodation where occupancy, other than that of the owner or his family is restricted to those of the same sex (s. 3); (4) employment (and here age, defined to cover the span from age 40 to 64 inclusive, is added to the prohibited grounds of discrimination), whether it be a reference or recruitment for employment, or dismissal or refusal to employ or refusal to train or promote or transfer, or with respect to any term or condition of employment or with respect to discriminatory advertising or applications for employment, and employment agencies are also brought under the general ban of discrimination (s. 4). There are exceptions here (1) in respect of age, sex or marital status where this is a bona fide occupational classification; (2) in respect of exclusively religious, philanthropic, educational, fraternal or social organizations not operated for private profit; (3) in respect of domestic employment in a single family residence; and (4) in respect of bona fide superannuation or pension or insurance plans that

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make any distinction or exclusion or preference between employees because of age, sex or marital status. Special provision is made in s. 4a. to prohibit trade unions from discriminating on any of the prohibited grounds (including age) in respect of membership therein or by expulsion or suspension and, similarly, as to self-governing professions. The Crown in right of the Province and its agencies are subject to the prohibitions of the Code (s. 6). There is also a special provision (s. 6a.) under which the Ontario Human Rights Commission, to which administration of the Code is confided, may give approval to what may be called affirmative action programs.

Part II of the Code deals with administration by the Ontario Human Rights Commission, composed of three or more members as determined by the Government. The Commission is charged to promote the principles of the Code and to conduct research and educational programs designed to eliminate discriminatory practices. Its main task of administration lies, however, in the investigation of complaints and to enforce the Code.

Part III of the Code deals with complaint procedures, and what is noteworthy is that the lodging of complaints is not limited to persons who allegedly suffer any prohibited discrimination, and the Commission too may initiate a complaint. Upon receipt of a complaint or its initiation, «the first duty of the Commission or an officer thereof is to try to effect a settlement. Powers of entry into premises are given under a previous order obtainable on an *ex parte* application to a justice of the peace. If a settlement is not achieved, the Commission is required to make a recommendation to the Minister of Labour whether or not a board of inquiry should be appointed but whatever the recommendation it is in the discretion of the Minister to appoint such a board. Under s. 14b.(6), a

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board of inquiry (subject to the provisions of s. 14d. respecting appeals) “has exclusive jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision”.

Under s. 14c., a board of inquiry, on finding a contravention of the Code may order any offending party “to do any act or thing that, in the opinion of the board, constitutes full compliance... and to rectify any injury caused to any person or to make compensation therefor”. Section 14d. provides for an appeal by any party to a hearing before a board from the board’s decision or order to the Ontario Supreme Court in accordance with that Court’s rules. The Minister has a right to be heard on the appeal. The scope of the appeal is set out in s. 14d.(4) in the following terms:

**14d. ...**

(4) An appeal under this section may be made on questions of law or fact or both and the court may affirm or reverse the decision or order of the board or direct the board to make any decision or order that the board is authorized to make under this Act and the court may substitute its opinion for that of the board.

It is difficult to envisage any wider appeal than that prescribed by the foregoing provision.

In addition to the complaint procedure and the possibility of a board of inquiry and judicial scrutiny thereafter, the Code in Part IV provides for summary conviction penalties for contravention of the Code and a conviction may be followed by an application to a judge of the Ontario Supreme Court by the Minister for an injunction to restrain the continuance of the violation of the Code. However, under s. 16, prosecution depends upon the previous consent thereto in writing by the Minister.

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

There is, in my view, a narrow line between founding a civil cause of action directly upon a breach of a statute and as arising from the statute itself and founding a civil cause of action at common law by reference to policies reflected in the statute and standards fixed by the statute. The cases that have dealt with situations of this kind have been in the field of negligence, with the legislation viewed as establishing standards of behaviour, and deviation, unless excused, amounting to a species of strict liability: see Fleming, *The Law of Torts* (5th ed., 1977), at pp. 131-33, and see also at pp. 122-23. The contention in the present case is, of course, based on strict liability, especially having regard to the way in which the issue herein arose, that is, on the basis of facts recited by the plaintiff and taken as provable.

A line of English cases dealing with statutory duties to employees respecting factory and mine safety illustrates judicial enforcement by civil action for damages, although the legislative prescription is enforcement by penal proceedings: see *Salmond on Torts* (17th ed., 1977), at p. 247. The same approach has been taken in this country in respect of statutory duties imposed under railway legislation: see, for example, *Halifax & South Western Railway v. Schwartz*<sup>2</sup>. Such cases, and others like them have arisen, however, under legislation which (unlike *The Ontario Human Rights*

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<sup>2</sup> (1913), 47 S.C.R. 590.

*Code*) does not prescribe a regulatory enforcement authority, although there may be a regulatory authority to prescribe standards enforceable by penal sanction. Questions may arise whether the statutory duties are absolute or are qualified by required proof of want of due care, and this, again, turns on the construction of the legislation: *c.f. Paskivski v. Canadian Pacific Ltd.*<sup>3</sup> In so far as such cases involve the law of negligence they are distinguishable from the present case, and in so far as they reflect strict liability for breach of a statute (see, for example, *Monk v. Warbey*<sup>4</sup>, they are inapplicable to a situation like the one here where there is elaborate enforcement machinery.

What we have here, if the Court of Appeal is correct in its conclusion, is a species of an economic tort, new in its instance and founded, even if indirectly, on a statute enacted in an area outside a fully recognized area of common law duty: see Williams, “The Effect of Penal Legislation in the Law of Tort” (1960), 23 Mod. L. Rev. 233, at p. 256. It is one thing to apply a common law duty of care to standards of behaviour under a statute; that is simply to apply the law of negligence in the recognition of so-called statutory torts. It is quite a different thing to create by judicial fiat an obligation—one in no sense analogous to a duty of care in the law of negligence—to confer an economic benefit upon certain persons, with whom the alleged obligor has no connection, and solely on the basis of a breach of a statute which itself provides comprehensively for remedies for its breach.

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It was conceded that the relevant provisions in this case, if applicable, are in s. 4(1)(a) and (b) which read as follows:

- 4.—(1) No person shall,
- (a) refuse to refer or to recruit any person for employment;
  - (b) dismiss or refuse to employ or to continue to employ any person;

On the facts here, taken as provable, there was a refusal to recruit for employment and, certainly, a refusal to employ. However, a refusal to enter into contract relations or perhaps, more accurately, a refusal even to consider the prospect of such relations has not been recognized at common law as giving rise to any liability in tort.

None of the cases considered in the Ontario Court of Appeal, all arising at common law and under the civil law of Quebec, relate to a refusal to recruit or to employ. They exhibit a strict *laissez faire* policy, even where the business or service whose facilities were denied on the ground of colour or race or

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<sup>3</sup> [1976] 1 S.C.R. 687.

<sup>4</sup> [1935] 1 K.B. 75.

ancestry was under government licence: see *Loew's Montreal Theatres Ltd. v. Reynolds*<sup>5</sup>; *Franklin v. Evans*<sup>6</sup>; *Christie v. The York Corporation*<sup>7</sup>; *Rogers v. Clarence Hotel*<sup>8</sup>. In those cases where a plaintiff succeeded in his claim for damages for denial of services or accommodation on the ground of colour or race, recovery was based on an innkeeper's liability: see *Constantine v. Imperial London Hotels, Ltd.*<sup>9</sup> and *cf. Rothfield v. North British Railway Co.*<sup>10</sup>

There are two observations to be made in connection with the cases referred to in the Court of Appeal and with the reasons of that Court delivered by Wilson J.A. In *Rogers v. Clarence Hotel*, *supra*, there was a dissenting judgment in the British Columbia Court of

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Appeal by O'Halloran J.A. and it would appear that his dissent, based on what that learned judge said was a common law principle of equality, influenced the Ontario Court of Appeal. The dissent is, however, weakened somewhat by its reliance on an innkeeper case, the Scottish *Rothfield* case. The common law of innkeepers' liability had, historically, developed along different lines from that respecting restaurants and taverns; keepers of a common inn were under an obligation to receive travellers or intending guests, irrespective of race or colour or other arbitrary disqualification: see *Halsbury's Laws of England* (1979, 4th ed.), vol. 24, Inns and Innkeepers, at pp. 616 *et seq.*

Secondly, and more obviously, Wilson J.A. relied on *Ashby v. White*<sup>11</sup> where Holt C.J., dealing with a denial of a right to vote, said (at p. 953):

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.

There was a proprietary aspect to the right to vote, and among the questions that arose was whether material loss must be shown by the plaintiff, a question that, on the basis of the above-quoted principle, was answered in the negative. Birkett J. invoked *Ashby v. White* in the *Constantine* case, an innkeeper case, where the plaintiff could not succeed if he was required to prove that he suffered special damage. He suffered none because he readily obtained accommodation at another of the defendant's hotels. However, nominal damages were awarded on the *Ashby v. White* principle but exemplary damages for the humiliation and indignity suffered by the plaintiff were refused.

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<sup>5</sup> (1919), 30 Que. K.B. 459.

<sup>6</sup> (1924), 55 O.L.R. 349.

<sup>7</sup> [1940] S.C.R. 139.

<sup>8</sup> [1940] 2 W.W.R. 545.

<sup>9</sup> [1944] 2 All E.R. 171.

It is neither here nor there whether the result in the *Constantine* case was correct because both there and in *Ashby v. White* the plaintiff had a

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legally protected interest. The present case is not concerned with whether a remedy can be provided for an admitted right but with whether there is a right at all, that is, an interest which the law will recognize as deserving protection.

Another support, perhaps the strongest support, for the result reached by the Ontario Court of Appeal lay in the approach taken by Mackay J. in *Re Drummond Wren*<sup>12</sup>, where a restrictive covenant in a deed of land, prohibiting the sale of the land to “Jews, or persons of objectionable nationality”, was struck down as offensive to public policy as expressed, *inter alia*, in *The Ontario Racial Discrimination Act, 1944*. As Wilson J.A. pointed out, Mackay J. invalidated the covenant not because it violated the Act but because it was contrary to the public policy expressed in the Act; and she added: “This is the distinction which underlies the alternate bases on which the plaintiff has put her claim.”

I do not myself quarrel with the approach taken in *Re Drummond Wren*, but it is necessary to point out that a different view on public policy was taken by the Ontario Court of Appeal in *Re Noble and Wolf*<sup>13</sup>, a case not mentioned by Wilson J.A. Moreover, when this last-mentioned case came to this Court as *Noble and Wolf v. Alley*<sup>14</sup>, the obnoxious covenant in that case, similar to the one in *Re Drummond Wren*, was held unenforceable for uncertainty and as a restraint on alienation, property law grounds, and the Court made no pronouncement on public policy, although the Court of Appeal had done so, disagreeing therein with *Re Drummond Wren*.

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Having canvassed the cases that I have mentioned, Wilson J.A. began her concluding reasons in these words:

Against this background of authorities, we are called on to decide the matter now on appeal before us, namely, assuming that the plaintiff can prove the allegations set forth in her statement of claim, do they give rise to a cause of action at common law and, if they do not, do they give rise to a civil cause of action under *The Ontario Human Rights Code*?

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<sup>10</sup> [1920] S.C. 805.

<sup>11</sup> (1703), 2 Ld. Raym. 938.

<sup>12</sup> [1945] O.R. 778.

<sup>13</sup> [1949] O.R. 503.

<sup>14</sup> [1951] S.C.R. 64.

In my view, they give rise to a cause of action at common law. While no authority cited to us has recognized a tort of discrimination, none has repudiated such a tort. The matter is accordingly *res integra* before us.

She followed this by quoting the preamble of *The Ontario Human Rights Code* and continued as follows:

I regard the preamble to the Code as evidencing what is now, and probably has been for some considerable time, the public policy of this Province respecting fundamental human rights. If we accept that “every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin”, as we do, then it is appropriate that these rights receive the full protection of the common law. The plaintiff has a right not to be discriminated against because of her ethnic origin and alleges that she has been injured in the exercise or enjoyment of it. If she can establish that, then the common law must, on the principle of *Ashby v. White et al.*, *supra*, afford her a remedy.

I do not regard the Code as in any way impeding the appropriate development of the common law in this important area. While the fundamental human right we are concerned with is recognized by the *Code*, it was not created by it. Nor does the *Code*, in my view, contain any expression of legislative intention to exclude the common law remedy. Rather the reverse since s. 14(a) appears to make the appointment of a board of inquiry to look into a complaint made under the *Code* a matter of ministerial discretion.

I confess to some difficulty in understanding the basis of the learned justice’s observation that “While the fundamental human right we are con-

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cerned with is recognized by the *Code*, it was not created by it” (or, I assume, by its predecessors). There is no gainsaying the right of the Legislature to establish new rights or to create new interests of which the Court may properly take notice and enforce, either under the prescriptions of the Legislature or by applying its own techniques if, on its construction of the legislation, enforcement has not been wholly embraced by the terms of the legislation: see *Salmond on Torts*, *supra*, c. 10, *passim*.

In the present case, the enforcement scheme under *The Ontario Human Rights Code* ranges from administrative enforcement through complaint and settlement procedures to adjudicative or quasi-adjudicative enforcement by boards of inquiry. The boards are invested with a wide range of remedial authority including the award of compensation (damages in effect), and to full curial enforcement by wide rights of appeal which, potentially, could bring cases under the Code to this Court. The Ontario Court of Appeal did not think that this scheme of enforcement excluded a common law remedy, saying in the words of Wilson J.A. (which I repeat):

Nor does the *Code*, in my view, contain any expression of legislative intention to exclude the common law remedy. Rather the reverse since s. 14(a) appears to make the appointment of a board of inquiry to look into a complaint made under the *Code* a matter of ministerial discretion.

I would have thought that this fortifies rather than weakens the Legislature's purpose, being one to encompass, under the Code alone, the enforcement of its substantive prescriptions. It is unnecessary to consider here how far the Minister's discretion is untrammelled, or whether a clue to its character is afforded by the ensuing provisions for appeal to the courts from a decision or order of a board of inquiry.

The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opin-

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ion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the Code.

For the foregoing reasons, I would hold that not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use.

The appeal is, accordingly, allowed, the judgment of the Ontario Court of Appeal is set aside and the judgment of Callaghan J. dismissing the action is restored. In the circumstances, there will be no order as to costs, either here or in the courts below.

*Appeal allowed.*

*Solicitors for the appellant: Hicks, Morley, Hamilton, Stewart, Storie, Toronto.*

*Solicitors for the respondent: Pomerant and Devlin, Toronto.*