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Case Law Update: The Supreme Court of Canada Finds that Administrative Tribunals have the Jurisdiction to Grant "Charter" Remedies

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The Supreme Court of Canada, in its recent decision in *R. v. Conway*, has removed any lingering doubts that administrative tribunals have the authority to grant *Charter* remedies. Whereas it was previously permitted for an administrative tribunal, proceeding on a "remedy by remedy" analysis, to award a *Charter* remedy, the Supreme Court has now made it easier for these adjudicative bodies to ascertain their authority to award *Charter* remedies. By turning the inquiry about jurisdiction into an institutional one, the result will almost certainly be an increase in the number of cases and areas in which *Charter* remedies are sought.

The Supreme Court, in *Cooper v. Canada (Human Rights Commission)*, found that the *Charter* belongs to the people and that, to be meaningful, the *Charter* must find its expression in the decisions of administrative tribunals. Reiterating that the denial of early access to remedies is a denial of an appropriate and just remedy, the Supreme Court of Canada, in *R. v. Conway*, took this expression one step further, and held that there was no reason why an administrative tribunal should not be considered a "court of competent jurisdiction" to grant *Charter* remedies, provided that this does not offend its enabling statute.

At issue in *R. v. Conway* was an application before the Ontario Review Board ("ORB") by Mr. Conway, a patient at CAMH, for (among other things) an absolute discharge pursuant to s. 24(1) of the *Charter*. The ORB concluded that it had no jurisdiction to consider Mr. Conway's *Charter* claim. On appeal, the Ontario Court of Appeal confirmed that the ORB was not a court of competent jurisdiction for the purpose of granting an absolute discharge under s. 24(1) of the *Charter*. The question for the Supreme Court, therefore, was whether the ORB possessed the necessary jurisdiction to grant remedies pursuant to s. 24(1) of the *Charter*.

Writing for a unanimous court, Justice Abella answered the question before the court in the positive, but ultimately dismissed Mr. Conway's appeal.

According to the court, existing case law establishes that expert administrative tribunals should play a primary role in determining *Charter* issues that fall within their specialized jurisdiction and that in exercising their statutory functions, and in fact have the authority and the duty to consider and apply the Constitution. Accordingly, it was appropriate and consistent with the court's gradual expansion of the relationship between administrative tribunals and the *Charter* to adopt a merger of the three distinct constitutional streams flowing from the *Mills*, *Slaight*, and *Cuddy Chicks* cases.

Therefore, when a remedy under s. 24(1) of the *Charter* is sought from an administrative tribunal, the tribunal must first determine whether it has the jurisdiction, explicit or implied, to decide questions of law. If it does, and there is no clear evidence that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal can consider and apply the *Charter* and *Charter* remedies. Once this preliminary inquiry has been resolved in the affirmative, the remaining question is whether, in light of the relevant statutory scheme, the tribunal can grant the particular remedy sought. This is a question of legislative intent, and "what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of

the particular tribunal", keeping in mind the tribunal's statutory mandate, structure, and function.

This decision broadens the power of administrative tribunals to award *Charter* remedies, which had already been found to exist in the jurisprudence, by changing the focus of the inquiry into jurisdiction from a "remedy by remedy" approach to an institutional one. However, the court was careful to point out that administrative tribunals remain creatures of statute, and that Parliament could constrain their jurisdiction to grant *Charter* remedies.

It will be interesting, in the coming months, to monitor not only the frequency with which administrative tribunals are called upon to grant *Charter* remedies, but also to see how generous administrative tribunals will be in interpreting their enabling statutes for the purposes of determining legislative intent with respect to the granting of constitutional remedies. One can surmise that this decision will result in an increase in *Charter* claims before administrative tribunals, with the concomitant delays and increase in costs. Furthermore, one would expect that, at least for the early cases, there will be an increase in the frequency with which courts are asked to review the decisions of administrative tribunals in that respect, thereby leading to additional delays and costs.

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