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Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. and Pharmx Rexall Drug Stores Ltd. *Appellants*

v.

Minister of Health and Long-Term Care, Lieutenant Governor-in-Council of Ontario and Attorney General of Ontario *Respondents*

- and -

Shoppers Drug Mart Inc., Shoppers Drug Mart (London) Limited and Sanis Health Inc. *Appellants*

v.

Minister of Health and Long-Term Care, Lieutenant Governor-in-Council of Ontario and Attorney General of Ontario *Respondents*

INDEXED AS: KATZ GROUP CANADA INC. *v.* ONTARIO (HEALTH AND LONG-TERM CARE)

2013 SCC 64

File Nos.: 34647, 34649.

2013: May 14; 2013: November 22.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Food and drugs — Regulations — Validity — Province of Ontario enacting Regulations to effectively ban the sale of private label drugs by pharmacies — Purpose of Regulations to reduce drug prices — Whether Regulations are ultra vires on the ground that they are inconsistent with the statutory scheme and mandate — Drug Interchangeability and Dispensing Fee Act Regulation, R.R.O. 1990, Reg. 935, s. 9 — Ontario Drug Benefit Act Regulation, O. Reg. 201/96, s. 12.0.2.

Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. et Pharmx Rexall Drug Stores Ltd. *Appelantes*

c.

Ministre de la Santé et des Soins de longue durée, Lieutenant-gouverneur en conseil de l'Ontario et procureur général de l'Ontario *Intimés*

- et -

Shoppers Drug Mart Inc., Shoppers Drug Mart (London) Limited et Sanis Health Inc. *Appelantes*

c.

Ministre de la Santé et des Soins de longue durée, Lieutenant-gouverneur en conseil de l'Ontario et procureur général de l'Ontario *Intimés*

RÉPERTORIÉ : KATZ GROUP CANADA INC. *c.* ONTARIO (SANTÉ ET SOINS DE LONGUE DURÉE)

2013 CSC 64

N[os] du greffe : 34647, 34649.

2013 : 14 mai; 2013 : 22 novembre.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Moldaver et Wagner.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Aliments et drogues — Règlements — Validité — Adoption, par la province de l'Ontario, de règlements ayant pour effet d'interdire effectivement la vente, par les pharmacies, de médicaments sous marque de distributeur — Règlements ayant pour objectif de réduire les prix des médicaments — Les règlements sont-ils ultra vires au motif qu'ils sont incompatibles avec l'objet et le mandat de la loi? — Drug Interchangeability and Dispensing Fee Act Regulation, R.R.O. 1990, Règl. 935, art. 9 — Ontario Drug Benefit Act Regulation, O. Reg. 201/96, art. 12.0.2.

For decades, Ontario has been involved in an ongoing struggle to control rising drug costs. Generic drugs have been a key part of the strategy for dealing with this problem. Persistent market practices, however, have kept generic prices high. In Ontario, the result has been an episodic and totemic tug-of-war between regulators and those engaged in the manufacture, distribution and sale of generic drugs.

In 1985, two complementary and intersecting statutes were introduced together to address the problem of rising drug prices for consumers: the *Drug Interchangeability and Dispensing Fee Act* and the *Ontario Drug Benefit Act*. The *Drug Interchangeability and Dispensing Fee Act* empowers the Ministry to designate a cheaper generic drug as "interchangeable" with a more expensive brand-name drug. Pharmacists must dispense the cheaper interchangeable generic to customers unless the prescribing physician specifies "no substitution" or the customer agrees to pay the extra cost of the brand name. This statute also limits the dispensing fees that pharmacies can charge private customers.

The *Ontario Drug Benefit Act* governs the Ontario Drug Benefit Program whereby the province reimburses pharmacies when they dispense prescription drugs at no charge to "eligible persons" — primarily seniors and persons on social assistance. All drugs for which Ontario will provide reimbursement, along with the price that Ontario will pay for them, are listed in the Formulary. When a pharmacy dispenses a listed drug to an eligible person, the *Ontario Drug Benefit Act* requires Ontario to reimburse the pharmacy for an amount based on the Formulary price of the drug plus a prescribed mark-up and prescribed dispensing fee. This legislative scheme effectively creates two markets in Ontario for brand name and generic drugs. The private market consists of individuals buying drugs at their own expense or for reimbursement by private drug insurance plans. The "public market" is the government-funded Ontario Drug Benefit Program. Generic drugs reach consumers in Ontario's private and public markets through a supply chain that involves several participants regulated at the federal level, the provincial level, or both. They are: fabricators, who make the generic drugs; manufacturers, who sell generic drugs under their own name to wholesalers or directly to pharmacies; wholesalers, who buy drugs from manufacturers to distribute to pharmacies; and

Depuis des décennies, l'Ontario lutte constamment en vue de contrôler la hausse des prix des médicaments. Les médicaments génériques ont constitué un élément clé de la stratégie visant à contrer ce problème. Des pratiques commerciales persistantes ont toutefois maintenu à des niveaux élevés les prix des médicaments génériques. En Ontario, on a ainsi assisté à des affrontements épisodiques et totémiques entre les organismes de réglementation et les entreprises chargées de la fabrication, de la distribution et de la vente des médicaments génériques.

En 1985, deux lois qui se complètent et se recoupent ont été adoptées ensemble afin de remédier au problème de la hausse des prix des médicaments pour les consommateurs : la *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation* et la *Loi sur le régime de médicaments de l'Ontario*. La *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation* habilite le ministère à désigner un médicament générique moins coûteux comme étant « interchangeable » avec un médicament de marque plus coûteux. Les pharmaciens doivent délivrer aux clients le produit générique interchangeable moins coûteux à moins que le médecin qui prescrit n'indique « pas de remplacement » ou que le client accepte de payer le coût plus élevé du médicament de marque. La loi limite également les honoraires de préparation que les pharmacies peuvent demander à leurs clients privés.

La *Loi sur le régime de médicaments de l'Ontario* régit le Programme de médicaments de l'Ontario, par lequel la province rembourse les pharmacies qui délivrent sans frais des médicaments sur ordonnance à des « personnes admissibles » — essentiellement les personnes âgées et les prestataires de l'aide sociale. Le Formulaire des médicaments énumère tous les médicaments remboursables par l'Ontario et indique les prix que la province paye pour ces médicaments. Lorsqu'une pharmacie délivre à une personne admissible un médicament énuméré, la *Loi sur le régime de médicaments de l'Ontario* oblige la province à rembourser à cette pharmacie un montant calculé en fonction du prix du médicament prévu au Formulaire des médicaments, auquel s'ajoutent une majoration prescrite ainsi que les honoraires de préparation prescrits. Ce régime législatif a pour effet de créer en Ontario deux marchés pour les médicaments de marque et les médicaments génériques. Le marché privé est composé de particuliers qui achètent des médicaments à leurs frais ou se font rembourser par leur régime d'assurance-médicaments privé. Le « marché public » correspond au Programme de médicaments de l'Ontario financé par le gouvernement ontarien. Les médicaments génériques sont dispensés aux consommateurs ontariens sur le marché public et sur le

pharmacies, who buy drugs from wholesalers or manufacturers and dispense them to their customers.

Before 2006, the price at which manufacturers could apply to list generic drugs in the Formulary was capped by regulations under the two statutes. In order to be competitive, manufacturers would, however, give pharmacies a substantial rebate to induce them to buy their products. The price that manufacturers charged — and customers paid — was thereby artificially increased to the extent of the rebates. In 2006, in order to stop this inflationary effect on generic drug prices, the two statutes and the Regulations under them were amended to prohibit rebates. The expected savings did not occur and manufacturers continued to charge high prices for generic drugs. Instead of the rebates, manufacturers were now paying pharmacies $800 million annually in professional allowances. Amendments were therefore introduced in 2010 eliminating the "professional allowances" exception.

The Regulations to the two statutes were also amended to prevent pharmacies from controlling manufacturers who sell generic drugs under their own name but do not fabricate them. This was done by creating a category designated as "private label products", which includes products sold but not fabricated by a manufacturer which does not have an arm's length relationship with drug wholesalers or pharmacies. Under the Regulations, private label products cannot be listed in the Formulary or designated as interchangeable.

Sanis Health Inc., a subsidiary of Shoppers Drug Mart, was incorporated by Shoppers for the purpose of buying generic drugs from third party fabricators and selling them under the Sanis label in Shoppers Drug Mart stores. Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. and Pharmx Rexall Drug Stores Ltd. also operate pharmacies

marché privé au moyen d'une chaîne d'approvisionnement qui fait intervenir plusieurs participants assujettis à la réglementation fédérale et à la réglementation provinciale, ou à l'une ou l'autre. Il s'agit des participants suivants : les manufacturiers, qui fabriquent les médicaments génériques; les fabricants, qui vendent des médicaments génériques en leur propre nom à des grossistes ou directement aux pharmacies; les grossistes, qui achètent des médicaments aux fabricants en vue de leur distribution aux pharmacies; et les pharmacies, qui achètent les médicaments aux grossistes ou aux fabricants et les délivrent à leurs clients.

Avant 2006, le prix auquel les fabricants pouvaient demander que leurs médicaments génériques soient énumérés au Formulaire des médicaments était plafonné par les règlements d'application des deux lois. Pour être concurrentiels, les fabricants consentaient toutefois aux pharmacies des rabais substantiels pour les inciter à acheter leurs produits. Le prix que les fabricants demandaient — et que les clients payaient — était par conséquent artificiellement augmenté dans la même proportion que ces rabais. Pour stopper cette inflation des prix des médicaments génériques, les deux lois et leurs règlements d'application ont été modifiés en 2006 afin d'interdire les rabais. Les économies prévues ne se sont pas matérialisées et les fabricants ont continué à demander des prix élevés pour les médicaments génériques. Au lieu d'accorder des rabais, les fabricants payaient désormais aux pharmacies 800 millions de dollars par année en remises aux professionnels. Des modifications ont donc été introduites en 2010 pour supprimer l'exception relative aux « remises aux professionnels ».

Les règlements d'application des deux lois ont également été modifiés pour empêcher les pharmacies de contrôler les fabricants qui vendent des médicaments génériques en leur propre nom sans les fabriquer eux-mêmes. Le législateur a créé à cette fin une catégorie appelée « produits sous marque de distributeur » qui englobe les produits vendus mais non fabriqués par un fabricant qui a un lien de dépendance avec des grossistes ou des pharmacies. Aux termes des règlements, les produits sous marque de distributeur ne peuvent être énumérés au Formulaire des médicaments ni être désignés comme étant interchangeables.

Sanis Health Inc., une filiale de Shoppers Drug Mart, a été constituée en personne morale par Shoppers en vue d'acheter des médicaments génériques de manufacturiers tiers et de les vendre sous la marque Sanis dans les magasins Shoppers Drug Mart. Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. et Pharmx Rexall

in Ontario and, like Shoppers, have taken steps to set up their own "private label" manufacturer. In 2010, Sanis applied to list several generic drugs in the Formulary and have them designated as "interchangeable". Its application was rejected, however, because those generic drugs were "private label products". Shoppers and Katz challenged the Regulations that banned the sale of private label products as being *ultra vires* on the grounds that they were inconsistent with the purpose and mandate of the statutes. The challenge succeeded in the Divisional Court. The Court of Appeal reversed the decision.

Held: The appeal should be dismissed.

A successful challenge to the *vires* of Regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate. Regulations benefit from a presumption of validity. This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations rather than on regulatory bodies to justify them; and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, where possible, the regulation is construed in a manner which renders it *intra vires*. Both the challenged regulation and the enabling statute should be interpreted using a broad and generous approach consistent with this Court's approach to statutory interpretation generally. This inquiry does not involve assessing the policy merits of the Regulations to determine whether they are necessary, wise or effective in practice. Nor is it an inquiry into the underlying political, economic, social or partisan considerations.

In this case, the original legislative intent animating the two statutes was to control the cost of prescription drugs in Ontario without compromising safety. As the legislative history shows, attempts were made to promote transparent pricing and eliminate price inflation along the drug supply chain, all in pursuit of the ultimate objective of lowering drug costs. The purpose of the 2010 Regulations banning private label products was to prevent another possible mechanism for circumventing the ban on the rebates that had kept drug prices inflated. If pharmacies were permitted to create their own affiliated manufacturers whom they controlled, they would be

Drug Stores Ltd. exploitent elles aussi des pharmacies en Ontario et, à l'instar de Shoppers, ont entrepris des démarches en vue d'établir leur propre fabricant de médicaments génériques « sous marque de distributeur ». En 2010, Sanis a demandé que plusieurs médicaments génériques soient énumérés au Formulaire des médicaments et qu'ils soient désignés comme « interchangeables ». Sa demande a toutefois été rejetée parce que ces médicaments génériques étaient des « produits sous marque de distributeur ». Shoppers et Katz ont contesté les règlements interdisant la vente de produits sous marque de distributeur, les qualifiant d'*ultra vires* au motif qu'ils étaient incompatibles avec l'objet et le mandat de la loi. Elles ont obtenu gain de cause devant la Cour divisionnaire. La Cour d'appel a infirmé cette décision.

Arrêt : Le pourvoi est rejeté.

Pour contester avec succès la validité d'un règlement, il faut démontrer qu'il est incompatible avec l'objectif de sa loi habilitante ou avec le cadre du mandat prévu par la Loi. Les règlements jouissent d'une présomption de validité. Cette présomption comporte deux aspects : elle impose à celui qui conteste le règlement le fardeau de démontrer que celui-ci est invalide, plutôt que d'obliger l'organisme de réglementation à en justifier la validité; ensuite, la présomption favorise une méthode d'interprétation qui concilie le règlement avec sa loi habilitante de sorte que, dans la mesure du possible, le règlement puisse être interprété d'une manière qui le rend *intra vires*. Il convient de donner au règlement contesté et à sa loi habilitante une interprétation téléologique large compatible avec l'approche générale adoptée par la Cour en matière d'interprétation législative. Cette analyse ne comporte pas l'examen du bien-fondé du règlement pour déterminer s'il est nécessaire, sage et efficace dans la pratique. L'analyse ne s'attache pas aux considérations sous-jacentes d'ordre politique, économique ou social ni à la recherche, par les gouvernements, de leur propre intérêt.

En l'espèce, l'intention du législateur à l'origine des deux lois était de contrôler le coût des médicaments délivrés sur ordonnance en Ontario sans en compromettre l'innocuité. Comme le démontre l'historique législatif, on a tenté de promouvoir des méthodes de fixation des prix transparentes et de contrer la flambée des prix le long de la chaîne d'approvisionnement des médicaments, le tout en vue d'atteindre l'objectif ultime de réduire le coût des médicaments. Les règlements de 2010 interdisant les produits sous marque de distributeur visaient à empêcher un autre mécanisme susceptible de contourner l'interdiction des rabais qui maintenaient les prix des médicaments

directly involved in setting the Formulary prices and have strong incentives to keep those prices high.

The 2010 private label Regulations contribute to the legislative pursuit of transparent drug pricing. They fit into this strategy by ensuring that pharmacies make money exclusively from providing professional health care services, instead of sharing in the revenues of drug manufacturers by setting up their own private label subsidiaries. The Regulations were therefore consistent with the statutory purpose of reducing drug costs.

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Referred to: *Waddell v. Governor in Council* (1983), 8 Admin. L.R. 266; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485; *Glykis v. Hydro-Québec*, 2004 SCC 60, [2004] 3 S.C.R. 285; *Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595; *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741; *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106; *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2; *Alaska Trainship Corp. v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; *Municipal Corporation of City of Toronto v. Virgo*, [1896] A.C. 88; *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90.

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Ontario Drug Benefit Act, R.S.O. 1990, c. O.10, ss. 0.1, 1(1), 1.2(2)(a), 1.3, 11.5, 18(1), (6).

R.R.O. 1990, Reg. 935, ss. 2, 9(1), (2) "private label product" [ad. O. Reg. 221/10, s. 5].

Transparent Drug System for Patients Act, 2006, S.O. 2006, c. 14.

élevés. Si l'on permettait aux pharmacies de créer leurs propres fabricants affiliés et de les contrôler, elles participeraient directement à la fixation des prix affichés au Formulaire des médicaments, ce qui les inciterait fortement à maintenir des prix élevés.

Les règlements de 2010 relatifs aux produits sous marque de distributeur contribuent à l'atteinte de l'objectif législatif de transparence du prix des médicaments. Ils s'inscrivent dans cette stratégie en assurant que les pharmacies tirent leurs revenus exclusivement de la prestation de services professionnels de santé plutôt que de la part des revenus des fabricants qu'elles touchent en mettant sur pied des filiales qui offrent des médicaments sous leur propre marque. Les règlements étaient par conséquent conformes à l'objectif législatif consistant à réduire les prix des médicaments.

Jurisprudence

Arrêts mentionnés : *Waddell c. Governor in Council* (1983), 8 Admin. L.R. 266; *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, 2004 CSC 19, [2004] 1 R.C.S. 485; *Glykis c. Hydro-Québec*, 2004 CSC 60, [2004] 3 R.C.S. 285; *Jafari c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1995] 2 C.F. 595; *Ontario Federation of Anglers & Hunters c. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741; *Thorne's Hardware Ltd. c. La Reine*, [1983] 1 R.C.S. 106; *CKOY Ltd. c. La Reine*, [1979] 1 R.C.S. 2; *Alaska Trainship Corp. c. Administration de pilotage du Pacifique*, [1981] 1 R.C.S. 261; *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164; *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231; *Municipal Corporation of City of Toronto c. Virgo*, [1896] A.C. 88; *Forget c. Québec (Procureur général)*, [1988] 2 R.C.S. 90.

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Loi sur le régime de médicaments de l'Ontario, L.R.O. 1990, ch. O.10, art. 0.1, 1(1), 1.2(2)a), 1.3, 11.5, 18(1), (6).

O. Reg. 201/96, art. 1, 1(6) [abr. & rempl. O. Reg. 220/10, art. 1(1)], 12.0.2(1), (2) « *private label product* » [aj. O. Reg. 220/10, art. 3].

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Terrence J. O'Sullivan and *M. Paul Michell*, for the appellants Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. and Pharmx Rexall Drug Stores Ltd.

Mahmud Jamal, *Craig T. Lockwood*, *Eric Morgan* and *W. David Rankin*, for the appellants Shoppers Drug Mart Inc., Shoppers Drug Mart (London) Limited and Sanis Health Inc.

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges MacPherson, Epstein et Karakatsanis), 2011 ONCA 830, 109 O.R. (3d) 279, 286 O.A.C. 68, 345 D.L.R. (4th) 277, 37 Admin. L.R. (5th) 101, [2011] O.J. No. 5894 (QL), 2011 CarswellOnt 14816, qui a infirmé une décision des juges Whalen, Molloy et Swinton, 2011 ONSC 615, [2011] O.J. No. 480 (QL), 2011 CarswellOnt 720. Pourvoi rejeté.

Terrence J. O'Sullivan et *M. Paul Michell*, pour les appelantes Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. et Pharmx Rexall Drug Stores Ltd.

Mahmud Jamal, *Craig T. Lockwood*, *Eric Morgan* et *W. David Rankin*, pour les appelantes Shoppers Drug Mart Inc., Shoppers Drug Mart (London) Limited et Sanis Health Inc.

Lise G. Favreau, *Kim Twohig* and *Kristin Smith*, for the respondents.

The judgment of the Court was delivered by

[1] ABELLA J. — Canada spends more on prescription drugs per capita than almost all members of the Organisation for Economic Co-operation and Development.[1] Prescription drugs are the second largest area of health care spending.[2] Drug costs accounted for approximately 9.5% of government health care expenses in 1985. By 2010, that number had risen to 15.9%.[3]

[2] A key part of the strategy for controlling drug costs has been to replace brand-name drugs with generic drugs, in the expectation that generic drugs would be significantly cheaper. Those expectations were, however, challenged by persistent market practices that kept generic prices high. In Ontario, the result has been an episodic tug-of-war between regulators and those engaged in the manufacture, distribution and sale of generic drugs. This appeal arises out of one of those regulatory episodes.

Background

[3] The sale and pricing of generic drugs is provincially regulated. In Ontario, two complementary and intersecting statutes were introduced together in 1985 to address the problem of rising drug prices: the *Drug Interchangeability and*

1 *Health at a Glance 2009: OECD Indicators* (2009) (online), at p. 167.

2 Competition Bureau of Canada, *Benefiting from Generic Drug Competition in Canada: The Way Forward* (2008) (online), at p. 7.

3 Canadian Institute for Health Information, *National Health Expenditure Trends, 1975 to 2012* (2012), at p. 21.

Lise G. Favreau, *Kim Twohig* et *Kristin Smith*, pour les intimés.

Version française du jugement de la Cour rendu par

[1] LA JUGE ABELLA — Le Canada dépense davantage par habitant pour les médicaments délivrés sur ordonnance que presque tous les autres pays membres de l'Organisation de coopération et de développement économiques[1]. Les produits pharmaceutiques vendus sur ordonnance sont, en importance, la deuxième composante du coût des soins de santé[2]. En 1985, le coût des médicaments représentait environ 9,5 p. 100 du total des dépenses de santé du gouvernement. En 2010, cette proportion avait grimpé à 15,9 p. 100[3].

[2] Un élément clé de la stratégie de contrôle du coût des médicaments a consisté à remplacer les médicaments de marque par des médicaments génériques dans l'espoir que ces derniers soient beaucoup moins coûteux. Ces espoirs se sont toutefois estompés en raison de pratiques commerciales persistantes qui ont maintenu les prix des médicaments génériques à des niveaux élevés. En Ontario, on a ainsi assisté à des affrontements épisodiques entre les organismes de réglementation et les entreprises chargées de la fabrication, de la distribution et de la vente des médicaments génériques. Le présent pourvoi découle de l'un de ces épisodes conflictuels en matière de réglementation.

Contexte

[3] La vente et la fixation des prix des médicaments génériques sont réglementées par les provinces. En Ontario, deux lois qui se complètent et se recoupent ont été adoptées ensemble en 1985 afin de remédier au problème de la hausse des prix

1 *Panorama de la santé 2009 : Les indicateurs de l'OCDE* (2009) (en ligne), p. 167.

2 Bureau de la concurrence du Canada. *Pour une concurrence avantageuse des médicaments génériques au Canada : Préparons l'avenir* (2008) (en ligne), p. 7.

3 Institut canadien d'information sur la santé, *Tendances des dépenses nationales de santé, 1975 à 2012* (2012), p. 23.

lower prices to Ontario patients. With private label products, the price reductions that Sanis presumably enjoys would not be passed onto end-payors such as government, insurers and patients. Instead, it seems that profits would be retained within pharmacy-controlled organizations without benefiting consumers. While that would not be a "rebate" as defined in the legislation, it is a similar problem that the provisions against rebates seek to prevent. Further, there is a concern that Shoppers Drug Mart pharmacies could have an interest in dispensing [Sanis products] in preference to others, which raises the potential for a conflict of interest.

As a result, I do not intend to designate the Products as interchangeable under the [*Drug Interchangeability and Dispensing Fee Act*] or as listed drug products under the [*Ontario Drug Benefit Act*].

[21] Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. and Pharmx Rexall Drug Stores Ltd. operate the Pharma Plus and Rexall pharmacies in Ontario and, like Shoppers, have taken steps to set up their own private label manufacturer. They have indicated that they intend to follow the same general business model as Sanis.

[22] Shoppers and Katz challenged the private label regulations as being *ultra vires* on the grounds that they were inconsistent with the statutory purpose and mandate. They succeeded in the Divisional Court, where Molloy J. concluded that the private label regulations were neither consistent with the purposes of the *Ontario Drug Benefit Act* and the *Drug Interchangeability and Dispensing Fee Act*, nor authorised by the regulation-making provisions. This decision was reversed in the Court of Appeal, where a majority (MacPherson and Karakatsanis JJ.A.) found that the private label regulations were *intra vires*.

[23] I agree with MacPherson and Karakatsanis JJ.A. and would dismiss the appeal.

médicaments visent à inciter les fabricants à offrir des prix moins élevés aux patients ontariens. Dans le cas des produits sous marque de distributeur, les réductions de prix dont Sanis bénéficierait vraisemblablement ne seraient pas transmises à ceux qui les payent en bout de ligne comme le gouvernement, les assureurs et les patients. Il semble plutôt que les entreprises contrôlées par les pharmacies conserveraient les profits sans en faire bénéficier les consommateurs. Même s'il ne s'agirait pas d'un « rabais » au sens de la loi, le problème ressemble à celui que les dispositions interdisant les rabais visent à éviter. De plus, il y a lieu de craindre qu'il soit dans l'intérêt des pharmacies de la chaîne Shoppers Drug Mart de vendre [les produits Sanis] de préférence à tout autre, ce qui soulève la possibilité d'un conflit d'intérêts.

Par conséquent, je n'ai pas l'intention de désigner les produits comme des produits interchangeables au sens de la [*Loi sur l'interchangeabilité des médicaments et les honoraires de préparation*] ou comme des produits médicamenteux énumérés au sens de la [*Loi sur le régime de médicaments de l'Ontario*].

[21] Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. et Pharmx Rexall Drug Stores Ltd. exploitent les pharmacies Pharma Plus et Rexall en Ontario et, à l'instar de Shoppers, ont entrepris des démarches en vue d'établir leur propre fabricant de médicaments génériques sous marque de distributeur. Elles ont indiqué avoir l'intention de suivre le même modèle d'entreprise que celui de Sanis.

[22] Shoppers et Katz ont contesté les règlements relatifs aux produits sous marque de distributeur, les qualifiant d'*ultra vires* au motif qu'ils étaient incompatibles avec l'objet et le mandat de la loi. Elles ont obtenu gain de cause devant la Cour divisionnaire, où la juge Molloy a conclu que les règlements relatifs aux produits sous marque de distributeur n'étaient pas compatibles avec l'objet de la *Loi sur le régime de médicaments de l'Ontario* et de la *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation* et qu'ils n'étaient pas autorisés par les dispositions de ces lois relatives à la prise de règlements. Cette décision a été infirmée par la Cour d'appel, qui a jugé à la majorité (les juges MacPherson et Karakatsanis) que les règlements relatifs aux produits sous marque de distributeur étaient *intra vires*.

[23] Je suis d'accord avec les juges MacPherson et Karakatsanis et je suis d'avis de rejeter le pourvoi.

Analysis

[24] A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate (Guy Régimbald, *Canadian Administrative Law* (2008), at p. 132). This was succinctly explained by Lysyk J.:

> In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament, having regard to the purpose(s) or objects(s) of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.

(*Waddell v. Governor in Council* (1983), 8 Admin. L.R. 266, at p. 292)

[25] Regulations benefit from a presumption of validity (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 458). This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them (John Mark Keyes, *Executive Legislation* (2nd ed. 2010), at pp. 544-50); and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires* (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (loose-leaf), at 15:3200 and 15:3230).

[26] Both the challenged regulation and the enabling statute should be interpreted using a "broad and purposive approach . . . consistent with this Court's approach to statutory interpretation generally" (*United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 8; see also Brown and Evans, at 13:1310; Keyes, at pp. 95-97; *Glykis v.*

Analyse

[24] Pour contester avec succès la validité d'un règlement, il faut démontrer qu'il est incompatible avec l'objectif de sa loi habilitante ou encore qu'il déborde le cadre du mandat prévu par la Loi (Guy Régimbald, *Canadian Administrative Law* (2008), p. 132). Ainsi que le juge Lysyk l'a expliqué de manière succincte :

> [TRADUCTION] Pour déterminer si le texte législatif subordonné contesté est conforme aux exigences de la loi habilitante, il est essentiel de cerner la portée du mandat conféré par le législateur en ce qui a trait à l'intention ou à l'objet de la loi dans son ensemble. Le simple fait de démontrer que le délégataire a respecté littéralement le libellé (souvent vague) de la loi habilitante lorsqu'il a pris le texte législatif subordonné n'est pas suffisant pour satisfaire au critère de la conformité à la loi. Le libellé de la disposition habilitante doit être interprété comme comportant l'exigence primordiale selon laquelle le texte législatif subordonné doit respecter l'intention et l'objet de la loi habilitante prise dans son ensemble.

(*Waddell c. Governor in Council* (1983), 8 Admin. L.R. 266, p. 292)

[25] Les règlements jouissent d'une présomption de validité (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 458). Cette présomption comporte deux aspects : elle impose à celui qui conteste le règlement le fardeau de démontrer que celui-ci est invalide, plutôt que d'obliger l'organisme réglementaire à en justifier la validité (John Mark Keyes, *Executive Legislation* (2e éd. 2010), p. 544-550); ensuite, la présomption favorise une méthode d'interprétation qui concilie le règlement avec sa loi habilitante de sorte que, *dans la mesure du possible*, le règlement puisse être interprété d'une manière qui le rend *intra vires* (Donald J. M. Brown et John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (feuilles mobiles), 15:3200 et 15:3230).

[26] Il convient de donner au règlement contesté et à sa loi habilitante une « interprétation téléologique large [. . .] compatible avec l'approche générale adoptée par la Cour en matière d'interprétation législative » (*United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, 2004 CSC 19, [2004] 1 R.C.S. 485, par. 8; voir également Brown et Evans, 13:1310; Keyes, p. 95-97; *Glykis c.*

Hydro-Québec, 2004 SCC 60, [2004] 3 S.C.R. 285, at para. 5; Sullivan, at p. 368; *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, s. 64).

[27] This inquiry does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice" (*Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595 (C.A.), at p. 604). As explained in *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.):

> . . . the judicial review of regulations, as opposed to administrative decisions, is usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed. The motives for their promulgation are irrelevant. [para. 41]

[28] It is not an inquiry into the underlying "political, economic, social or partisan considerations" (*Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at pp. 112-13). Nor does the *vires* of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives (*CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, at p. 12; see also *Jafari*, at p. 602; Keyes, at p. 266). They must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose (*Alaska Trainship Corp. v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 280; *Jafari*, at p. 604; Brown and Evans, at 15:3261). In effect, although it is possible to strike down regulations as *ultra vires* on this basis, as Dickson J. observed, "it would take an egregious case to warrant such action" (*Thorne's Hardware*, at p. 111).

[29] The grants of authority relevant to the private label regulations are, under the *Drug Interchangeability and Dispensing Fee Act*:

Hydro-Québec, 2004 CSC 60, [2004] 3 R.C.S. 285, par. 5; Sullivan, p. 368; *Loi de 2006 sur la législation*, L.O. 2006, ch. 21, ann. F, art. 64).

[27] Cette analyse ne comporte pas l'examen du bien-fondé du règlement pour déterminer s'il est « nécessaire, sage et efficace dans la pratique » (*Jafari c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1995] 2 C.F. 595 (C.A.), p. 604). Comme le tribunal l'a expliqué dans l'arrêt *Ontario Federation of Anglers & Hunters c. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (C.A. Ont.) :

> [TRADUCTION] . . . le contrôle judiciaire des règlements, contrairement à celui des décisions administratives, se limite normalement à la question de leur incompatibilité avec l'objet de la loi ou à l'inobservation d'une condition préalable prévue par la loi. Les raisons qui ont motivé la prise du règlement ne sont pas pertinentes. [par. 41]

[28] L'analyse ne s'attache pas aux considérations sous-jacentes « d'ordre politique, économique ou social [ni à la recherche, par les gouvernements, de] leur propre intérêt » (*Thorne's Hardware Ltd. c. La Reine*, [1983] 1 R.C.S. 106, p. 113). La validité d'un règlement ne dépend pas non plus de la question de savoir si, de l'avis du tribunal, il permettra effectivement d'atteindre les objectifs visés par la loi (*CKOY Ltd. c. La Reine*, [1979] 1 R.C.S. 2, p. 12; voir également *Jafari*, p. 602; Keyes, p. 266). Pour qu'il puisse être déclaré *ultra vires* pour cause d'incompatibilité avec l'objet de la loi, le règlement doit reposer sur des considérations « sans importance », doit être « non pertinent » ou être « complètement étranger » à l'objet de la loi (*Alaska Trainship Corp. c. Administration de pilotage du Pacifique*, [1981] 1 R.C.S. 261; *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Cour div.); *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231, p. 280; *Jafari*, p. 604; Brown et Evans, 15:3261). En réalité, bien qu'il soit possible de déclarer un règlement *ultra vires* pour cette raison, comme le juge Dickson l'a fait observer, « seul un cas flagrant pourrait justifier une pareille mesure » (*Thorne's Hardware*, p. 111).

[29] Les dispositions de la *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation* qui confèrent le pouvoir de prendre des règlements relatifs aux produits sous marque de distributeur sont formulées comme suit :

14. – (1) The Lieutenant Governor in Council may make regulations,

(a) prescribing conditions to be met by products or by manufacturers of products in order to be designated as interchangeable with other products;

(b) prescribing conditions to be met for a product to continue to be designated as interchangeable;

Under the *Ontario Drug Benefit Act*, they are:

18. – (1) The Lieutenant Governor in Council may make regulations,

. . .

(b) prescribing conditions to be met for a drug product to be designated as a listed drug product;[10]

(b.1) prescribing conditions to be met for a listed drug product to continue to be designated as a listed drug product;

. . .

(m) respecting any matter considered necessary or advisable to carry out the intent and purposes of this Act.

[30] To start the analysis, we must determine the purposes of the enabling statutes.

[31] The original legislative intent animating the two *Acts* was to combat high drug prices caused by manufacturers quoting artificially high Formulary prices while providing hidden discounts to pharmacies. When the statutes were first introduced in 1985, the then Minister of Health, the Hon. Murray J. Elston, explained that they were intended to address the problem of "unrealistic" drug pricing:

10 A "listed drug product" is a drug listed in the Formulary by the Executive Officer (ss. 1(1), 1.2(2)(a) and 1.3).

14 (1) Le lieutenant-gouverneur en conseil peut, par règlement :

a) prescrire les conditions auxquelles doivent répondre les produits ou les fabricants de produits pour que ces produits puissent être désignés comme étant interchangeables avec d'autres produits;

b) prescrire les conditions auxquelles il doit être satisfait pour qu'un produit continue d'être désigné comme étant interchangeable;

La *Loi sur le régime de médicaments de l'Ontario* prévoit ce qui suit :

18 (1) Le lieutenant-gouverneur en conseil peut, par règlement :

. . .

b) prescrire les conditions auxquelles il doit être satisfait pour qu'un produit médicamenteux soit désigné comme produit médicamenteux énuméré[10];

b.1) prescrire les conditions auxquelles il doit être satisfait pour qu'un produit médicamenteux énuméré continue d'être désigné comme produit médicamenteux énuméré;

. . .

m) traiter de toute question qu'il considère utile ou nécessaire pour réaliser l'objet de la présente loi.

[30] Au début de l'analyse, il nous faut préciser en quoi consistent les objectifs visés par les lois habilitantes.

[31] L'intention du législateur à l'origine des deux *Lois* était de lutter contre les prix élevés des médicaments du fait que les fabricants affichaient au Formulaire des médicaments des prix artificiellement élevés tout en accordant des rabais cachés aux pharmacies. Lorsque les projets de loi ont été présentés pour la première fois en 1985, le ministre de la Santé de l'époque, M. Murray J. Elston, a expliqué qu'ils visaient à s'attaquer au problème des prix [TRADUCTION] « irréalistes » des médicaments :

10 Un « produit médicamenteux énuméré » est un médicament énuméré dans le Formulaire des médicaments par l'administrateur (par. 1(1), al. 1.2(2)a) et art. 1.3).

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1. *Chan v. Canada (Minister of Employment and Immigration) (T.D.), [1994] 2 F.C. 612*

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Chan v. Canada (Minister of Employment and Immigration) (T.D.), [1994] 2 F.C. 612

Federal Courts Reports

Federal Court of Canada - Trial Division

Rothstein J.

Heard: Québec, January 6, 1994.

Judgment: Ottawa, January 19, 1994.

Court File No. 92-T-1825

[1994] 2 F.C. 612 | *[1994] F.C.J. No. 45*

Tai Sun Chan (Applicant) v. The Minister of Employment and Immigration (Respondent)

Case Summary

Citizenship and Immigration — Judicial review — Federal Court jurisdiction — Applicant landed as "entrepreneur" — Application to review immigration officer's decision applicant not having satisfied conditions imposed upon landing — Application properly brought as application for judicial review — Tétreault-Gadoury not applicable — Immigration Act not distinguishing between jurisdiction conferred on immigration officer and another immigration tribunal to which immigration officer's decision may be appealed — Immigration officers having jurisdiction to decide questions of law, including validity of regulations pursuant to which such decisions made — Under Federal Court Act, appropriate procedure application for judicial review, except in certain situations such as where viva voce evidence required — S. 18.1(3) giving Court authority to make declaration of invalidity of immigration officer's decision based on invalidity of regulation pursuant to which decision made — Multiplicity of procedures if different procedures for errors of fact, law resulting in additional cost, confusion.

The applicant was landed in 1989 as an "entrepreneur" subject to certain conditions, pursuant to former

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subparagraph 23(1)(d)(iv) of the Immigration Regulations, 1978, which required an immigrant to establish a business or commercial venture in Canada that would make a significant contribution to the economy, and whereby employment opportunities in Canada would be created within two years after the date of landing. In 1992 an immigration officer wrote to the applicant advising that he had not satisfied the conditions attached to his landing. The applicant filed an application for judicial review of that decision, seeking inter alia a declaration that former subparagraph 23(1)(d)(iv) was ultra vires the Immigration Act. The respondent acknowledged that the immigration officer had made certain errors, but submitted that the applicant should proceed by way of action, not by way of application for judicial review because immigration officers do not have the jurisdiction to decide questions of law. The respondent relied on Tétreault-Gadoury v. Canada (Employment and Immigration Commission) wherein La Forest J. found, based on the scheme of the Unemployment Insurance Act, 1971, that the board of referees had no jurisdiction to decide the constitutional question. His Lordship noted that, although the Act did not specifically address the question of the jurisdiction of the board of referees, the Act did expressly confer jurisdiction to consider questions of law, including constitutional questions, on the umpire to whom there was an appeal from the board of referees. Referring to the maxim expressio unius est exclusio alterius, he concluded that the board of referees had no jurisdiction to consider constitutional issues. The respondent pointed out that under the Immigration Act other tribunals have been expressly vested with the jurisdiction to decide questions of law and fact. By contrast, immigration officers are not expressly vested with such power. The issues were (1) whether immigration officers have jurisdiction to decide questions of law, in particular, questions as to the validity of the regulations applied by them (in which case, Tétreault-Gadoury would not apply); (2) if not, whether Tétreault-Gadoury applied so that this Court, upon an application for judicial review, would not have jurisdiction to decide the validity of regulations applied by immigration officers.

Held, the matter should be proceeded with as an application for judicial review.

Tétreault-Gadoury did not apply. Under the Immigration Act, there is no administrative or quasi-judicial appeal from a decision of this type by an immigration officer. There is no distinction, as in the Unemployment Insurance Act, 1971, between the jurisdiction conferred on an immigration officer and another immigration tribunal to which a decision of an immigration officer may be appealed. Although other immigration tribunals are expressly given jurisdiction to decide questions of law, they are not tribunals that consider appeals of this type from immigration officers. Any decision made by an immigration officer must be based on findings of fact and interpretations of law. In imposing conditions upon the landing and then deciding whether those conditions have been complied with, the immigration officer would most often be dealing with factual questions, but occasionally some question as to what the condition requires or whether the condition is consistent with the regulation under which it is imposed may be raised. These are questions of law as is the question as to the validity of a regulation itself. If immigration officers have jurisdiction to interpret regulations that they apply they have jurisdiction to decide the validity of such regulations. If the dicta in Tétreault-Gadoury applied, there would be no possibility of seeking judicial review of decisions of immigration officers on the basis of errors of law. Parliament did not intend such an unreasonable result.

The current Federal Court Act makes it clear that the appropriate procedure to follow when challenging a decision of a federal board, commission or other tribunal, is by way of an application for judicial review and not by way of an action. In an appropriate case (i.e. where viva voce evidence is required), an application for judicial review may be proceeded with as an action as if it had been commenced by statement of claim, but that does not change the originating procedure. Subsection 18.1(3) gives the Court full authority to make a declaration of invalidity of a decision of an immigration officer based on the invalidity of the regulation pursuant to which the immigration officer made his decision. If an error of law could only be brought before the Court by way of action, applicants seeking relief from decisions of immigration officers would be required to choose between different processes depending upon the grounds to be advanced. This could lead to the institution of two processes in a case such as this. Such a multiplicity of procedures would serve no useful purpose and the confusion and additional cost would be clear disadvantages. It had not been demonstrated that the Court would be impeded in the performance of its functions or that any party would be prejudiced by there being only one process, i.e. judicial review, for seeking relief in this Court from decisions of immigration officers.

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Statutes and Regulations Judicially Considered

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44].
Federal Court Act, *R.S.C., 1985, c. F-7, ss. 18* (as am. by S.C. 1990, c. 8, s. 4), 18.1 (as enacted idem, s. 5), 18.4 (as enacted idem).
Federal Court Rules, C.R.C., c. 663, R. 1618 (as enacted by SOR/92-43, s. 19).
Immigration Act, R.S.C., 1985, c. I-2, s. 69.4(2) (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 18).
Immigration Regulations, 1978, SOR/78-172, s. 23(1) (as am. by SOR/83-837, s. 3; 85-1038, s. 7; 90-750, s. 3).
Immigration Regulations, 1978, amendment, SOR/93-44, s. 17.
Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48.

Cases Judicially Considered

Distinguished:

Tétreault-Gadoury v. Canada (Employment and Immigration Commission), *[1991] 2 S.C.R. 22*; *(1991), 81 D.L.R. (4th) 358*; *50 Admin. L.R. 1*; *36 C.C.E.L. 117*; *91 CLLC 14,023*; *4 C.R.R. (2d) 12*; *126 N.R. 1*; revg Tétreault-Gadoury v. Canada (Canada Employment and Immigration Commission), *[1989] 2 F.C. 245*; *(1988), 53 D.L.R. (4th) 384*; *33 Admin. L.R. 244*; *23 C.C.E.L. 103*; *88 CLLC 14,050*; *88 N.R. 6* (C.A.);
Estrada v. Canada (Minister of Employment and Immigration) *(1987), 8 F.T.R. 317*; *1 Imm. L.R. (2d) 24* (F.C.T.D.);
Southam Inc. v. Canada (Minister of Employment and Immigration), *[1987] 3 F.C. 329*; *(1987), 13 F.T.R. 138*; *3 Imm. L.R. (2d) 226* (T.D.).

APPLICATION for leave to bring an application for judicial review. Application granted.

Counsel

T. Constance Nakatsu for applicant. I. John Loncar for respondent.

Solicitors

Cecil L. Rotenberg, Don Mills, Ontario, for applicant. Deputy Attorney General of Canada for respondent.

The following are the reasons for order rendered in English by

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ROTHSTEIN J.

1 The procedural issue giving rise to this order is whether the question of the validity of regulations, pursuant to which an immigration officer decided that an immigrant had not satisfied the conditions attached to his landing, is subject to judicial review by this Court.

2 The applicant is a citizen of Hong Kong. On August 16, 1989, he was landed as an "entrepreneur" and conditions were attached to his landing.

3 The nature of the terms and conditions for landing for entrepreneurs, at the time the applicant landed, was set out in former subparagraph 23(1)(d)(iv) of the Immigration Regulations, 1978,[1] SOR/78-172, as amended [by SOR/83-837, s. 3; 85-1038, s. 7; 90-750, s. 3]:

> 1. (1) Where terms or conditions may be imposed
>
> . . .
>
> only terms or conditions of the following nature may be imposed, namely,
>
> (d) in the case of an immigrant,
>
> . . .
>
> 1iv) where he was assessed under section 8 as an entrepreneur, the condition that, within a period of not more than two years after the date of his landing,
>
> 1A) he establish, purchase or make a substantial investment in a business or commercial venture in Canada that will make a significant contribution to the economy and whereby employment opportunities in Canada are created or continued for one or more Canadian citizens or permanent residents, other than the entrepreneur and his dependants, and
>
> 1B) he participate actively and on an on-going basis in the management of that business or commercial venture,

4 On October 16, 1992, A. Collerman, an immigration officer, wrote to the applicant advising that he had not satisfied the terms and conditions related to his landing. The letter stated, inter alia:

> In my opinion, you have not satisfied the terms and conditions imposed on your visa upon your landing in Canada. You are the subject of a report under Section 27 of the Immigration Act since August 1991. Our report will recommend that you be directed to an Immigration Inquiry, where the issuance of a removal order may be made against you and your dependents [sic].

5 The applicant filed an application for judicial review of the decision of Immigration Officer Collerman. In his application, the applicant sought, inter alia, a declaration that former subparagraph 23(1)(d)(iv) of the Immigration Regulations, 1978 is ultra vires the Immigration Act, R.S.C., 1985, c. I-2, as amended. The terms and conditions, which the immigration officer found had not been satisfied, had been imposed pursuant to this subparagraph.

6 The applicant's leave application was granted. After leave was granted, counsel for the respondent, acknowledging difficulties with the Immigration Officer's decision, brought a motion requesting, inter alia:

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(1) an order that the decision of Immigration Officer Collerman be set aside; and

(2) an order that the applicant's effort to fulfil his terms and conditions of landing be reassessed by a different immigration officer.

7 In support of the respondent's motion, counsel for the respondent filed the affidavit of Harley Nott, a barrister and solicitor employed by the respondent. In his affidavit, Mr. Nott acknowledged that Immigration Officer Collerman made certain errors which justified the matter being referred back for redetermination.

8 Applicant's counsel was not willing to agree that the Court should summarily refer the matter back to a different immigration officer for redetermination as requested by respondent's counsel. He submitted that in the event the applicant was not successful on the reassessment, the applicant would find himself back in this Court presenting the same arguments that are presently before the Court (i.e. that former subparagraph 23(1)(d)(iv) of the Immigration Regulations, 1978 is ultra vires the Immigration Act). As applicant's counsel was not consenting to the motion, counsel for the respondent withdrew the motion.

9 Counsel for the respondent now submits that the applicant's submission, that former subparagraph 23(1)(d)(iv) of the Immigration Regulations, 1978 is ultra vires the Immigration Act, is not properly before the Court. He submits that the applicant is seeking declaratory relief as to the validity of regulations pursuant to which immigration officers make decisions. He says that as immigration officers do not have the jurisdiction to decide questions of law, it is not proper for the applicant to proceed by way of application for judicial review.

10 For this proposition, respondent's counsel relies on Tétreault-Gadoury v. Canada (Employment and Immigration Commission), *[1991] 2 S.C.R. 22*. In that case, a constitutional question was brought before the Federal Court of Appeal [*[1989] 2 F.C. 245*] directly from a decision of a board of referees under the Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48. La Forest J. found, based on the scheme of the Unemployment Insurance Act, 1971, that the board of referees had no jurisdiction to decide the constitutional question. Because the jurisdiction of the Federal Court of Appeal was limited to overseeing and controlling the legality of decisions of administrative bodies and to referring matters back for redetermination, the Court did not have the jurisdiction to make a declaration on the constitutional question when the board of referees itself did not have such jurisdiction.

11 In the case at bar, two issues must be addressed.

(1) Do immigration officers have jurisdiction to decide questions of law and, in particular, questions as to the validity of the regulations applied by them? If the answer is yes then Tétreault-Gadoury (supra) is of no application.

(2) If immigration officers do not have jurisdiction to decide questions of law, is Tétreault-Gadoury (supra) to be interpreted and applied so that this Court, upon an application for judicial review, would not have jurisdiction to decide the validity of regulations applied by immigration officers?

12 As to the first issue, in arguing that immigration officers do not have the power to decide questions of law, counsel for the respondent pointed out that under the Immigration Act, other tribunals have been expressly vested with the jurisdiction to decide questions of law and fact. For example, the Immigration Appeal Division under subsection 69.4(2) [as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 18] is expressly authorized to hear and determine all questions of law and fact that may arise in relation to the making of a removal order or the refusal to approve an application for landing made by a member of the family class. By contrast, immigration officers are not expressly vested with such power. He analogized the limitation on the powers of immigration officers to the limitation on boards of referees under the Unemployment Insurance Act, 1971, as determined in Tétreault-Gadoury (supra).

13 In Tétreault-Gadoury (supra), La Forest J. noted that although the Unemployment Insurance Act, 1971 did not

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specifically address the question of the jurisdiction of the board of referees, that Act did expressly confer jurisdiction to consider questions of law, including constitutional questions, on the umpire to whom there was an appeal from the board of referees. Referring to the maxim expressio unius est exclusio alterius, he concluded that the board of referees had no jurisdiction to consider constitutional questions.

14 However, in the case of the Immigration Act, there is no administrative or quasi-judicial appeal from a decision (of this type) of an immigration officer. There is no distinction, as in the Unemployment Insurance Act, 1971, between the jurisdiction conferred on an immigration officer and another immigration tribunal to which a decision of an immigration officer may be appealed. Although respondent's counsel points to other immigration tribunals expressly given jurisdiction to decide questions of law, they are not tribunals that consider appeals of this type from immigration officers. I am therefore of the view that the decision of the Supreme Court in Tétreault-Gadoury (supra), based on the statutory scheme of the Unemployment Insurance Act, 1971, does not apply to the determination of the question of whether immigration officers, under the Immigration Act, have jurisdiction to decide questions of law.

15 It seems to me that any decision made by an immigration officer must be based on findings of fact and interpretations of law. The function of immigration officers in cases such as the one at bar is to impose conditions upon the landing of certain immigrants and then decide whether the immigrant has complied with such conditions. I would expect that in most cases the immigration officer would be dealing with factual questions, e.g. what has the applicant done in relation to the condition imposed? But occasionally, at least some question as to precisely what the condition requires or whether or not the condition is consistent with the regulation under which it is imposed may be raised. These are questions of law as is the question as to the validity of a regulation itself.

16 Indeed, in this judicial review application, the respondent moved to have the immigration officer's decision set aside because, according to the affidavit of Harley Nott,

> 3. Officer Collerman, in assessing the Applicant's efforts to fulfil his terms and conditions of landing, pursuant to Immigration Regulation s. 23(1)(d)(iv), made the following errors:
>
> 1a) he incorrectly concluded that an educational facility did not qualify as a business or commercial venture that would make a significant contribution to the Canadian economy when it, in fact, did; and

The determination that an educational facility does or does not qualify as a business or commercial venture that would make a significant contribution to the Canadian economy is itself a determination of law. Mr. Nott himself seems to be saying that the immigration officer erred based upon a misinterpretation of whether former subparagraph 23(1)(d)(iv) included educational facilities. Whether or not the immigration officer erred in his interpretation, the process of interpreting the regulation is itself a determination of law. I see no reason why, if immigration officers have jurisdiction to interpret the regulations that they apply (which the respondent appears to be acknowledging), they do not have jurisdiction to decide the validity of such regulations when a challenge to them is raised.

17 I am of the view that in making decisions, immigration officers must have jurisdiction to decide relevant questions of law and that such jurisdiction includes deciding questions as to the validity of regulations pursuant to which such decisions are made.

18 Even if I am wrong, and immigration officers do not have jurisdiction to decide questions of law, or at least questions as to the validity of regulations that they apply, I do not think that the limitation placed on the Federal Court by the Supreme Court of Canada in Tétreault-Gadoury (supra), applies to the circumstances of the case at bar. The way in which La Forest J. characterized the issue in Tétreault-Gadoury (supra), was whether a tribunal, not expressly provided with the power to consider all relevant law may, nonetheless, apply the Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K) [R.S.C., 1985, Appendix II, No. 44]. The issue in the case at bar does not involve the Charter.[2] Moreover, as I have earlier indicated, there is no analogy in the Immigration Act to the distinction under the Unemployment

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Insurance Act, 1971, between boards of referees and umpires. There is no tribunal other than the Federal Court that may consider errors of law in decisions of immigration officers.

19 If the dicta of La Forest J. in Tétreault-Gadoury (supra), were applicable, there would be no possibility for persons to seek judicial review of decisions of immigration officers on the basis of errors of law. This is an unreasonable conclusion and cannot have been intended by Parliament.

20 In answer to the unreasonableness of such a conclusion, counsel for the respondent submits that the way in which an error of law (or at least the question of the validity of regulations inherent in decisions of immigration officers) may be brought before the Federal Court, is by way of an action and not by way of judicial review.

21 In support of this position, respondent's counsel relied upon some decisions of the Federal Court such as Estrada v. Canada (Minister of Employment and Immigration) *(1987), 8 F.T.R. 317* (F.C.T.D.) and Southam Inc. v. Canada (Minister of Employment and Immigration), *[1987] 3 F.C. 329* (T.D.). These authorities all interpret the jurisdiction and processes of the Federal Court under the Federal Court Act, *R.S.C., 1985, c. F-7*, as amended, prior to its amendment in 1990. The 1990 amendments significantly changed and simplified these processes.

22 In my view, the provisions of the current Federal Court Act make it clear that the appropriate procedure to follow when challenging a decision of a federal board, commission or other tribunal, is by way of an application for judicial review and not by way of an action. Section 18 [as am. by S.C. 1990, c. 8, s. 4] of the Federal Court Act states:

> 18. (1) Subject to section 28, the Trial Division has exclusive original jurisdiction
>
> (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
>
> . . .
>
> (3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

23 This version of section 18 of the Federal Court Act first appeared by virtue of S.C. 1990, c. 8, s. 4. With the enactment of this section, any doubt as to how challenges against federal boards, commissions or other tribunals should be brought to this Court was clarified. This includes claims for declaratory relief. The proper procedure is an application for judicial review.

24 This is not to say that in an appropriate case, an application for judicial review may not be proceeded with as an action as if it had been started by way of statement of claim. Subsection 18.4(2) [as enacted idem, s. 5] provides:

18.4 . . .

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1. *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, [2003] 2 S.C.R. 504*

Client/Matter: -None-
Search Terms: 2003 SCC 54
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, [2003] 2 S.C.R. 504

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Heard: December 9, 2002;

Judgment: October 3, 2003.

File Nos.: 28372, 28370.

[2003] 2 S.C.R. 504 | *[2003] 2 R.C.S. 504* | *[2003] S.C.J. No. 54* | *[2003] A.C.S. no 54* | *2003 SCC 54*

Donald Martin , appellant; v. Workers' Compensation Board of Nova Scotia and Attorney General of Nova Scotia , respondents, and Nova Scotia Workers' Compensation Appeals Tribunal, Ontario Network of Injured Workers Groups, Canadian Labour Congress, Attorney General of Ontario, Attorney General of British Columbia and Workers' Compensation Board of Alberta, interveners. And between Ruth A. Laseur , appellant; v. Workers' Compensation Board of Nova Scotia and Attorney General of Nova Scotia , respondents, and Nova Scotia Workers' Compensation Appeals Tribunal, Ontario Network of Injured Workers Groups, Canadian Labour Congress, Attorney General of Ontario, Attorney General of British Columbia and Workers' Compensation Board of Alberta, interveners. [page505]

(122 paras.)

Case Summary

Appeal From:

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ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Catchwords:

Administrative law — Workers' Compensation Appeals Tribunal — Jurisdiction — Charter issues — Constitutional validity of provisions of Appeals Tribunal's enabling statute — Whether Appeals Tribunal has jurisdiction to apply Canadian Charter of Rights and Freedoms — Workers' Compensation Act, *S.N.S. 1994-95, c. 10, s. 10B* — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, *N.S. Reg. 57/96*.

Catchwords:

Constitutional law — Charter of Rights — Equality rights — Workers' compensation legislation excluding chronic pain from purview of regular workers' compensation system and providing in lieu of benefits normally available to injured workers four-week functional restoration program beyond which no further benefits are available — Whether legislation infringes s. 15(1) of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter — Workers' Compensation Act, *S.N.S. 1994-95, c. 10, s. 10B* — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, *N.S. Reg. 57/96*.

Catchwords:

Administrative law — Boards and tribunals — Jurisdiction — Constitutional issues — Powers of administrative tribunals to determine questions of constitutional law — Appropriate test.

Summary:

The appellants, L and M, both suffer from the disability of chronic pain attributable to a work-related injury. M worked as a foreman and sustained a lumbar sprain. In the following months, he returned to work several times, but recurring pain required him to stop. He attended a work conditioning and hardening program. During this period, the Workers' Compensation Board of Nova Scotia provided him with temporary disability benefits and rehabilitation [page506] services. When his temporary benefits were discontinued, M sought review of this decision, but his claim was denied by the Board. L was employed as a bus driver and injured her back and her right hand when she slipped and fell from the bumper of her bus. She received temporary disability benefits. Although L attempted to return to work on several occasions, she found that performing her duties aggravated her condition. She was denied a permanent partial disability award and vocational rehabilitation assistance. M and L appealed the Board's decisions to the Workers' Compensation Appeals Tribunal on the ground that the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations* and portions of s. 10B of the *Workers' Compensation Act* infringed s. 15(1) of the *Canadian Charter of Rights and Freedoms*. These provisions exclude chronic pain from the purview of the regular workers' compensation system and provide, in lieu of the benefits normally available to injured workers, a four-week Functional Restoration Program beyond which no further benefits are available. The Board challenged the Appeals Tribunal's jurisdiction to hear the *Charter* argument.

The Appeals Tribunal affirmed its jurisdiction to apply the *Charter* and allowed M's appeal on the merits, holding that the Regulations and s. 10B(c) of the Act violated s. 15 of the *Charter* and that these violations were not justified under s. 1. M was awarded temporary benefits from August 6 to October 15, 1996. In L's appeal, the Appeals Tribunal concluded, based on the reasons given in M's appeal, that s. 10A and s. 10B(b) and (c) of the Act also violated s. 15(1) of the *Charter* and were not saved by s. 15(2) or s. 1; however, the Appeals Tribunal found that while L suffered from chronic pain attributable to her work injury, her permanent medical impairment rating under the applicable guidelines was 0 percent, thus barring her from obtaining permanent impairment or vocational rehabilitation. The Board appealed the Appeals Tribunal's *Charter*

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conclusions, M cross-appealed the cut-off of benefits as of October 15, 1996, and L cross-appealed the refusal to award benefits. The Court of Appeal allowed the Board's appeals and dismissed the cross-appeals. The court found that the Appeals Tribunal did not have jurisdiction to consider the constitutional validity of the Act and that, in any event, the chronic pain provisions did not demean the human dignity of [page507] the claimants and thus did not violate s. 15(1) of the *Charter*.

Held: The appeals should be allowed. Section 10B of the Act and the Regulations in their entirety infringe s. 15(1) of the *Charter* and the infringement is not justified under s. 1. The challenged provisions are of no force or effect by operation of s. 52(1) of the *Constitution Act, 1982*. The general declaration of invalidity is postponed for six months from the date of this judgment. In M's case, the decision rendered by the Appeals Tribunal is reinstated. L's case is returned to the Board.

The Constitution is the supreme law of Canada and, by virtue of s. 52(1) of the *Constitution Act, 1982*, the question of constitutional validity inheres in every legislative enactment. From this principle of constitutional supremacy flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts. To allow an administrative tribunal to decide *Charter* issues does not undermine the role of the courts as final arbiters of constitutionality in Canada. Administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard. In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision-makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases.

The Court of Appeal erred in concluding that the Appeals Tribunal did not have jurisdiction to consider the constitutionality of the challenged provisions of the Act and the Regulations. Administrative tribunals which have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. In applying this approach, there is no need to draw any distinction between "general" and "limited" questions of law. Explicit jurisdiction must be found in the terms of the statutory grant of authority. [page508] Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself. The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption by pointing to an explicit withdrawal of authority to consider the *Charter*; or by convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* (or a category of questions that would include the *Charter*, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations. To the extent that *Cooper v. Canada (Human Rights Commission)*, *[1996] 3 S.C.R. 854*, is inconsistent with this approach, it should no longer be relied upon.

The Appeals Tribunal could properly consider and decide the *Charter* issue raised in this case. The legislature expressly conferred on the Appeals Tribunal the authority to decide questions of law by providing, in s. 252(1) of the Act, that it "may confirm, vary or reverse the decision of a hearing officer" exercising the authority conferred upon the Board by s. 185(1) of the Act to "determine all questions of fact and law arising pursuant to this Part". Other provisions of the Act also confirm the legislature's intention that the Appeals Tribunal decide questions of law, including s. 256(1), which provides for a further appeal to the Court of Appeal "on any question of law". This suggests that the Appeals Tribunal may deal initially with such questions. The Appeals Tribunal thus has explicit jurisdiction to decide questions of law arising under the challenged provisions, a jurisdiction which is presumed to include the authority to consider their

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constitutional validity. This presumption is not rebutted in this case, as there is no clear implication arising from the Act that the legislature intended to exclude the *Charter* from the scope of the Appeals Tribunal's authority. Even if there had been no express provision endowing the Appeals Tribunal with authority to consider and decide questions of law arising under the Act, an examination of [page509] the statutory scheme set out by the Act would lead to the conclusion that it has implied authority to do so.

The Court of Appeal also erred in concluding that the challenged provisions of the Act and the Regulations did not infringe s. 15(1) of the *Charter*. The appropriate comparator group for the s. 15(1) analysis in this case is the group of workers subject to the Act who do not have chronic pain and are eligible for compensation for their employment-related injuries. By entirely excluding chronic pain from the application of the general compensation provisions of the Act and limiting the applicable benefits to a four-week Functional Restoration Program for workers injured after February 1, 1996, the Act and the Regulations clearly impose differential treatment upon injured workers suffering from chronic pain on the basis of the nature of their physical disability, an enumerated ground under s. 15(1) of the *Charter*. The view that since both the claimants and the comparator group suffer from physical disabilities, differential treatment of chronic pain within the workers' compensation scheme is not based on physical disability must be rejected. Differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated. Distinguishing injured workers with chronic pain from those without is still a disability-based distinction. Although, under the current guidelines, L would be found to have a 0 percent impairment rating and would thus be denied benefits anyway, deprivation of access to an institution available to others, even though the individual bringing the claim would not necessarily derive immediate benefits from such access, constitutes differential treatment. In the context of the Act, and given the nature of chronic pain, the differential treatment is discriminatory. It is discriminatory because it does not correspond to the actual needs and circumstances of injured workers suffering from chronic pain, who are deprived of any individual assessment of their needs and circumstances. Such workers are, instead, subject to uniform, limited benefits based on their presumed characteristics as a group. The scheme also ignores the needs of those workers who, despite treatment, remain permanently disabled by chronic pain. Nothing indicates that the scheme is aimed at improving the circumstances of a more disadvantaged group, or that the interests affected are merely economic or otherwise minor. On the contrary, the denial of the reality of the pain suffered by the affected workers reinforces widespread negative assumptions held by employers, compensation officials and some members of the medical profession. A reasonable person in circumstances similar to those of L and M, fully apprised of all the relevant circumstances and taking into account the relevant contextual factors, would [page510] conclude that the challenged provisions have the effect of demeaning the dignity of chronic pain sufferers.

The infringement of L's and M's equality rights cannot be justified under s. 1 of the *Charter*. The first objective of maintaining the financial viability of the Accident Fund is not pressing and substantial. Budgetary considerations in and of themselves cannot justify violating a *Charter* right, although they may be relevant in determining the appropriate degree of deference to governmental choices based on a non-financial objective. Likewise, the second objective of developing a consistent legislative response to chronic pain claims cannot stand on its own. Mere administrative expediency or conceptual elegance cannot be sufficiently pressing and substantial to override a *Charter* right. This objective only becomes meaningful when examined with the third objective of avoiding fraudulent claims based on chronic pain. Developing a consistent legislative response to the special issues raised by chronic pain claims -- such as determining whether the pain is actually caused by the work-related accident and assessing the relevant degree of impairment -- in order to avoid fraudulent claims is a pressing and substantial objective. The challenged provisions of the Act and the Regulations are rationally connected to this objective. It is obvious, however, that the blanket exclusion of chronic pain from the workers' compensation system does not minimally impair the rights of chronic pain sufferers. The challenged provisions make no attempt whatsoever to determine who is genuinely suffering and needs compensation, and who may be abusing the system. They ignore the very real needs of the many workers who are in fact impaired by chronic pain and whose condition is not appropriately remedied by the four-week Functional Restoration Program. The fourth objective is to implement early medical intervention and return to work as the optimal treatment for chronic pain. Assuming

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that this objective is pressing and substantial and that the challenged provisions are rationally connected to it, they do not minimally impair the rights of chronic pain sufferers. No evidence indicates that an automatic cut-off of benefits regardless of individual needs is necessary to achieve that goal. This is particularly true with respect to ameliorative benefits which would actually facilitate return to work, such as vocational rehabilitation, medical aid and the rights [page511] to re-employment and accommodation. Moreover, the legislation deprives workers whose chronic pain does not improve as a result of early medical intervention and who return to work from receiving any benefits beyond the four-week Functional Restoration Program. Others, like L, are not even admissible to this program because of the date of their injuries. The deleterious effects of the challenged provisions on these workers clearly outweigh their potential beneficial effects.

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Overruled: Cooper v. Canada (Human Rights Commission), *[1996] 3 S.C.R. 854*; discussed: Douglas/Kwantlen Faculty Assn. v. Douglas College, *[1990] 3 S.C.R. 570*; Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), *[1991] 2 S.C.R. 5*; Tétreault-Gadoury v. Canada (Employment and Immigration Commission), *[1991] 2 S.C.R. 22*; referred to: Egan v. Canada, *[1995] 2 S.C.R. 513*; Vriend v. Alberta, *[1998] 1 S.C.R. 493*; M. v. H., *[1999] 2 S.C.R. 3*; Battlefords and District Co-operative Ltd. v. Gibbs, *[1996] 3 S.C.R. 566*; Granovsky v. Canada (Minister of Employment and Immigration), *[2000] 1 S.C.R. 703*, *2000 SCC 28*; Weber v. Ontario Hydro, *[1995] 2 S.C.R. 929*; Bell Canada v. Canada (Human Rights Commission), *[2001] 2 F.C. 392*, rev'd *[2001] 3 F.C. 481*; Canada (Minister of Citizenship and Immigration) v. Reynolds *(1997), 139 F.T.R. 315*; McLeod v. Egan, *[1975] 1 S.C.R. 517*; David Taylor & Son, Ltd. v. Barnett, [1953] 1 All E.R. 843; Canadian Broadcasting Corp. v. Canada (Labour Relations Board), *[1995] 1 S.C.R. 157*; Pasiechnyk v. Saskatchewan (Workers' Compensation Board), *[1997] 2 S.C.R. 890*; Law v. Canada (Minister of Employment and Immigration), *[1999] 1 S.C.R. 497*; Reference re Workers' Compensation Act, 1983 (Nfld.), *[1989] 1 S.C.R. 922*; Janzen v. Platy Enterprises Ltd., *[1989] 1 S.C.R. 1252*; Brooks v. Canada Safeway Ltd., *[1989] 1 S.C.R. 1219*; Winko v. British Columbia (Forensic Psychiatric Institute), *[1999] 2 S.C.R. 625*; Eaton v. Brant County Board of Education, *[1997] 1 S.C.R. 241*; Andrews v. Law Society of British Columbia, *[1989] 1 S.C.R. 143*; [page512] Lavoie v. Canada, *[2002] 1 S.C.R. 769*, *2002 SCC 23*; Corbiere v. Canada (Minister of Indian and Northern Affairs), *[1999] 2 S.C.R. 203*; Lovelace v. Ontario, *[2000] 1 S.C.R. 950*, *2000 SCC 37*; R. v. Swain, *[1991] 1 S.C.R. 933*; British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), *[1999] 3 S.C.R. 868*; British Columbia (Public Service Employee Relations Commission) v. BCGSEU, *[1999] 3 S.C.R. 3*; Gosselin v. Quebec (Attorney General), *[2002] 4 S.C.R. 429*, *2002 SCC 84*; R. v. Oakes, *[1986] 1 S.C.R. 103*; Eldridge v. British Columbia (Attorney General), *[1997] 3 S.C.R. 624*; Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, *[1997] 3 S.C.R. 3*; Schachter v. Canada, *[1992] 2 S.C.R. 679*; R. v. Edwards Books and Art Ltd., *[1986] 2 S.C.R. 713*; White v. Slawter *(1996), 149 N.S.R. (2d) 321*; Marinelli v. Keigan *(1999), 173 N.S.R. (2d) 56*.

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Roman, Andrew J. "Case Comment: Cooper v. Canada (Human Rights Commission)" (1997), 43 Admin. L.R. (2d) 243.

History and Disposition:

APPEALS from judgments of the Nova Scotia Court of Appeal *(2000), 192 D.L.R. (4th) 611*, *188 N.S.R. (2d) 330*, 587 A.P.R. 330, *26 Admin L.R. (3d) 90*, *84 C.R.R. (2d) 246*, *[2000] N.S.J. No. 353* (QL), *2000 NSCA 126*, allowing the appeals and dismissing the cross-appeals from the decisions of the Workers' Compensation Appeals Tribunal. Appeals allowed.

Counsel

Kenneth H. LeBlanc, Anne S. Clark, Anne Derrick, Q.C., and Patricia J. Wilson, for the appellants.

Brian A. Crane, Q.C., David P. S. Farrar and Janet Curry, for the respondent the Workers' Compensation Board of Nova Scotia.

Catherine J. Lunn, for the respondent the Attorney General of Nova Scotia.

John P. Merrick, Q.C., and Louanne Labelle, for the intervener the Nova Scotia Workers' Compensation Appeals Tribunal.

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Ena Chadha and William Holder, for the intervener the Ontario Network of Injured Workers Groups.

Steven Barrett and Ethan Poskanzer, for the intervener the Canadian Labour Congress.

Robert Earl Charney, for the intervener the Attorney General of Ontario.

Kathryn L. Kickbush, for the intervener the Attorney General of British Columbia.

Written submissions only by Curtis Craig, for the intervener the Workers' Compensation Board of Alberta.

The judgment of the Court was delivered by

GONTHIER J.

I. Introduction

1 Chronic pain syndrome and related medical conditions have emerged in recent years as one of the [page514] most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians. Ruth Laseur and Donald Martin are the appellants in this case. Both suffer from the disability of chronic pain.

2 Courts are not the appropriate forum for an evaluation of the available medical evidence concerning chronic pain for general scientific purposes. Nevertheless, because disability is an enumerated ground in s. 15(1) of the *Canadian Charter of Rights and Freedoms*, the question whether the way in which a government handles chronic pain in providing services amounts to discrimination is a proper subject of judicial review. More specifically, these appeals concern the constitutional validity of s. 10B of the Nova Scotia *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended by S.N.S. 1999, [page515] c. 1 (the "Act"), and of the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96 (the "FRP Regulations"), adopted under that Act. These provisions exclude chronic pain from the purview of the regular workers' compensation system and provide, in lieu of the benefits normally available to injured workers, a four-week Functional Restoration (Multi-Faceted Pain Services) Program (the "Functional Restoration Program") beyond which no further benefits are available. A preliminary issue is whether the Nova Scotia Workers' Compensation Appeals Tribunal (the "Appeals Tribunal"), an administrative tribunal set up to hear appeals from decisions of the Workers' Compensation Board of Nova Scotia (the "Board"), had jurisdiction to decline to apply the challenged provisions to the appellants on the ground that these provisions violate the *Charter*.

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> The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.

Similar views had been expressed by the majority in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.

30 Second, *Charter* disputes do not take place in a vacuum. They require a thorough understanding of the objectives of the legislative scheme being challenged, as well as of the practical constraints it faces and the consequences of proposed constitutional remedies. This need is heightened when, as is often [page530] the case, it becomes necessary to determine whether a *prima facie* violation of a *Charter* right is justified under s. 1. In this respect, the factual findings and record compiled by an administrative tribunal, as well as its informed and expert view of the various issues raised by a constitutional challenge, will often be invaluable to a reviewing court: see *Douglas College, supra*, at pp. 604-5. As La Forest J. correctly observed in *Cuddy Chicks, supra*, at pp. 16-17:

> It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical... . The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance.

31 Third, administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard: see *Cuddy Chicks, supra*, at p. 17. An error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court. In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases. Therefore, allowing administrative tribunals to decide *Charter* issues does not undermine the role of the courts as final arbiters of constitutionality in Canada.

[page531]

32 In *Douglas College, supra*, La Forest J. expressly considered and rejected several general arguments made against recognizing that administrative tribunals that have jurisdiction to decide questions of law possess a concomitant jurisdiction to apply the *Charter*. He noted that some authors had pointed to practical concerns with respect to the desirability of such adjudication, such as the lack of legal expertise of some administrative tribunals, the differences between their rules of procedure and evidence and those followed by courts, and the need to maintain the accessibility and timeliness of their procedures. Nevertheless, La Forest J. concluded, at p. 603, that these considerations, "though not without weight, should [not] dissuade this Court from adopting what has now become the clearly dominant view in the courts of this country". Nor, in my view, should such practical considerations surreptitiously find their way back into the courts' analysis of a particular tribunal's jurisdiction despite a clear expression of legislative intent to endow it with authority to decide questions of law, including constitutional issues. I now turn to the rules governing this analysis.

2. The Applicable Law

33 In view of the policy considerations outlined above, this Court has adopted a general approach for the determination of whether a particular administrative tribunal or agency can decline to apply a provision of its

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enabling statute on the ground that the provision violates the *Charter*. This approach rests on the principle that, since administrative tribunals are creatures of Parliament and the legislatures, their jurisdiction must in every case "be found in a statute and must extend not only to the subject matter of the application and the parties, but also to the remedy sought": *Douglas College, supra*, at p. 595; see also *Cuddy Chicks, supra*, at pp. 14-15. When a case brought before an administrative tribunal involves a challenge to the constitutionality of a provision of its enabling statute, the tribunal is asked to interpret the relevant *Charter* right, apply it to the impugned [page532] provision, and if it finds a breach and concludes that the provision is not saved under s. 1, to disregard the provision on constitutional grounds and rule on the applicant's claim as if the impugned provision were not in force.

34 Since the subject matter and the remedy in such a case are premised on the application of the *Charter*, the question becomes whether the tribunal's mandate includes jurisdiction to rule on the constitutionality of the challenged provision: see *Douglas College, supra*, at p. 596; *Cuddy Chicks, supra*, at p. 15. This question is answered by applying a presumption, based on the principle of constitutional supremacy outlined above, that all legal decisions will take into account the supreme law of the land. Thus, as a rule, "an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid": *Cuddy Chicks, supra*, at p. 13; or, as stated in *Cooper, supra*, at para. 46:

> If a tribunal does have the power to consider questions of law, then it follows by the operation of s. 52(1) that it must be able to address constitutional issues, including the constitutional validity of its enabling statute.

While the general principles outlined above have been consistently reaffirmed by this Court and remain sound, their application has been fraught with difficulties, as evidenced by the disagreements that arose in *Cooper, supra*. I am of the view that it is now time to reappraise the case law and to provide a single set of rules concerning the jurisdiction of administrative tribunals to consider *Charter* challenges to a legislative provision.

35 In each case, the first question to be addressed is whether the administrative tribunal at issue has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision. While, as stated in the trilogy and *Cooper, supra*, this question is one of legislative intent, it is crucial that the relevant intent be clearly defined. [page533] The question is not whether Parliament or the legislature intended the tribunal to apply the *Charter*. As has often been pointed out, such an attribution of intent would be artificial, given that many of the relevant enabling provisions pre-date the *Charter*: see, e.g., A. J. Roman, "Case Comment: *Cooper v. Canada (Human Rights Commission)*" (1997), 43 Admin. L.R. (2d) 243, at p. 244; D. M. McAllister, "Administrative Tribunals and the *Charter*: A Tale of Form Conquering Substance", in *L.S.U.C. Special Lectures 1992 -- Administrative Law: Principles, Practice and Pluralism* (1993), 131, at p. 150. That attribution of intent would also be incompatible with the principle stated above that the question of constitutional validity inheres in every legislative enactment by virtue of s. 52(1) of the *Constitution Act, 1982*. Therefore, in my view, to the extent that passages in the trilogy and *Cooper, supra*, suggest that the relevant legislative intention to be sought is one that the tribunal apply the *Charter* itself, those passages should be disregarded.

36 Rather, one must ask whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, then the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of the *Charter*, unless the legislator has removed that power from the tribunal. Thus, an administrative tribunal that has the power to decide questions of law arising under a particular legislative provision will be presumed to have the power to determine the constitutional validity of that provision. In other words, the power to decide a question of law is the power to decide by applying only valid laws.

37 Often the statute will expressly confer on the tribunal jurisdiction to decide certain questions of law. Thus, in *Cuddy Chicks, supra*, the Ontario *Labour Relations Act* granted the Labour Relations Board jurisdiction "to determine all questions of fact or law that arise in any matter before it". This [page534] provision was held to provide a clear jurisdictional basis for the Labour Relations Board to consider the constitutional validity of a provision of the *Labour Relations Act* excluding agricultural employees from its purview. Yet, while obviously

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adequate, such a broad grant of jurisdiction is not necessary to confer on an administrative tribunal the power to apply the *Charter*. It suffices that the legislator endow the tribunal with power to decide questions of law arising under the challenged provision, and that the constitutional question relate to that provision.

38 This nuance was sometimes overlooked in the trilogy. Thus, in *Douglas College, supra*, La Forest J. held that an arbitration board had jurisdiction to apply the *Charter* to a provision in the collective agreement that the board was empowered to interpret and apply. While that conclusion was certainly correct, courts should use some care in relying on the reasoning used to support it. The British Columbia *Labour Code* provided that the arbitration board had authority to "interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement". La Forest J. found that the *Charter* was intended to be included within the meaning of the term "Act" in that section. With respect, I believe the better view is that, since the board had undisputed jurisdiction to decide questions of law arising under the collective agreement, and the agreement constituted "law" within the meaning of s. 52(1) of the *Constitution Act, 1982*, the board could consider the constitutional validity of the agreement's provisions. This conclusion would have been true regardless of whether the *Charter* is truly an "Act intended to regulate the employment relationship of the persons bound by a collective agreement".

39 In other words, the relevant question in each case is not whether the terms of the express grant of jurisdiction are sufficiently broad to encompass the *Charter* itself, but rather whether the express grant [page535] of jurisdiction confers upon the tribunal the power to decide questions of law arising under the challenged provision, in which case the tribunal will be presumed to have jurisdiction to decide the constitutional validity of that provision. The *Charter* is not invoked as a separate subject matter; rather, it is a controlling norm in decisions over matters within the tribunal's jurisdiction.

40 In cases where the empowering legislation contains an express grant of jurisdiction to decide questions of law, there is no need to go beyond the language of the statute. An express grant of authority to consider or decide questions of law arising under a legislative provision is presumed to extend to determining the constitutional validity of that provision.

41 Absent an explicit grant, it becomes necessary to consider whether the legislator intended to confer upon the tribunal implied jurisdiction to decide questions of law arising under the challenged provision . Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself, particularly when depriving the tribunal of the power to decide questions of law would impair its capacity to fulfill its intended mandate. As is the case for explicit jurisdiction, if the tribunal is found to have implied jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision.

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42 Once this presumption has been raised, either by an explicit or implicit grant of authority to decide questions of law, the second question that arises is whether it has been rebutted. The burden of establishing this lies on the party who alleges that the administrative body at issue lacks jurisdiction to apply the *Charter*. In general terms, the presumption may only be rebutted by an explicit withdrawal of authority to decide constitutional questions or by a clear implication to the same effect, arising from the statute itself rather than from external considerations. The question to be asked is whether an examination of the statutory provisions clearly leads to the conclusion that the legislature intended to exclude the *Charter*, or more broadly, a category of questions of law encompassing the *Charter*, from the scope of the questions of law to be addressed by the tribunal. For instance, an express conferral of jurisdiction to another administrative body to consider *Charter* issues or certain complex questions of law deemed too difficult or time-consuming for the initial decision maker, along with a procedure allowing such issues

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Document (1)

1. *R. v. Conway, [2010] 1 S.C.R. 765*

Client/Matter: -None-
Search Terms: 2010 SCC 22
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

R. v. Conway, [2010] 1 S.C.R. 765

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: October 22, 2009;

Judgment: June 11, 2010.

File No.: 32662.

[2010] 1 S.C.R. 765 | *[2010] 1 R.C.S. 765* | *[2010] S.C.J. No. 22* | *[2010] A.C.S. no 22* | *2010 SCC 22*

Paul Conway Appellant; v. Her Majesty The Queen and Person in charge of the Centre for Addiction and Mental Health Respondents, and Attorney General of Canada, Ontario Review Board, Mental Health Legal Committee and Mental Health Legal Advocacy Coalition, British Columbia Review Board, Criminal Lawyers' Association and David Asper Centre for Constitutional Rights, and Community Legal Assistance Society Interveners

(104 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Remedies — Accused not criminally responsible by reason of mental disorder detained in mental health facility — Accused alleging violations of his constitutional

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rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms — Accused also seeking as remedy order directing mental health facility to provide him with particular treatment — Whether Review Board has jurisdiction to grant remedies under s. 24(1) of Charter — If so, whether accused entitled to remedies sought — Criminal Code, *R.S.C. 1985, c. C-46, ss. 672.54*, 672.55.

Constitutional law — Charter of Rights — Remedies — Court of competent jurisdiction — Remedial [page766] jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms — New approach.

Criminal law — Mental disorder — Review Board — Remedial jurisdiction under Canadian Charter of Rights and Freedoms — Accused not criminally responsible by reason of mental disorder detained in mental health facility — Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms at his disposition hearing before Review Board — Board concluding accused was a threat to public safety and not entitled to absolute discharge under Criminal Code — Whether Review Board has jurisdiction to grant absolute discharge as remedy under s. 24(1) of Charter — If so, whether accused entitled to remedy sought — Criminal Code, *R.S.C. 1985, c. C-46, s. 672.54*.

Administrative law — Boards and tribunals — Jurisdiction — Remedial jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms — New approach.

Summary:

In 1984, C was found not guilty by reason of insanity on a charge of sexual assault with a weapon. Since the verdict, he has been detained in mental health facilities and diagnosed with several mental disorders. Prior to his annual review hearing before the Ontario Review Board in 2006, C alleged that the mental health centre where he was being detained had breached his rights under the *Canadian Charter of Rights and Freedoms*. He sought an absolute discharge as a remedy under s. 24(1) of the *Charter*. The Board unanimously concluded that C was a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute discharge under s. 672.54(*a*) of the *Criminal Code*, which provides that an absolute discharge is unavailable to any patient who is a "significant threat to the safety of the public". The Board therefore ordered that C remain in the mental health centre. The Board further concluded that it had no jurisdiction to consider C's *Charter* claims. A majority in the Court of Appeal upheld the Board's conclusion that it was not a court of competent jurisdiction for the purpose of granting an absolute discharge under s. 24(1) of the *Charter*. However, the Court of Appeal unanimously concluded that it was unreasonable for the Board not to address the [page767] treatment impasse plaguing C's detention. This issue was remitted back to the Board.

Before this Court, the issue is whether the Ontario Review Board has jurisdiction to grant remedies under s. 24(1) of the *Charter*. C has requested, in addition to an absolute discharge, remedies dealing with his conditions of detention: an order directing the mental health centre to provide him with access to psychotherapy and an order prohibiting the centre from housing him near a construction site.

Held: The appeal should be dismissed.

When the *Charter* was proclaimed, its relationship with administrative tribunals was a blank slate. However, various dimensions of the relationship quickly found their way to this Court. The first wave of relevant cases started in 1986 with *Mills v. The Queen*, *[1986] 1 S.C.R. 863*. The *Mills* cases established that a court or administrative tribunal was a "court of competent jurisdiction" under s. 24(1) of the *Charter* if it had jurisdiction over the person, the subject matter, and the remedy sought. The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, *[1989] 1 S.C.R. 1038*. The *Slaight* cases established that any

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exercise of statutory discretion is subject to the *Charter* and its values. The third and final wave started in 1990 with *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, followed in 1991 by *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. The cases flowing from this trilogy, which deal with s. 52(1) of the *Constitution Act, 1982*, established that specialized tribunals with both the expertise and the authority to decide questions of law are in the best position to hear and decide the constitutionality of their statutory provisions.

This evolution of the case law over the last 25 years has cemented the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. It confirms that we do not have one *Charter* for the courts and another for administrative tribunals and that, with rare exceptions, administrative tribunals with the authority to apply the law, have the jurisdiction to apply the *Charter* to the issues that arise in the proper [page768] exercise of their statutory functions. The evolution also confirms that expert tribunals should play a primary role in determining *Charter* issues that fall within their specialized jurisdiction and that in exercising their statutory functions, administrative tribunals must act consistently with the *Charter* and its values.

Moreover, the jurisprudential evolution affirms the practical advantages and the constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals. Any scheme favouring bifurcation is, in fact, inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction.

A merger of the three distinct constitutional streams flowing from this Court's administrative law jurisprudence calls for a new approach that consolidates this Court's gradual expansion of the scope of the *Charter* and its relationship with administrative tribunals. When a *Charter* remedy is sought from an administrative tribunal, the initial inquiry should be whether the tribunal can grant *Charter* remedies generally. The answer to this question flows from whether the administrative tribunal has the jurisdiction, explicit or implied, to decide questions of law. If it does, and unless the legislature has clearly demonstrated its intent to withdraw the *Charter* from the tribunal's authority, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate. The tribunal is, in other words, a court of competent jurisdiction under s. 24(1) of the *Charter*. This approach has the benefit of attributing *Charter* jurisdiction to a tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether the tribunal is a court of competent jurisdiction.

Once the initial inquiry has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought given its statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent, namely, whether the remedy sought is the kind [page769] of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations include the tribunal's statutory mandate and function.

In this case, C seeks certain *Charter* remedies from the Board. The first inquiry, therefore, is whether the Board is a court of competent jurisdiction under s. 24(1). The answer to this question depends on whether the Board is authorized to decide questions of law. The Board is a quasi-judicial body with significant authority over a vulnerable population. It operates under Part XX.1 of the *Criminal Code* as a specialized statutory tribunal with ongoing supervisory jurisdiction over the treatment, assessment, detention and discharge of NCR patients: accused who have been found not criminally responsible by reason of mental disorder. Part XX.1 of the *Criminal Code* provides that any party to a review board hearing may appeal the board's disposition on a question of law, fact or mixed fact and law. The *Code* also authorizes appellate courts to overturn a review board's disposition if it was based on a wrong decision on a question of law. This statutory language is indicative of the Board's authority to decide questions of law. Given this conclusion, and since Parliament has not excluded the *Charter* from the Board's mandate, it follows that the Board is a court of competent jurisdiction for the purpose of granting remedies under s. 24(1) of the *Charter*.

The next question is whether the remedies sought are the kinds of remedies which would fit within the

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Board's statutory scheme. This requires consideration of the scope and nature of the Board's statutory mandate and functions. The review board regime is intended to reconcile the "twin goals" of protecting the public from dangerous offenders and treating NCR patients fairly and appropriately. Based on the Board's duty to protect public safety, its statutory authority to grant absolute discharges only to non-dangerous NCR patients, and its mandate to assess and treat NCR patients with a view to reintegration rather than recidivism, it is clear that Parliament intended that dangerous NCR patients have no access to absolute discharges. C cannot, therefore, obtain an absolute discharge from the Board. The same is true of C's request for a treatment order. Allowing the Board to prescribe or impose treatment is expressly prohibited by s. 672.55 of the *Criminal Code*. Finally, neither the validity of C's complaint about the location of his room nor, obviously, the propriety of his request for an order prohibiting the mental health centre from housing him near a construction site, have been considered [page770] by the Board. It may well be that the substance of C's complaint can be fully addressed within the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values. If so, resort to s. 24(1) of the *Charter* may not add to the Board's capacity to either address the substance of C's complaint or provide appropriate redress.

Cases Cited

Considered: *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Carter v. The Queen*, [1986] 1 S.C.R. 981; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185; *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326; **referred to:** *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *United States v. Allard*, [1987] 1 S.C.R. 564; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Smith*, [1989] 2 S.C.R. 1120; *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *R. v. Menard*, 2008 BCCA 521, 240 C.C.C. (3d) 1; *British Columbia (Director of Child, Family & Community Service) v. L. (T.)*, 2009 BCPC 293, 73 R.F.L. (6) 455, aff'd 2010 BCSC 105 (CanLII); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *[page771] Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *R. v. Swain*, [1991] 1 S.C.R. 933; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3

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S.C.R. 3; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206.

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Constitution Act, 1982, s. 52(1).

Criminal Code, R.S.C. 1985, c. C-46, Part XX.1, ss. 672.4(1), 672.38(1), 672.39, 672.54, 672.55, 672.72(1), 672.78(1), 672.81(1), 672.83(1).

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History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Armstrong and Lang JJ.A.), 2008 ONCA 326, 90 O.R. (3d) 335, 293 D.L.R. (4) 729, [page772] 235 O.A.C. 341, 231 C.C.C. (3d) 429, 169 C.R.R. (2d) 314, [2008] O.J. No. 1588 (QL), 2008 CarswellOnt 2352, allowing in part an appeal from a decision of the Ontario Review Board. Appeal dismissed.

Counsel

Marlys A. Edwardh, *Delmar Doucette*, *Jessica Orkin* and *Michael Davies*, for the appellant.

Hart M. Schwartz and *Amanda Rubaszek*, for the respondent Her Majesty the Queen.

Janice E. Blackburn and *Ioana Bala*, for the respondent the Person in charge of the Centre for Addiction and Mental Health.

Simon Fothergill, for the intervener the Attorney General of Canada.

Stephen J. Moreau and *Elichai Shaffir*, for the intervener the Ontario Review Board.

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Paul Burstein and *Anita Szigeti*, for the interveners the Mental Health Legal Committee and the Mental Health Legal Advocacy Coalition.

Joseph J. Arvay, Q.C., *Mark G. Underhill* and *Alison Latimer*, for the intervener the British Columbia Review Board.

Cheryl Milne, for the interveners the Criminal Lawyers' Association and the David Asper Centre for Constitutional Rights.

David W. Mossop, Q.C., and *Diane Nielsen*, for the intervener the Community Legal Assistance Society.

The judgment of the Court was delivered by

ABELLA J.

1 The specific issue in this appeal is the remedial jurisdiction of the Ontario Review Board under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. The wider issue is the relationship between the *Charter*, its remedial provisions and administrative tribunals generally.

2 There are two provisions in the *Charter* dealing with remedies: s. 24(1) and s. 24(2). Section [page773] 24(1) states that anyone whose *Charter* rights or freedoms have been infringed or denied may apply to a "court of competent jurisdiction" to obtain a remedy that is "appropriate and just in the circumstances". Section 24(2) states that in those proceedings, a court can exclude evidence obtained in violation of the *Charter* if its admission would bring the administration of justice into disrepute. A constitutional remedy is also available under s. 52(1) of the *Constitution Act, 1982*, which states that the Constitution is the supreme law of Canada, and that any law inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.

3 When the *Charter* was proclaimed in 1982, its relationship with administrative tribunals was a *tabula rasa*. It was not long, however, before various dimensions of the relationship found their way to this Court.

4 The first relevant wave of cases started in 1986 with *Mills v. The Queen*, [1986] 1 S.C.R. 863. The philosophical legacy of *Mills* was in its conclusion that for the purposes of s. 24(1) of the *Charter*, a "court of competent jurisdiction" was a "court" with jurisdiction over the person, the subject matter, and the remedy sought. For the next 25 years, this three-part test served as the grid for determining whether a court or administrative tribunal was a "court of competent jurisdiction" under s. 24(1) of the *Charter* (*Carter v. The Queen*, [1986] 1 S.C.R. 981; *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *United States v. Allard*, [1987] 1 S.C.R. 564; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Smith*, [1989] 2 S.C.R. 1120; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 ("*Dunedin*"); *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *R. v. Menard*, 2008 BCCA 521, 240 C.C.C. (3d) 1; *British Columbia (Director of Child, Family & Community Service) v. L. (T.)*, 2009 BCPC 293, 73 R.F.L. (6th) 455, aff'd 2010 BCSC 105 (CanLII)).

[page774]

5 The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. Although *Slaight* did not - and does not - offer any direct guidance on what constitutes a "court of competent jurisdiction", its legacy was in its conclusion that any exercise of statutory discretion is subject to the *Charter* and its values (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 875; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624;

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Board, could establish its own procedural rules, consider all relevant evidence, record any oral evidence for future reference, exercise powers under the *Public Inquiries Act*, R.S.N.S. 1989, c. 372, and extend time limits for decisions when necessary. In addition, its members had been called to the bar and the Attorney General could intervene in proceedings involving constitutional questions. In his view, therefore, even if the Tribunal had lacked express authority to decide questions of law, an implied grant of authority would have been found. The legislature clearly intended to create a comprehensive scheme for resolving workers' compensation disputes. Nothing in the *Workers' Compensation Act* rebutted the presumption.

71 Moreover, allowing the Tribunal to apply the *Charter* furthered the policy objectives of allowing courts to "benefit from a full record established by a specialized tribunal fully apprised of the policy and practical issues relevant to the *Charter* claim". It also permitted workers to "have their *Charter* rights recognized within the relatively fast and inexpensive adjudicative scheme created by the Act" rather than having to pursue separate proceedings in the courts in addition to a compensation claim before the administrative tribunal (para. 56).

72 Gonthier J. concluded that the Workers' Compensation Board too, like the Appeals Tribunal, had the jurisdiction to review the constitutional validity of its enabling statute, since both statutory bodies had the same authority to decide questions of law.

[page801]

73 *Martin* was released with *Paul v. British Columbia (Forest Appeals Commission)*. Paul was charged with a breach of s. 96 of the *Forest Practices Code of British Columbia Act*, *R.S.B.C. 1996, c. 159*, which was a general prohibition against cutting Crown timber. Paul conceded that he cut the prohibited timber, but asserted that as an aboriginal person, he had a right to do so under s. 35 of the *Constitution Act, 1982*. The issue on appeal was whether the provincial Forest Appeals Commission had the authority to entertain Paul's constitutional argument.

74 Bastarache J., writing for the Court, applied the methodology in *Martin* to determine whether the Commission was authorized to consider and apply s. 35 of the *Constitution Act, 1982*. The issue therefore was whether the enabling statute either expressly or by implication granted the Commission the jurisdiction to interpret or decide questions of law.

75 The *Forest Practices Code* stated that any party to a proceeding before the Commission could make submissions as to fact, law and jurisdiction and could appeal a Commission's decision on a question of law or jurisdiction. These provisions made it impossible to conclude that the Commission's mandate was limited to purely factual matters, and the Court accordingly concluded that the Forest Appeals Commission was empowered to decide questions of law, including whether s. 35 of the *Constitution Act, 1982* applied.

76 In the case of *Okwuobi*, the issue was the jurisdiction of the Administrative Tribunal of Québec to hear rights claims for minority language education under the *Charter of the French language*, R.S.Q., c. C-11, and the *Canadian Charter*. Based on *Martin* and *Paul*, the Court concluded:

> As will become clear, the fact that the ATQ is vested with the ability to decide questions of law is crucial, and is determinative of its jurisdiction to apply the *Canadian Charter* in this appeal. The quasi-judicial structure of the ATQ, discussed briefly above, may be indicative of [page802] a legislative intention that constitutional questions be considered and decided by the ATQ, but the structure of the ATQ is not determinative. This is evidenced by the recent decisions of this Court in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, and *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. [para. 28]

In *Okwuobi*, the Administrative Tribunal of Québec was found to have the jurisdiction to decide questions of law. The presumption in favour of constitutional jurisdiction was therefore triggered and was not rebutted.

77 These cases confirm that administrative tribunals with the authority to decide questions of law and whose

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Charter jurisdiction has not been clearly withdrawn have the corresponding authority - and duty - to consider and apply the Constitution, including the *Charter*, when answering those legal questions. As McLachlin J. observed in *Cooper*:

> [E]very tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the effect of the *Charter* does not change the matter. The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals. [para. 70]

The Merger

78 The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly, [page803] they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a *Charter* remedy is sought to an inquiry asking whether it is "competent" to grant a particular remedy within the meaning of s. 24(1).

79 Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals (*Douglas College*, at pp. 603-4; *Weber*, at para. 60; *Cooper*, at para. 70; *Martin*, at para. 29). The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in *Mills*, at p. 891. And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction (*Weber*; *Regina Police Assn.*; *Quebec (Commission des droits de la personne et des droits de la jeunesse)*; *Quebec (Human Rights Tribunal)*; *Vaughan*; *Okwuobi*. See also *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 49.).

80 If, as in the *Cuddy Chicks* trilogy, expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when a remedy is sought under s. 52 of the *Constitution Act, 1982*, there is no reason why such tribunals are not also in the best position to assess constitutional questions when a remedy is sought under s. 24(1) of the *Charter*. As McLachlin J. said in *Weber*, "[i]f an arbitrator can find a law violative of the *Charter*, it would seem he or she can determine whether conduct in the administration of the collective agreement violates the *Charter* and likewise grant remedies" [page804] (para. 61). I agree with the submission of both the Ontario Review Board and the British Columbia Review Board that in both types of cases, the analysis is the same.

81 Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* - and *Charter* remedies - when resolving the matters properly before it.

82 Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, 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

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framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin*).

Application to This Case

83 The question before the Court is whether the Ontario Review Board is authorized to provide certain remedies to Mr. Conway under s. 24(1) of the *Charter*. Before the Board, Mr. Conway sought an absolute discharge. At the hearing before this Court, and for the first time, he requested additional remedies dealing with his conditions of detention: an [page805] order directing CAMH to provide him with access to psychotherapy, and an order prohibiting CAMH from housing him near a construction site.

84 The first inquiry is whether the Board is a court of competent jurisdiction. In my view, it is. The Board is a quasi-judicial body with significant authority over a vulnerable population. It is unquestionably authorized to decide questions of law. It was established by, and operates under, Part XX.1 of the *Criminal Code* as a specialized statutory tribunal with ongoing supervisory jurisdiction over the treatment, assessment, detention and discharge of those accused who have been found not criminally responsible by reason of mental disorder ("NCR patient"). Section 672.72(1) provides that any party may appeal a board's disposition on any ground of appeal that raises a question of law, fact or mixed fact and law. Further, s. 672.78(1) authorizes an appellate court to allow an appeal against a review board's disposition where the court is of the opinion that the board's disposition was based on a wrong decision on a question of law. I agree with the conclusion of Lang J.A. and the submission of the British Columbia Review Board that, as in *Martin* and *Paul*, this language is indicative of the Board's power to decide legal questions. And there is nothing in Part XX.1 of the *Criminal Code* - the Board's statutory scheme - which permits us to conclude that Parliament intended to withdraw *Charter* jurisdiction from the scope of the Board's mandate. It follows that the Board is entitled to decide constitutional questions, including *Charter* questions, that arise in the course of its proceedings.

85 The question for the Court to decide therefore is whether the particular remedies sought by Mr. Conway are the kinds of remedies that Parliament appeared to have anticipated would fit within the statutory scheme governing the Ontario Review Board. This requires us to consider the scope and nature of the Board's statutory mandate and functions.

[page806]

86 Part XX.1 of the *Criminal Code* was enacted after this Court struck down the traditional regime for dealing with mentally ill offenders as contrary to s. 7 of the *Charter* in *R. v. Swain*, [1991] 1 S.C.R. 933. The traditional system subjected offenders with mental illness to automatic and indefinite detention at the pleasure of the Lieutenant Governor in Council (*Criminal Code*, s. 614(2) (formerly s. 542(2)) (repealed S.C. 1991, c. 43, s. 3); *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625). Part XX.1 was designed to address the concerns raised in *Swain* and was intended to highlight that offenders with a mental illness must be "treated with the utmost dignity and afforded the utmost liberty compatible with [their] situation" (*Winko*, at para. 42; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498, at para. 22).

87 Part XX.1 introduced a new verdict - "not criminally responsible on account of mental disorder" - into the traditional guilt/innocence dichotomy. This verdict is neither an acquittal nor a conviction; rather, it diverts offenders to a special stream that provides individualized assessment and treatment for those found to be a significant danger to the public (*Winko*, at para. 21; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 90; *Penetanguishene*, at para. 21). Those NCR patients who are not a significant danger to the public must be unconditionally released.

88 The Ontario Board manages and supervises the assessment and treatment of each NCR patient in Ontario by holding annual hearings and making dispositions for each patient (ss. 672.38(1), 672.54, 672.81(1) and 672.83(1); *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1

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Citation: Public Utilities Board v. Manitoba Public Insurance Corp. et al., 2011 MBCA 88

Date: 20111122
Docket: AI 10-30-07364

2011 MBCA 88 (CanLII)

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Scott

Madam Justice Holly C. Beard

Mr. Justice Alan D. MacInnes

BETWEEN:

THE PUBLIC UTILITIES BOARD	)	***W. S. Saranchuk, Q.C.*** *and*
	)	***C. A. Everard***
Applicant	)	*for the Applicant*
	)	
- and -	)	
	)	***J. F. Rook, Q.C.,***
MANITOBA PUBLIC INSURANCE	)	***R. K. Agarwal*** *and*
CORPORATION	)	***K. L. Kalinowsky***
	)	*for the Respondent*
Respondent	)	
	)	

- and -	)	***J. B. Williams***
	)	*for the Interveners*
THE CONSUMERS ASSOCIATION	)	
OF CANADA (MANITOBA),	)	
THE MANITOBA SOCIETY OF	)	*Appeal heard:*
SENIORS and THE MANITOBA	)	***January 10 and 11, 2011***
MOTOR LEAGUE	)	
	)	
	)	*Judgment delivered:*
Interveners	)	***November 22, 2011***

2011 MBCA 88 (CanLII)

BEARD J.A.

I. THE ISSUE

1 This matter has come before this court as the result of an impasse between the applicant, the Public Utilities Board (the PUB), and the respondent, the Manitoba Public Insurance Corporation (the MPIC), regarding the disclosure of information by the MPIC to the PUB. To resolve this impasse, the PUB has filed this application, which comes by way of stated case, pursuant to s. 58.4(1) of *The Public Utilities Board Act*, C.C.S.M., c. P280 (*The PUB Act*), asking for the opinion of this court on the following question:

> Does the [PUB] have the jurisdiction to require the Respondent [MPIC] to disclose to the [PUB]:

> (a) [MPIC's] actual and projected financial information including, without limiting the generality of the foregoing, itemized revenues, itemized gross and net costs or expenses, earnings, overall retained earnings, reserves and provisions, cost allocations (including for such expenses as staffing costs), and investment income allocations; and
>
> (b) information concerning [MPIC's] policies, plans and decisions
>
> relating to [MPIC's] divisions other than compulsory driver and vehicle insurance, also known as the Basic insurance program?

2 The MPIC argues that the following questions should be added and decided:

> (c) whether the [PUB] can effectively expand its jurisdiction over MPIC to include non-basic by seeking disclosure of information about non-basic; and
>
> (d) whether the [PUB] requires information about non-basic to fulfill its narrow mandate.

3 There are three interveners in this matter, who take a joint position supporting the PUB's position that the PUB has the jurisdiction to require the MPIC to provide the requested disclosure as it relates to the divisions other than basic insurance. They did qualify the PUB's jurisdiction by stating that it is limited to requiring disclosure of only that information that it reasonably concludes may be relevant to its statutory role in determining just and reasonable rates for basic insurance.

II. STANDARD OF REVIEW

4 This matter has come before this court as a matter of first instance by way of a stated case, and not as an appeal or review of a decision from a

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lower tribunal. As a result, the principles of standard of review are not applicable.

III. THE FACTS

5 What follows is a brief history of the MPIC and its relationship with the PUB. The MPIC was incorporated in 1971 and began operations in 1972, its purpose being to provide compulsory universal automobile insurance for all motor vehicles registered in Manitoba, to be delivered through a Crown monopoly. Over time, the MPIC expanded its operation by developing other lines of business which were to be conducted on a competitive basis with private insurers. In 2004, the Government of Manitoba added the responsibility for administering driver and vehicle licensing to those operations. At the present time, the operations of the MPIC are divided into two categories or lines of business for financial reporting purposes, referred to as "basic" and "non-basic," the first, being the compulsory driver and vehicle insurance (basic insurance), and the second, being all other operations.

6 Other significant changes have occurred over the years that have affected the business operations of the MPIC, including: the replacement of the tort system of determining fault for an accident by a "total no-fault" system; transferring the complete administration of driver licensing and vehicle registration to the MPIC; having insurance brokers collect registration and driver licence fees; adopting on-line services allowing brokers to interact electronically with the MPIC; and instituting an anti-theft program involving the Winnipeg Police Service and Manitoba Justice, which

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included the installation of vehicle immobilizers, all at additional cost to the MPIC. As is noted in several general rate application reports by the PUB, many of these significant changes have arisen through legislative amendments that were not discussed with the PUB prior to their disclosure at the MPIC annual general rate application that followed implementation.

7 In 1985/86, the MPIC incurred a large loss on the basic insurance operations. Following this, the government ordered a review of the operations of the MPIC by Judge Kopstein, who submitted his report to the government in 1988. Based on that report, the government instituted a number of changes to the insurance scheme to implement his recommendations for better accountability, including passing *The Crown Corporations Public Review and Accountability Act*, C.C.S.M., c. C336 (*The CCAA*), in 1988 and, commencing that year, requiring the MPIC to obtain approval from the PUB for any changes in the rate bases and premiums charged for basic insurance. Since 1988, the MPIC has had an annual hearing before the PUB to have its rates for basic insurance approved.

8 Since the inception of the annual rate reviews, the MPIC and the PUB have been of different minds regarding the MPIC's disclosure obligations. The PUB is of the view that it is entitled to receive information and documents regarding the non-basic lines of business as part of its responsibility to review and approve rates and premiums for basic insurance, while the MPIC is of the view that information that relates exclusively to the non-basic lines of business is irrelevant to the PUB's mandate and it has refused to provide the information when requested to do so by the PUB. The

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PUB has never ordered the MPIC to produce the disputed information and, prior to this application, had never challenged the MPIC's refusal to do so. Over the years, it has commented on this issue in its orders, but has proceeded to hear and determine the annual rate applications without the information.

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IV. THE POSITIONS OF THE PARTIES

The Applicant's Position

9 The PUB takes the position that the issue to be determined is one of statutory interpretation, being whether s. 26 of *The CCAA* (see Appendix A) gives it the jurisdiction to require the MPIC to disclose a wide range of information and documents that relate to the non-basic lines of business. It argues that the overarching principle governing this determination is the "modern approach" to statutory interpretation (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4 at para. 37, [2006] 1 S.C.R. 140), and that the provision is to be given a "fair, large and liberal interpretation" in accordance with s. 6 of *The Interpretation Act*, C.C.S.M., c. I80.

10 According to the PUB, it has express jurisdiction to compel this disclosure, based on the ordinary meaning of its enabling legislation and, in particular, s. 26(4)(a)(ix) of *The CCAA*, which, it argues, authorizes it, in its sole discretion, to determine which factors are relevant to its rate review function. It argues that the information is relevant due to the interconnectedness of the operations of the basic and non-basic lines of business, such that it cannot carry out its mandate to review the rates for

30 Further, the PUB has not asked this court to rule on its jurisdiction to require the production of specific documents or information; rather, it has asked for confirmation that it has the jurisdiction to demand a wide range of non-specified documents and information from the MPIC relating to the non-basic categories of business over which it has no jurisdiction to regulate rates. It says that it needs this information to carry out its function under s. 26 of *The CCAA*. This, it says, includes safeguarding the public interest, which, it argues, has two components: the first, being to hold the MPIC accountable for its rates and to protect the consumers purchasing compulsory insurance from unreasonable rates; and the second, being to ensure the financial health of the MPIC.

2011 MBCA 88 (CanLII)

Jurisdiction of the PUB

31 The mandate of the PUB, in the context of this case, is set out in s. 26 of *The CCAA*, that being to review and approve the MPIC's rate bases and premiums charged with respect to compulsory driver and vehicle insurance. As can be seen from its annual orders, the PUB has expressed dissatisfaction with three aspects of its mandate:

- from the beginning of its oversight of the MPIC, the PUB has expressed dissatisfaction with its limited jurisdiction and has been looking both to obtain information related to the non-basic lines of business and to expand its jurisdiction to include the review of rates for non-basic lines of business;

- the PUB has taken the position that driver and vehicle licensing should have been included with the basic line of business, rather than

the non-basic, and for many years has been recommending that it be moved so that it will be subject to review by the PUB; and

- the PUB has expressed dissatisfaction with the fact that it has not been involved in the planning for significant changes to the MPIC's operations affecting both the basic and non-basic lines of business, but rather has only received disclosure at the subsequent general rate application.

2011 MBCA 88 (CanLII)

32 Notwithstanding the fact that the PUB has made its concerns known to the government on an annual basis since 1989, the government has not made any changes to the PUB's legislated mandate to expand its jurisdiction. Clearly, the government must be aware of the PUB's concerns and, notwithstanding, is either satisfied with the PUB's existing limited mandate or, at least to date, has chosen not to act on those concerns.

33 While all parties agree that its mandate, as set out in s. 26, must be interpreted in accordance with the scheme of the legislation, the PUB has looked at only two statutes, being *The PUB Act* and *The CCAA*. In fact, that scheme also includes *The MPIC Act*, which legislates additional significant controls by the government over the activities of the MPIC.

34 Under the legislative scheme, the Crown Corporations Council has the mandate to review all long-term plans and to receive and review the annual financial statements for the MPIC's entire business, which would include both basic insurance and the non-basic lines of business. The government receives financial disclosure of the MPIC's entire operation, including both

basic and non-basic lines of business, which includes an annual report of its operations and the annual audited financial statements, all of which are subject to public review by a committee of the Legislature. The government has the ultimate authority to approve and enact all rates for both basic insurance and the non-basic lines of business, subject to the proviso that it cannot approve rates for basic insurance that have not been approved by the PUB. It, therefore, has the ultimate responsibility for the financial health of the MPIC. It is within this legislative scheme that the PUB's mandate to review the rates for only basic insurance must be interpreted.

2011 MBCA 88 (CanLII)

Cross-Subsidization

35 On the issue of protecting the consumers of basic insurance and holding the MPIC accountable for their insurance rates, the PUB and the interveners have expressed a concern about the possibility of cross-subsidization; that is, the improper allocation of costs, assets and liabilities between lines of business such that one line is used to subsidize another. This is a valid concern in the case of the MPIC because there are services that are shared among the lines of business and some income and expenditures are incurred for the benefit of more than one line of business and must be allocated between them. The interveners have argued that the PUB requires detailed financial information about the non-basic line of business to ensure that there is no cross-subsidization between basic insurance and the non-basic lines of business.

36 To address this concern, and in compliance with the PUB's Order 150/07, the MPIC retained the accounting firm of Deloitte & Touche

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Document (1)

1. *Consumers' Assn. of Canada (Manitoba) Inc. v. Manitoba Hydro Electric Board (Manitoba Hydro), [2005] M.J. No. 142*

Client/Matter: -None-
Search Terms: 2005 MBCA 55
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

Consumers' Assn. of Canada (Manitoba) Inc. v. Manitoba Hydro Electric Board (Manitoba Hydro), [2005] M.J. No. 142

Manitoba Judgments

Manitoba Court of Appeal

Monnin J.A. (In Chambers)

Heard: February 23, 2005.

Oral judgment: May 5, 2005.

Docket Nos. AI04-30-05963 and AI04-30-05969

[2005] M.J. No. 142 | 2005 MBCA 55 | 195 Man.R. (2d) 12 | 138 A.C.W.S. (3d) 990

Between The Consumers' Association of Canada (Manitoba) Inc. and The Manitoba Society of Seniors Inc. (CAC/MSOS) (intervenors) applicants, and The Manitoba Hydro Electric Board (Manitoba Hydro) (applicant) respondent) (Docket No. AI04-30-05963) And between Manitoba Industrial Power Users Group (MIPUG) (intervenor) applicant, and Manitoba Hydro (applicant) respondent (Docket No. AI04-30-05969)

(70 paras.)

Case Summary

Administrative law — Judicial review and statutory appeal — When available — Leave to appeal — Standard of review — Natural resources law — Hydro-electricity — Rates.

Application for leave to appeal by the Consumers Association of Canada, the Manitoba Society of Seniors and the Manitoba Industrial Power Users Group from a decision of the Public Utilities Board approving rate increases for all classes of customers of the Manitoba Hydro Electric Board. Hydro sought to increase its

rates and proposed a rate increase varying according to the class of customers. The Public Utilities Board approved an identical rate increase for all classes of customers on the basis that Hydro's retained earnings were low as a result of a drought and that the shortfall should be borne by all consumers. The applicants argued that the rate increase was not just and reasonable. They claimed that the Board did not use the standard method for calculating rate increases, that it failed to conclude that Hydro's operations were cost-efficient before approving the rate increases and that certain classes of customers were already paying more than the reasonable rates calculated by Hydro. The applicants argued that the Board exceeded its jurisdiction by failing to sufficiently examine Hydro's costs and revenues before approving the rate increase.

HELD: Application dismissed.

The applicants' argument that the Board failed to establish a just and reasonable rate was not a matter of law but a difference of opinion about the Board's conclusion. The Board's reasons indicated that it considered extensive financial information and used its discretion to set the rate increase. The fact that the Board did not use the financial tools discussed by the applicants did not lead to the conclusion that its decision was not just and reasonable. The Board's decision to build retained earnings faster than proposed by Hydro in order to protect Hydro's financial health was within the Board's jurisdiction. The Board did not rely on irrelevant evidence or fail to consider relevant evidence. The Board did not use inappropriate tests or make its decision arbitrarily. There were no questions of pure law to be decided. The applicants failed to convince the court that the matters were of public importance.

Statutes, Regulations and Rules Cited:

The Crowns Corporations Public Review and Accountability Act, *C.C.S.M. c. C336 s. 26*

The Manitoba Hydro Act, *C.C.S.M. c. H190*

The Public Utilities Board Act, *C.C.S.M. c. P280 s. 44*(1), s. 58(1), s. 58(2), s. 77(a)

Counsel

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T.D. McCaffrey for the Applicant MIPUG

P.J. Ramage for the Respondents

R.F. Peters and A. L. Southall for the Public Utilities Board

MONNIN J.A. (orally)

1 In both of these actions, the applicants, The Consumers' Association of Canada (Manitoba) Inc. and The

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those two decisions. The underlying basis for the rate increase that the PUB authorized can initially be found at p. 22 of Order 101/04:

> On an overall basis, the Board finds the financial impact of the drought on MH to have been extremely significant, and, combining this with other factors results in the requested rate increases being insufficient.
>
> Additional revenue is immediately required to begin the rebuilding of MH's retained earnings, towards the broadly accepted debt to equity ratio target of 75:25. The Board will expect MH to maintain vigilance over its costs, so that the additional revenues contribute as they are intended to move towards achieving the debt to equity target more quickly than suggested in MH's 2003 Integrated Financial Forecast.
>
> Accordingly, and after careful reflection and realizing the additional burden that will [be] placed on the economy, the Board has determined to vary MH's rate increase requests.

60 In its order 143/04, the PUB expands on the concerns that drove it to the decision it arrived at, and it is clear that in arriving at its order, the PUB was concerned with the overall financial stability of Hydro as that stability had been affected by the drought of the previous years. The PUB wrote (at pp. 85-88):

> Beginning in the fall of 2002, and particularly into the 2004 fiscal year, MH experienced severe financial losses primarily due to drought, resulting in the Corporation reporting an audited annual loss of $428 million for its 2003/04 fiscal year. This drought also highlighted the increased risks faced by MH in the export market, and the resulting need for MH to build and maintain adequate reserves in advance of further significant investments in generating and transmission facilities.
>
> The Board recognizes the concerns of the Intervenors that MH's revised estimate of over $2 billion for the impact of a five year drought was not fully substantiated or tested during the hearing process. However, when the single year loss for fiscal 2004 was greater than $400 million, and occurred despite successful initiatives undertaken by MH to restrain the loss, MH's $2 billion plus estimate may be reasonable when considering a [sic] the prospects of a 5-year drought. The Board will look to MH to provide further support for its loss estimate when the Corporation's risks are quantified as part of its risk management process.
>
> The Board acknowledges the concerns of the Intervenors regarding MH's forecasts of capital, operating and administrative costs. The Board made a number of comments and directives in Order 101/04 to address these expenditures. However, the Board cannot ignore the significant impact of the drought. The Board remains of the view that it is reasonable for MH to begin recovering from the financial impact of the drought, and to progress towards achieving its debt to equity targets at as fast a rate as reasonably possible. Another drought will occur, and there is no certainty that the next drought will not occur before retained earnings have been sufficiently rebuilt.
>
> MH explained during the hearings that even in the absence of another drought it would not reach its targeted debt to equity ratio by 2013/14, and provided no plan to achieve its target within this 10-year planning horizon. The Board believes that this situation is not reasonable. The current debt to equity ratio of MH is much higher than that of Quebec Hydro and B.C. Hydro.
>
> The approved increases are meant to assist the Corporation to recover from the impacts of the drought and begin re-building reserves for the benefit of all consumers and to provide increased protection from the negative impacts of future droughts.
>
> During the public hearing, MH explained that its IFF represents MH's best estimate of the Corporation's future results. MH added that in some years, MH will achieve greater net income than forecast, and in other years MH will earn less. The main drivers of net income fluctuations are weather, water levels and export prices. Over time, net income results may balance to the averages included in the forecasts, all other things being equal. The Board notes that MH's IFF forecasts have always included assumed rate increases at approximately the rate of inflation over the long term.

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Prior to this Application, MH had not sought rate increases since 1997, favourable net export revenues had offset increased and increasing operating costs. Substantial real, after inflation, reductions in rates occurred over this period.

While the Board has considered the impact of the unreconciled difference in the Corporation's detailed 2005 and 2006 expense forecasts related to OM&A expenditures, as apprehended by CAC/MSOS, the Board's view is influenced by actual cost trends and the risks and financial targets of the future. The Board accepts MH's contention at the hearing that "top down" derived estimates of OM&A are reasonable, even if there is a problem with some aspects of the detailed "bottom up" forecasts.

As was indicated at the hearing, the Board sought and obtained the audited financial results of MH for 2003/04 and the unaudited results for the first quarter of 2004/05. These reports were provided by MH in confidence, as they had yet to be filed with the legislature or publicly issued. Through its review of these results, the Board was further enabled to support its overall view of the Corporation's OM&A expenses.

Budgeting is not a science, it is an art. When considering potential future cost levels, proper budgeting relies heavily on trends, known circumstances, project planning and an assessment of risks. While the unreconciled difference apprehended by CAC/MSOS should have been noted and corrected prior to filing the Application, or addressed by MH at the hearing, the absence of these corrective measures does not eliminate the greater need of recognizing overall cost direction. Ignoring increasing costs, the rapid increases in staff complement and higher levels of organizational activity that is underway within MH would not be appropriate.

The Board is satisfied that MH took reasonable steps to mitigate its loss during the drought, including its actions in the futures market to reduce its export delivery obligations. The Board notes that no Intervenor indicated concern with MH's actions related to export activities during the drought period. However, the Board is of the view that the events and actions of the recent drought created opportunities to learn and prepare for future droughts.

The 2002-2004 drought related experience suggests that:

(a) MH is at risk of sustaining significant losses related to energy pricing when its hydraulic generation falls materially below the long-term mean;

(b) During periodic droughts, when MH is a net importer of electricity, the Corporation may be faced with highly unfavourable import prices;

(c) MH requires somewhere in the order of $200 million per year in export revenue, net of associated water rental fees and fuel and power purchases, in order to break even; and

(d) There are risks, as well as benefits, associated with MH's practice of seeking total energy sales above its hydraulic generation capabilities.

Therefore, the Board directs MH to file a study by an independent expert on MH's response to the 2002-2004 drought, the study shall assess MH's actions and provide comments and recommendations with respect to future actions and circumstances. This report is to be filed by January 31, 2005.

61 When one sifts through all of the material and arguments put forth by the applicants in support of their positions, it becomes more and more clear that their argument that the PUB failed to reach a "just and reasonable" rate is not a matter of law but a dispute with the opinion at which the PUB arrived.

62 A review of the record demonstrates that the PUB did in fact review extensive financial information and then exercised its discretion. It may well be that the PUB could not, or would not, review the specific financial tools that the applicants argue it should have, but that is insufficient in my mind to justify a finding that, as a whole, the PUB did not fix rates that were just and reasonable.

63 The intent of the legislation is to approve fair rates, taking into account such considerations as cost and policy or otherwise as the PUB deems appropriate. Rate approval involves balancing the interests of multiple consumer

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groups with those of the utility. The PUB's decision to build retained earnings more rapidly than proposed in order to better protect the utility and consumers from the financial impact of future drought, clearly meets the intent of the legislation and is within the jurisdiction afforded the PUB in s. 26 of the Accountability Act.

64 The role of the PUB under the Accountability Act is not only to protect consumers from unreasonable charges, but also to ensure the fiscal health of Hydro. It is clear the PUB understood its role in this regard.

65 The PUB has two concerns when dealing with a rate application; the interests of the utility's ratepayers, and the financial health of the utility. Together, and in the broadest interpretation, these interests represent the general public interest. These issues were addressed in the PUB's decision.

66 All in all, the PUB addressed the right question, the reasonableness of approved rates. It did not rely on irrelevant evidence or fail to consider relevant evidence. The PUB was alive to the issues and alive to the implications of its decision. It did not apply inappropriate tests or apply appropriate tests or factors incorrectly. It did not make its decision in an arbitrary manner.

67 The setting of rates, and the elements that are to be considered in doing so, require a specialized knowledge and understanding that ought not to be interfered with by courts unless there is clear error in that decision or the manner in which it was arrived at. This is not such a case.

68 When all of the arguments of the applicants are considered in light of the evidence the PUB heard and the decision it eventually made, I have not been convinced that what the applicants are complaining about is anything but the methodology the PUB utilized to arrive at that decision. The PUB then went on to justify that decision in the light of the interests of both the public and Hydro.

69 On whatever standard of review I might consider to be the applicable one, the applicants have not convinced me that leave to appeal should be granted. There are no questions of pure law to be decided. At best, from the applicants' perspective, their applications are grounded on questions of mixed fact and law and those issues are not such that they present a matter of importance that ought to engage the court.

70 I therefore deny the applications for leave to appeal.

MONNIN J.A.

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Document (1)

1. *Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554*

Client/Matter: -None-
Search Terms: "question of law" and "statutory interpretation"
Search Type: Terms and Connectors
Narrowed by:

Content Type	Narrowed by
Cases	Court: Supreme Court of Canada

Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin and Iacobucci JJ.

1992: June 3 / 1993: February 25.

File No.: 22145.

[1993] 1 S.C.R. 554 | *[1993] 1 R.C.S. 554* | *[1993] S.C.J. No. 20* | *[1993] A.C.S. no 20* | *1993 CanLII 164*

Canadian Human Rights Commission, appellant; v. Department of Secretary of State, Treasury Board of Canada and Canadian Union of Professional and Technical Employees, respondents, and Attorney General of Canada, respondent, and Brian Mossop, mis en cause, and Equality for Gays and Lesbians Everywhere, Canadian Rights and Liberties Federation, the National Association of Women and the Law, the Canadian Disability Rights Council and the National Action Committee on the Status of Women, interveners, and Focus on the Family, the Salvation Army, REAL Women, the Evangelical Fellowship of Canada and the Pentecostal Assemblies of Canada, interveners.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL (163 paras.) [page555]

Case Summary

Civil rights — Discriminatory practice — Family status — Employee denied bereavement leave to attend funeral of father of his male companion — Collective agreement providing for leave upon death of a member of an employee's "immediate family" — "Immediate family" including common-law spouse of opposite sex — Federal legislation prohibiting discrimination on basis of "family status" — Whether denial of bereavement leave based on family status — Canadian Human Rights Act, R.S.C., 1985, c. H-6, ss. 3, 10.

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Judicial review — Standard of review — Curial deference toward specialized tribunals — Whether Federal Court of Appeal erred in holding that any error of law by human rights tribunal reviewable — Whether Tribunal committed such an error of law in interpreting family status as including a same-sex relationship — Federal Court Act, R.S.C., 1985, c. F-7, s. 28.

The complainant, a federal government employee, took a day off work to attend the funeral of the father of the man he described as his lover. The two men had known each other for over ten years and resided together in a jointly owned and maintained home. The collective agreement between Treasury Board and the complainant's union governing terms of employment provided for up to four days' leave upon the death of a member of an employee's "immediate family", a term defined as including a common-law spouse. The definition of "common-law spouse" was restricted to a person of the opposite sex. The day after the funeral the complainant applied for bereavement leave pursuant to the collective agreement, but his application was refused. The grievance he filed was rejected on the basis that the denial of his application was in accordance with the collective agreement. The complainant then filed complaints with the appellant Canadian Human Rights Commission against his employer, Treasury Board and his union.

The Human Rights Tribunal concluded that a discriminatory practice had been committed contrary to the Canadian Human Rights Act, which prohibited discrimination on the basis of "family status". It ordered that the day of the funeral be designated as a day of bereavement leave and that the collective agreement be amended so that the definition of common-law spouse include persons of the same sex who would meet the definition in [page556] its other respects. The Federal Court of Appeal granted the Attorney General of Canada's application pursuant to s. 28 of the Federal Court Act and set aside the Tribunal's decision. This appeal is to determine whether the Federal Court of Appeal erred in holding that any error of law by a human rights tribunal is reviewable on a s. 28 application, and in holding that the term "family status" in the Canadian Human Rights Act did not include a homosexual relationship. No Charter issues were raised in this appeal.

Held (L'Heureux-Dubé, Cory and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and La Forest, Sopinka, Cory, McLachlin and Iacobucci JJ.: The general question raised in this appeal is one of ***statutory interpretation*** and as such is a ***question of law*** over which the Federal Court of Appeal has jurisdiction under s. 28 of the Federal Court Act.

Per Lamer C.J. and La Forest, Sopinka and Iacobucci JJ.: The denial of bereavement leave in this case was not discrimination on the basis of family status within the meaning of s. 3 of the Canadian Human Rights Act.

Per Lamer C.J. and Sopinka and Iacobucci JJ.: The Federal Court of Appeal had the necessary jurisdiction to review the Tribunal's decision. Where the Court has limited the power of intervention of the reviewing courts to cases of patent unreasonableness, the tribunals were acting under the special protection of privative clauses. There is no such clause immunizing the decisions of a human rights tribunal. The issue in this case is one of ***statutory interpretation***, and therefore a ***question of law*** reviewable under s. 28 of the Federal Court Act. While the courts have shown curial deference toward certain specialized tribunals in interpreting their enabling Act, such deference will not apply to findings of law in which the tribunal has no particular expertise, such as findings of law by human rights tribunals. If need be, La Forest J.'s reasons were adopted in this regard.

The Canadian Human Rights Act did not prohibit discrimination on the basis of sexual orientation at the time [page557] the complainant was denied bereavement leave. When Parliament added the phrase "family status" to the Act in 1983 it refused at the same time to add sexual orientation to the list of prohibited grounds of discrimination. In this case, the complainant's sexual orientation is so closely connected with the grounds which led to the refusal of the benefit that this denial could not be condemned as discrimination on the basis of "family status" without indirectly introducing into the Act the prohibition which Parliament specifically decided not to include. Absent a Charter challenge of its constitutionality, when Parliamentary intent is clear, courts and administrative tribunals are not empowered to do anything else but to apply the

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law.

Per La Forest and Iacobucci JJ.: Lamer C.J.'s general approach was agreed with. With respect to the standard of review, the general question raised is one of ***statutory interpretation***, and as such is a ***question of law*** over which the Federal Court of Appeal has jurisdiction. In the absence of provisions indicating a legislative intention to limit judicial review, such as a privative clause, the normal supervisory role of the courts remains. While the courts have also been willing to show deference to administrative tribunals for reasons of relative expertise, the superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context, and does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of ***statutory interpretation*** and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal, and must therefore review the tribunal's decisions on questions of this kind on the basis of correctness, not on a standard of reasonability.

With respect to the meaning to be attributed to the words "family status", while the Act should be interpreted generously with a view to effecting its purpose, neither ordinary meaning, context, nor purpose indicates a legislative intention to include same-sex couples within "family status". This is not an action under the Charter, where the Court may review the actions of Parliament or the government.

Per L'Heureux-Dubé J. (dissenting): While courts will intervene in the face of a jurisdictional error, or a [page558] patently unreasonable error of fact or law, they should exercise caution and deference in reviewing the decisions of specialized administrative tribunals. The best approach to determining the appropriate standard of review in a specific case is one which recognizes the need for flexibility. The pragmatic and functional approach articulated by the Court in Bibeault provides the proper framework. It must be asked whether the legislator intended the question to be within the jurisdiction conferred on the tribunal. If so, the role of the courts is a superintending one, and intervention will be warranted only where the decision is patently unreasonable. This approach requires a focus on jurisdiction which accounts for the general values of deference, and the ease with which questions can be improperly branded as jurisdictional. Though it was first used in the context of a board protected by a privative clause, it is a principled approach of general application which does not focus on formal categories, but rather seeks to determine the rationale behind deference in a specific context. The Court will examine not only the wording of the enactment conferring jurisdiction on the tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal. If, after the various factors are considered, it is concluded that courts should answer the question, then the question is one which does not lie within the board's jurisdiction and the test of correctness should apply. If it is concluded that the question should be answered by the board, then the question is one within the board's jurisdiction and courts should only intervene if the decision is patently unreasonable.

There is nothing in s. 28 of the Federal Court Act that dictates review of every error of law. Review is a discretionary remedy. Given the rationale for deference and the importance of the court's supervisory power, an error should be a serious one to merit a court's intervention.

The Tribunal has the jurisdiction to determine questions of fact, and courts should defer to these findings unless they are patently unreasonable. The Tribunal also has jurisdiction to interpret its Act and, consequently, [page559] the meaning of the term "family status" in s. 3 of the Canadian Human Rights Act. Courts should defer to the Tribunal's interpretation since the legislature specifically intended that the Commission and its tribunals should carry out the task of interpreting the grounds of discrimination in the Act. While courts do have a role to play in this task, that role is a limited one, confined to overturning an interpretation which is patently unreasonable.

It is well established that human rights legislation has a unique quasi-constitutional nature, and that it is to be given a large, purposive and liberal interpretation. The purpose of the Act, set out in s. 2, is to ensure that people have an equal opportunity to make for themselves the life that they are able and wish to have without being hindered by discriminatory practices. The social cost of discrimination is insupportably high, and these insidious practices are damaging not only to the individuals who suffer the discrimination, but also to the very

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fabric of our society.

Even if one were to take a textual approach to the interpretation of s. 3 of the Act, it would not be necessary to construe "family status" as including only those families which have recognizable status at law. The term "status" may also indicate more factual matters of rank, social position, or relation to others. When the meaning of the French version of the term, "situation de famille", is considered, it is apparent that the scope of "family status" has potential to be very broad.

Parliament's decision to leave "family status" undefined is evidence of clear legislative intent that the term's meaning should be left for the Commission and its tribunals to define. Even if Parliament had in mind a specific idea of the scope of "family status", there is no definition in the Act which embodies this scope. Concepts of equality and liberty which appear in human rights documents are not bounded by the precise understanding of those who drafted them. The enumerated grounds of discrimination must be examined in the context of contemporary values, not in a vacuum. Their meaning is not frozen in time and the scope of each ground may evolve. Textual context should not detract from the purposive approach mandated by human rights documents, and legislative intent is best inferred from [page560] the legislation itself. The Tribunal cannot be reproached for having applied recognized principles of interpretation of human rights legislation, in light of the particular purpose of its Act.

The Tribunal's interpretation of "family status" in s. 3 of the Act is not patently unreasonable. The traditional conception of family is not the only conception. The multiplicity of definitions and approaches illustrates clearly that there is no consensus as to the boundaries of family, and that "family status" may have varied meanings depending on the context or purpose for which the definition is desired. This same diversity in definition is found in Canadian legislation affecting the "family"; the law has evolved and continues to evolve to recognize an increasingly broad range of relationships. The family is not merely a creation of law, and while law may affect the ways in which families behave or structure themselves, the changing nature of family relationships also has an impact on the law. It is clear that many Canadians do not live within traditional families. In defining the scope of the protection for "family status", the Tribunal thought it essential not only to look at families in the traditional sense, but also to consider the values that lie at the base of our support for families. It found that these values are not exclusive to the traditional family and can be advanced in other types of families. On the evidence before it and in the context of the Act, the Tribunal concluded that the potential scope of the term "family status" is broad enough that it does not prima facie exclude same-sex couples. In making this finding, the Tribunal used the proper interpretational approach, considered the purpose of the Act and the values at the base of the protection of families. This is a matter that lay at the heart of the Tribunal's specialized jurisdiction and expertise, and it cannot be said that this conclusion is at all unreasonable, a fortiori patently unreasonable. Using a functional approach, the Tribunal concluded that the specific relationship before it was one which, on the evidence, could come within the scope of "family status". Since this conclusion is far from being patently unreasonable, it must be left undisturbed.

[page561]

The collective agreement restricted the bereavement leave to "immediate family", the definition of which clearly included some familial relationships while excluding others, in particular employees in permanent and public relationships with persons of the same sex. The Tribunal found that, given the complainant's factual situation and the purpose of the bereavement leave, the complainant had been denied an employment opportunity on the basis of the prohibited ground of "family status". While sexual orientation may appear to be the ground of discrimination, the central focus is "family status". The complainant was denied leave because the relationship he had with his companion was not recognized as a family relationship. The Tribunal, acting within its jurisdiction, identified the complainant's claim as one of discrimination on the basis of "family status". Based on the purpose of the Act, the purpose of the benefit, and all the evidence before it, it was perfectly reasonable for the Tribunal to conclude that the collective agreement violated s. 10(b) of the Act, a conclusion with which the Court has no reason to interfere.

Per Cory J. (dissenting): La Forest J.'s reasons were agreed with in so far as they pertain to the duty of the courts to review and the standard of review that should be applied to the decisions of human rights tribunals.

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The absence of any privative clause in the Canadian Human Rights Act is one of the factors that may be taken into account in determining the deference that should be accorded the decision of a tribunal acting pursuant to that Act and the extent of the supervisory role the court should exercise in reviewing such a decision. Based on the factors discussed by L'Heureux-Dubé J., however, the Tribunal was correct in determining that the term "family status" was sufficiently broad to include same-sex couples living together in a long-term relationship and that the complainant and his companion came within the scope of this term.

Per McLachlin J. (dissenting): La Forest J.'s reasons on the standard of review which courts should apply to human rights tribunals were agreed with. Applying this standard, and on the basis of the factors reviewed by L'Heureux-Dubé J., the Tribunal was correct in concluding that the relationship between the complainant [page562] and his companion falls within the term "family status" under the Act.

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By Lamer C.J.

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By L'Heureux-Dubé J. (dissenting)

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APPEAL from a judgment of the Federal Court of Appeal, *[1991] 1 F.C. 18*, *71 D.L.R. (4th) 661*, *32 C.C.E.L. 276*, *114 N.R. 241*, *90 C.L.L.C. para. 17,021*, *12 C.H.R.R. D/355*, setting aside a decision of a Human Rights Tribunal *(1989), 10 C.H.R.R. D/6064*, upholding a complaint of discrimination. Appeal dismissed, L'Heureux-Dubé, Cory and McLachlin JJ. dissenting.

René Duval and William Pentney, for the appellant.

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Barbara A. McIsaac, Q.C., and Lisa Hitch, for the respondents, the Attorney General of Canada, the Department of the Secretary of State and the Treasury Board of Canada. Gwen Brodsky, for the interveners, Equality for Gays and Lesbians Everywhere, the Canadian Rights and Liberties Federation, the National Association of Women and the Law, the Canadian Disability Rights Council and the National Action Committee on the Status of Women. W.I.C. Binnie, Q.C., and Jenney P. Stephenson, for the interveners, Focus on the Family, the Salvation Army, REAL Women, the Evangelical Fellowship of Canada and the Pentecostal Assemblies of Canada.

Solicitor for the appellant: René Duval, Ottawa. Solicitor for the respondents, the Attorney General of Canada, the Department of the Secretary of State and the Treasury Board of Canada: Barbara McIsaac, Ottawa. Solicitor for the interveners, Equality for Gays and Lesbians Everywhere, the Canadian Rights and Liberties Federation, the National Association of Women and the Law, the Canadian Disability Rights Council and the National Action Committee on the Status of Women: Gwen Brodsky, Vancouver. Solicitors for the interveners, Focus on the Family, the Salvation Army, REAL Women, the Evangelical Fellowship of Canada and the Pentecostal Assemblies of Canada: McCarthy Tétrault, Toronto.

The judgment of Lamer C.J. and Sopinka and Iacobucci JJ. was delivered by

LAMER C.J.

I - Facts

1 In June 1985, the complainant Brian Mossop was employed in Toronto as a translator for the Department of the Secretary of State. On June 3, 1985, Mossop attended the funeral of the father of the man whom Mossop described as his lover. Mossop testified that the two men have known each other since 1974, and have resided together since 1976 in a jointly owned and maintained home. They share the day-to-day developments in their lives and maintain a sexual relationship. Each has made the other the beneficiary of his will. They are known to their friends and families as lovers.

2 At the time, Mossop's terms of employment were governed by a collective agreement between the Treasury Board and the Canadian Union of Professional and Technical Employees ("CUPTE"). Article 19.02 of this

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2. Stone J.A. (concurring in the result)

17 Stone J.A. agreed with the result proposed by Marceau J.A., and also with his reasons except for a few differences which follow.

18 Firstly, according to Stone J.A. it is of considerable significance, in deciding the correctness of the decision of the Tribunal, to look at the objective of Parliament in adding "family status" as a prohibited ground of discrimination. He stated, at p. 40:

> Until that amendment was adopted on July 1, 1983 the original English version of the Act included only "marital status" whereas the original French version included only "situation de famille". The amendment appears to have been introduced to resolve a discrepancy between the two versions.

19 Relying on the Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, Stone J.A. noted that, at the time of the amendment, the then Minister of Justice made it clear that the government decided not to include in the Act "sexual orientation" as a prohibited ground of discrimination. In the opinion of Stone J.A., the term "family status", as used in the CHRA, does not include discrimination based on sexual orientation.

20 Secondly, Stone J.A. expressed the view that they were not asked to decide whether the term "family status" includes or excludes common law relationships, only briefly noting that a common law relationship is one that exists between two persons of the opposite sex.

21 Finally, as to the Charter issue, Stone J.A. noted that none of the parties had sought to demonstrate that any provision of the CHRA was in conflict with the Charter. The argument advanced before the court was that the Charter mandated the expression "family status" to include same-sex [page576] couples. Stone J.A.'s response to this argument was unequivocal (at p. 43):

> While accepting that human rights legislation should be interpreted, as much as possible, in a manner consistent with the provisions of the Charter and its interpretation, I cannot accept that the Charter should operate so as to mandate the courts to ascribe to a statutory term a meaning which it was not intended to possess. If the statutory term, construed as I think it should be construed, is thought to conflict with the provisions of the Charter then the constitutional validity of that term must be put in issue for the Charter to play a role in resolving the dispute. Having already decided that the term "family status", as it is used in the Act, does not import sexual orientation as a prohibited ground of discrimination, I am unable to see how the Charter can alter the construction of that term.

IV - Issues

22

1. Did the Federal Court of Appeal err when it held that any error of law by a Canadian Human Rights Tribunal is reviewable on an application pursuant to s. 28 of the Federal Court Act?
2. Did the Federal Court of Appeal err when it held that the term "family status' in the CHRA did not include a homosexual relationship between two individuals?

V - Analysis

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23 The first question put to the Court, that concerning the Federal Court of Appeal's jurisdiction to review any error of law by the Canadian Human Rights Tribunal, is in my opinion quite straightforward. The appeal before the Federal Court of Appeal was based on s. 28 of the Federal Court Act, which for convenience's sake I shall reproduce here:

> 28. (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order [page577] of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, on the ground that the board, commission or tribunal
>
> ...
>
> (b) erred in law in making its decision or order, whether or not the error appears on the face of the record;

24 On this point I agree with Marceau J.A. of the Federal Court of Appeal, and adopt his reasons in this regard (at pp. 31-32):

> The standard for reviewing the Tribunal's interpretation, said counsel, should be that established by the Supreme Court in Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al., *[1975] 1 S.C.R. 382*; and National Bank of Canada v. Retail Clerks' International Union et al., *[1984] 1 S.C.R. 269*. I disagree. In both those cases referred to, and in the others where likewise the Supreme Court has limited the power of intervention of the reviewing courts to cases of patent unreasonableness, the tribunals were acting under the special protection of privative clauses. There is no such clause immunizing the decisions of a human rights tribunal. It may be difficult at times, in analyzing a decision, to extract the ***question of law*** from the facts of the case so as to verify the treatment given to it by the tribunal without interfering with factual findings not subject to review. But the facts in this case are clearly established and there is no danger of mixing them up with the purely legal question of interpretation involved. If the Tribunal was not correct in its answer to the question, however understandable may have been its error, the Court has the duty to intervene.

25 The question before the Court in this case is one of ***statutory interpretation***: it is therefore a ***question of law***. The appellant argued that, nevertheless, the Federal Court of Appeal should have exercised judicial restraint and upheld the Tribunal's decision. Absent a privative clause, the courts have shown curial deference vis-à-vis certain specialized tribunals when interpreting their own Act. The question is therefore whether a tribunal set up under the CHRA is such a body. On this point, this [page578] Court, my colleague L'Heureux-Dubé J. dissenting, just a few months ago, in Zurich Insurance Co. v. Ontario (Human Rights Commission), *[1992] 2 S.C.R. 321*, at p. 338, found that such a board does not have the kind of expertise that should enjoy curial deference on matters other than findings of fact:

> In spite of the ability to overturn decisions of the Board on findings of fact, this Court has indicated that some curial deference will apply even to cases without privative clauses to reflect the principle of the specialization of duties (see Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission), *[1989] 1 S.C.R. 1722*, at p. 1746, Etobicoke, supra, at p. 211). While curial deference will apply to findings of fact, which the Board of Inquiry may have been in a better position to determine, such deference will not apply to findings of law in which the Board has no particular expertise.

26 It seems to me that this should have put the matter to rest. But if any additional reasons need be given for our having come to that conclusion, I would adopt in that regard the reasons of my colleague Justice La Forest in this case.

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27 Having decided this question, I must now turn to the second one. It is important to remember that when this case was heard last June, the only question submitted to this Court was whether, by specifically denying homosexual couples access to certain benefits conferred on heterosexual couples, a union and the government had infringed the CHRA. There was no question of determining whether the government and the unions should or should not extend these types of benefits to homosexual couples, nor of deciding whether Parliament when enacting the CHRA should have prohibited discrimination on the basis of sexual orientation. Also of great importance to the dynamics of the analysis in this case is the fact that none of the provisions of the CHRA were challenged under the [page579] Charter. The question before this Court was thus strictly one of ***statutory interpretation***.

28 Since then, as the result of two important decisions of Canadian courts, the situation in this country has evolved with respect to the questions at issue in this appeal. On July 9, 1992 this Court handed down its decision in Schachter v. Canada, *[1992] 2 S.C.R. 679*, confirming that, in a limited number of special circumstances, the courts may add to the text of legislative provisions so that they conform to the requirements of the Constitution. On August 6, 1992, the Ontario Court of Appeal, relying on the principles set forth in Schachter, added sexual orientation to the list of prohibited grounds of discrimination contained in s. 3 of the CHRA, as it was of the view that without this addition the provision was contrary to s. 15 of the Charter. The case in question was Haig v. Canada *(1992), 9 O.R. (3d) 495*. On November 9, 1992, the Minister of Justice, Kim Campbell, announced her intention not to appeal that decision.

29 As a result of these developments, the Court invited the parties to this appeal to submit new arguments. Relying on the reasons of the Ontario Court of Appeal in Haig, the appellant could then have challenged the constitutionality of s. 3 of the CHRA on the basis of the absence of sexual orientation from the list of prohibited grounds of discrimination. This would have enabled this Court to address the fundamental questions argued in the Ontario Court of Appeal in Haig. It would then have been possible to give a much more complete and lasting solution to the present problem.

30 The appellant chose not to take this approach, however, and insisted that this Court dispose of its action solely on the basis of the meaning of "family status". In these circumstances, as the Court did not have the benefit of any argument that would have enabled it to give an informed ruling on the questions decided by the Ontario Court of Appeal in Haig, and since on the present record it cannot do so, I can do no more than to dispose of this [page580] appeal on the basis of the law as it stood at the time of the events in question. Accordingly, the issue to be determined, on the facts of this case, is whether there was discrimination on the basis of Mr. Mossop's "family status" under the CHRA as it stood at the time the events occurred.

31 When Mr. Mossop was denied bereavement leave in June 1985, the CHRA did not prohibit discrimination on the basis of sexual orientation. In my opinion, this fact is a highly relevant part of the context in which the phrase "family status" in the Act must be interpreted. It is interesting to note in this regard that there was a recommendation by the Canadian Human Rights Commission that sexual orientation be made a prohibited ground of discrimination. Nevertheless, at the time of the 1983 amendments to the CHRA, no action was taken to implement this recommendation.

32 It is thus clear that when Parliament added the phrase "family status" to the English version of the CHRA in 1983, it refused at the same time to prohibit discrimination on the basis of sexual orientation in that Act. In my opinion, this fact is determinative. I find it hard to see how Parliament can be deemed to have intended to cover the situation now before the Court in the CHRA when we know that it specifically excluded sexual orientation from the list of prohibited grounds of discrimination contained in the Act. In the case at bar, Mr. Mossop's sexual orientation is so closely connected with the grounds which led to the refusal of the benefit that this denial could not be condemned as discrimination on the basis of "family status" without indirectly introducing into the CHRA the prohibition which Parliament specifically decided not to include in the Act, namely the prohibition of discrimination on the basis of sexual orientation.

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Content Type	Narrowed by
CA Cases	-None-

Trans Mountain Pipe Line Company Ltd. (appellant)v.National Energy Board, Dome Petroleum Limited, Gulf Oil CanadaLimited, Interprovincial Pipe Line Limited, Shell CanadaLimited, TransCanada Pipelines Limited, Trans-Northern PipeLine Company, Air Canada, Canadian Pacific Air Lines Limited,Japan Airlines Co. Ltd., Pacific Western Airlines Ltd., QantasAirways Ltd., United Airlines Inc., Western Airlines Inc.,Minister of Energy for Ontario, Procureur général du Québec,and Attorney General for British Columbia (respondents), [1979] 2 F.C. 118

Federal Courts Reports

Federal Court of Canada

COURT OF APPEAL

PRATTE AND RYAN JJ. AND KERR D.J.

VANCOUVER, FEBRUARY 19, 20, 21 AND 23, 1979.

Action No. A-178-78

[1979] 2 F.C. 118

Case Summary

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Crown — Pipelines — Application for order to amend tolls charged by appellant on ground that tolls were insufficient compensation for services rendered by appellant — Report made to Board by Presiding Member after evidence taken and submissions made — Report subsequently adopted by Board as own decision, without affording appellant further opportunity to be heard — Appeal from Board's decision — Whether or not Board's failure to give appellant opportunity to be heard before adopting report a denial of natural justice — National Energy Board Act, R.S.C. 1970, c. N-6, ss. 14(1), 18, 50.

APPEAL.

COUNSEL

D.M.M. Goldie, Q. C. for appellant. P.G. Griffin for respondent National Energy Board. Colin L. Campbell, Q. C. for respondent TransCanada Pipelines Limited. L.G. Nathanson and S.R. Schachter for respondent Attorney General for British Columbia. No one appearing for respondents Dome Petroleum Limited, Gulf Oil Canada Limited, Interprovincial Pipe Line Limited, Shell Canada Limited, Trans-Northern Pipe Line Company, Air Canada, Canadian Pacific Air Lines Limited, Japan Airlines Co. Ltd., Pacific Western Airlines Ltd., Qantas Airways Ltd., Western Airlines Inc., Minister of Energy for Ontario and Procureur général du Québec.

SOLICITORS

Russell & DuMoulin, Vancouver, for appellant. National Energy Board, Ottawa, for respondent National Energy Board. Ladner Downs, Vancouver, for respondent Dome Petroleum Limited. McCarthy & McCarthy, Toronto, for respondent TransCanada Pipelines Limited. Davis & Company, Vancouver, for respondent Attorney General for British Columbia.

The following are the reasons for judgment delivered orally in English by

1 PRATTE J.: This is an appeal pursuant to section 18(1) of the National Energy Board Act[1] from an order of the Board prescribing the tolls which the appellant could charge from February 1, 1978.

2 The appellant owns and operates an oil pipeline from a point near Edmonton, Alberta, to Burnaby, British Columbia, with a short spur running to Sumas on the International Boundary. It is subject to the jurisdiction of the National Energy Board which has the power to regulate the tolls that it may charge.

3 On March 14, 1977, the appellant applied to the Board for an order, under section 50 of the National Energy Board Act, amending the tolls charged by the appellant on the ground that they were unjust and unreasonable in that they were insufficient to yield a fair and reasonable compensation to the appellant for the services rendered by it.

4 Pursuant to subsection 14(1) of the Act, the Board authorized one of its members (hereinafter called the "Presiding Member") to take evidence and hear submissions respecting the appellant's application for the purpose of making a report to the Board. The Presiding Member held public hearings at which the appellant and other interested parties had an opportunity to lead evidence, cross examine witnesses and present argument; he subsequently made a report to the Board of his findings and recommendations. The Board, after considering "the Presiding Member's report and the evidence adduced at the said hearing" adopted the report as its own decision. That is the order against which this appeal is directed.

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5 The appellant's first ground of attack relates to the procedure followed by the Board pursuant to subsection 14(1). That subsection reads as follows:

> 14. (1) The Board or the Chairman may authorize any one of the members to report to the Board upon any question or matter arising in connection with the business of the Board, and the person so authorized has all the powers of the Board for the purpose of taking evidence or acquiring the necessary information for the purpose of such report, and upon such a report being made to the Board, it may be adopted as the order of the Board or otherwise dealt with as the Board considers advisable.

6 The sole complaint of the appellant in this respect, if I understood counsel correctly, arises from the Board's failure, before making a decision on the Presiding Member's report, to give the appellant an opportunity to be heard on the contents of that report. It is the appellant's submission that natural justice required that it be given such an opportunity. I do not agree. The appellant, while not entitled to any particular form of hearing, was entitled to be heard on its application. It cannot, however, be contested that it was so heard since the record shows that both the evidence adduced and the submissions made by the appellant before the Presiding Member were communicated to the Board. Natural justice did not require, in my view, that the appellant be given the further right of being heard on the Presiding Member's report. The making of that report was part of the Board's decision process and I do not think that the appellant had the right to interpose itself in that process. The rights of an applicant, it seems to me, are the same whether or not the decision is made pursuant to subsection 14(1): in both cases the applicant is entitled to be heard on its application. An applicant does not acquire a right to an additional hearing when the Board chooses to resort to the procedure of subsection 14(1).

7 The other grounds of appeal relate to the method followed and the factors taken into consideration by the Board in determining the tolls that the appellant could charge. It will not be necessary for me to consider separately each one of a those grounds since, in my opinion, they must all fail for the same reason: they do not involve any question of law.

8 Under sections 50 and following of the Act, the Board's duty was to determine the tolls which, in the circumstances, it considered to be "just and reasonable".

9 Whether or not tolls are just and reasonable is clearly a question of opinion which, under the Act, must be answered by the Board and not by the Court. The meaning of the words "just and reasonable" in section 52 is obviously a question of law, but that question is very easily resolved since those words are not used in any special technical sense and cannot be said to be obscure and need interpretation. What makes difficulty is the method to be used by the Board and the factors to be considered by it in assessing the justness and reasonableness of tolls. The statute is silent on these questions. In my view, they must be left to the discretion of the Board which possesses in that field an expertise that judges do not normally have. If, as it has clearly done in this case, the Board addresses its mind to the right question, namely, the justness and reasonableness of the tolls, and does not base its decision on clearly irrelevant considerations, it does not commit an error of law merely because it assesses the justness and reasonableness of the tolls in a manner different from that which the Court would have adopted.

10 For these reasons, I would dismiss the appeal.

* * *

11 RYAN J. concurred.

* * *

12 KERR D.J. concurred.

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1 R.S.C. 1970, c. N-6, s. 18.

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Document (1)

1. *Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources Ltd., [2001] A.J. No. 864*

Client/Matter: -None-
Search Terms: 2001 ABCA 174
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources Ltd., [2001] A.J. No. 864

Alberta Judgments

Alberta Court of Appeal

Calgary, Alberta

Conrad, O'Leary and Picard JJ.A.

Heard: September 14, 2000.

Judgment: filed June 29, 2001.

Docket: 99-18558

[2001] A.J. No. 864 | 2001 ABCA 174 | [2001] 10 W.W.R. 99 | 93 Alta. L.R. (3d) 242 | 286 A.R. 146 | 107 A.C.W.S. (3d) 145

Between Giant Grosmont Petroleums Ltd., NAL Resources Ltd. Northstar Energy Corporation Ltd., Renaissance Energy Ltd., Ocean Energy Resources Canada, Ltd., Paramount Resources Ltd., Purcell Energy Ltd., appellants (applicants), and Gulf Canada Resources Ltd. and Petro-Canada, respondents (respondents), and The Alberta Energy and Utilities Board, respondent

(105 paras.)

Case Summary

On appeal from the order of Hart J. Dated the 17th day of September, 1999. Filed the 8th day of November, 1999.

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Counsel

J.W. Rose, Q.C. and T.F. Mayson, for the appellants. F.R. Foran, Q.C., for the respondent, Gulf Canada Resources Ltd. W.T. Corbett, Q.C., for the respondent, Petro-Canada. D. Larder, for the respondent, Alberta Energy and Utilities Board.

Reasons for judgment were delivered by Picard J.A., concurred in by O'Leary J.A. Dissenting reasons were delivered by Conrad J.A. (para. 47).

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REASONS FOR JUDGMENT

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> The proposed Bill is in large measure a consolidation of the legislation relating to oil sands development, which is presently contained in the Oil and Gas Conservation Act. ...
>
> The Bill therefore reflects the removal from the Oil and Gas Conservation Act of those parts which apply only to oil sands activities and their inclusion in this new Bill. In addition, a number of provisions necessary to properly administer oil sands activities have been included in this new Bill.

9 There is no indication from the above excerpts that the intention of the legislature was to reduce the Board's power, even considering the removal of ss. 26(1)(f) and 29(2) from the OGCA. Rather, the intention was to consolidate the legislation relating to oil sands development, due to the unique nature of the oil sands, and to incorporate any additional provisions necessary for the proper and more efficient development of the Oil Sands Areas.

10 Although the admissibility of legislative debates to determine legislative intent in statutory construction has, in the past, been held to be doubtful, the Supreme Court of Canada and this Court have now confirmed its admissibility, at least for the general purpose of showing the mischief Parliament or the Legislature was attempting to remedy: R. v. Heywood, *[1994] 3 S.C.R. 761*; R. v. Gisby, *2000 ABCA 261* at paras. 25-30. While I have considered the Hansard excerpts above as relevant to both the background and purpose of the legislation in issue, I remain mindful of the limited reliability and weight that should be given to this evidence: R. v. Morgentaler, *[1993] 3 S.C.R. 463* at 484.

11 The impugned regulations, Alta. Reg. 47/99 and Alta. Reg. 48/99, were passed by the Board on February 24, 1999 pursuant to powers contained in the OSCA and the OGCA. The regulations regulate the production of gas from wells completed in certain geological intervals defined in the Board's Oil Sands Area Orders OSA 1, 2 and 3 (the Oil Sands Areas). The effect of the regulations is to provide the Board with authority to preclude operators from producing gas from wells completed in the Oil Sands Areas after July 1, 1998, unless the Board approves such production or exempts such wells from the operation of the regulations. The regulations also grant the Board the power to make any order or direction it considers necessary where gas production may affect recovery of crude bitumen from the Oil Sands Areas.

DECISION BELOW

12 The chambers judge concluded that the regulations were intra vires the Board and dismissed the Appellants' application. He noted that regulations can be passed only if the legislature has conferred a power or authority to do so. The Appellants demonstrated that, prior to 1983, there were express legislative provisions in the OGCA under ss. 26(1)(f) and 29(2). These provisions clearly required producers to obtain Board approval prior to producing gas within or adjacent to oil sands deposits but were repealed in 1983 with the passage of the OSCA. The OSCA does not contain the same or similar statutory provisions but the subject regulations have the same effect. The Appellants argued that absent the repealed statutory provisions, the regulations in question could not have been passed pursuant to enabling legislative authority and are, therefore, ultra vires the Board. The Respondent Board, together with Gulf and Petro-Canada, argued that there is ample specific and general authority for the Board to make the regulations. They pointed to ss. 21(g) and (u) of the OSCA and ss. 10(1) and (y) of the OGCA, which empower the Board to pass regulations dealing with the prevention of waste and the conservation of oil sands and oil and gas resources. In addition, they pointed to the Board's broad mandate and powers under the Alberta Energy and Utilities Board Act (the AEUB Act) and the Energy Resources Conservation Act (ERCA), s. 2 of which sets out as a stated purpose of the legislation effecting "the conservation of" and preventing "the waste of the energy resources of Alberta".

13 The chambers judge, taking a purposive approach to the applicable statutes, relied on Bell Canada v. Canadian Radio Television & Telecommunications Commission *(1989), 60 D.L.R. (4th) 682* (S.C.C.) in finding that the powers of any administrative tribunal must be stated in its enabling statute but may also exist "by necessary implication from the wording of the Act, its structure and its purpose". He held that the objects and stated purposes of the legislation make it clear that prevention of waste and conservation of resources go to the very

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root of the Board's purpose and existence and that s. 21 of the OSCA and s. 10 of the OGCA expressly empower the Board to pass regulations for these purposes. He concluded that the impugned regulations were consistent with these purposes and to construe the legislation otherwise would be to "sterilize these powers through over technical interpretations of enabling statutes": Bell Canada, supra. As stated above, he dismissed the Appellants' application.

LEGISLATION

14 The general power to make regulations is conferred on the Board by s. 21(1) of the OSCA and s. 10(1) of the OGCA.

> Oil Sands Conservation Act
>
> 1(1) The Board may make regulations
>
> ...
>
> (g) respecting methods of operation to be observed for the prevention of waste;
>
> ...
>
> (u) generally to conserve oil sands and crude bitumen and to prevent the waste or improvident disposition of oil sands, crude bitumen, derivatives of crude bitumen, declared oil sands or oil sands products.
>
> Oil and Gas Conservation Act
>
> 10(1) The Board may make regulations
>
> ...
>
> (y) generally to conserve oil and gas, and to prevent waste or improvident disposition of oil or gas, and to do any other matter reasonably incidental to the development and drilling of any oil or gas wells, the operation of them, and the production from them.

ISSUE

15 The issue to be determined on this appeal is whether the Board had the authority under its enabling legislation to pass the impugned regulations.

STANDARD OF REVIEW

16 The determination of the scope of the Board's regulatory authority involves the construction of its enabling legislation. The standard of review of the decision of the chambers judge is correctness. As noted by Justice La Forest in Gould v. Yukon Order of Pioneers, *[1996] 1 S.C.R. 571*, where the issue is one of statutory interpretation and general legal reasoning, the reviewing court has a duty to consider the correctness of the Board's decision. The question of power to enact regulations does not engage the Board's expertise and, therefore, deference is not required to be given to the Board's decision.

ANALYSIS

Introduction

17 It is a fundamental principle of public law that all governmental action be supported by a grant of legal authority: D. Brown & J. Evans, Judicial Review of Administrative Action in Canada, looseleaf (Toronto: Canvasback Publishing, 1998) at para. 13:1100. Although there is no requirement for administrative tribunals to specify an exact source when purporting to act pursuant to their jurisdiction, when that jurisdiction is challenged, the administrative tribunal must not only point to but also support its source: British Columbia (Milk Board) v.

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Grisnich, *[1995] 2 S.C.R. 895* at para. 5. The Appellants argue that no affirmative authority to enact the impugned regulations exists in the relevant legislation, noting that neither s. 10 of the OGCA nor s. 21 of the OSCA grant specific power to the Board to enact regulations to control concurrent production of natural gas and crude bitumen. In determining whether the Board has the requisite authority to enact the impugned regulations, however, certain principles of statutory interpretation must be recognized.

Principles of Statutory Interpretation

18 A court must, as noted by the chambers judge, take a purposive approach to interpreting legislation. The interpretation of regulatory legislation is generally undertaken with a view to its essential purpose. Ambiguities or other uncertainties tend to be resolved by reference to the statute's overall purpose or purposes: Brown & Evans, supra at para. 13:1310. This modern approach to the interpretation of legislation, entrusting the administration of a regulatory scheme to an administrative tribunal is exemplified by the following statement of McIntyre J. in Maple Lodge Farms Ltd. v. Canada, *[1982] 2 S.C.R. 2* at 7:

> In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislature intended. ... [T]he courts should wherever possible, avoid a narrow technical construction and endeavour to make effective the legislative intent as applied to the administrative scheme involved.

19 The Appellants are correct in their submission that there is no specific power granted to the Board to enact regulations to control concurrent production of natural gas and crude bitumen. This submission overlooks another very important principle of interpretation, however, and that is that powers of an administrative tribunal may be implied from the wording of its enabling legislation. As stated in the leading decision of Bell Canada supra, at 706:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the Act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

20 This approach is also supported by the Interpretation Act, R.S.A. 1980, c. I-7, s. 10:

> 10. An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

21 In examining the purposes and objectives of the Board's enabling legislation, the court must consider not only the immediate context and the whole act in which the particular provision appears, but also any other legislation that may cast light on the meaning or effect of the words. As stated by Sullivan, R. in Driedger on the construction of Statutes, 3d ed. (Vancouver: Butterworths, 1994) at 285 and relied on by the Board:

> Governing principle. Statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject. The governing principle was stated by Lord Mansfield in R. v. Loxdale:
>
> > Where there are different statutes in pari materia though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.

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Document (1)

1. *Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3*

Client/Matter: -None-
[1992] 1 SCR 3:
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
CA Cases	-None-

Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ. [page4]

1991: February 19, 20 / 1992: January 23.

File No.: 21890.

[1992] 1 S.C.R. 3 | *[1992] 1 R.C.S. 3* | *[1992] S.C.J. No. 1* | *[1992] A.C.S. no 1* | *1992 CanLII 110*

Her Majesty the Queen in right of Alberta, as represented by the Minister of Public Works, Supply and Services, appellant, and The Minister of Transport and the Minister of Fisheries and Oceans, appellants; v. Friends of the Oldman River Society, respondent, and The Attorney General of Quebec, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Saskatchewan, the Attorney General of Newfoundland, the Minister of Justice of the Northwest Territories, the National Indian Brotherhood/Assembly of First Nations, the Dene Nation and the Metis Association of the Northwest Territories, the Native Council of Canada (Alberta), the Sierra Legal Defence Fund, the Canadian Environmental Law Association, the Sierra Club of Western Canada, the Cultural Survival (Canada), the Friends of the Earth and the Alberta Wilderness Association, interveners.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL (136 paras.)

Case Summary

Constitutional law — Distribution of legislative powers — Environment — Environmental assessment — Whether federal environmental guidelines order intra vires Parliament — Constitution Act, 1867, ss. 91, 92 — Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

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Environmental law — Environmental assessment — Statutory validity of federal environmental guidelines order — Whether guidelines order authorized by s. 6 of Department of the Environment Act — Whether guidelines order inconsistent with Navigable Waters Protection Act — Department of the Environment Act, R.S.C., 1985, c. E-10, s. 6 — Navigable Waters Protection Act, R.S.C., 1985, c. N-22, ss. 5, 6 — Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Environmental law — Environmental assessment — Applicability of federal environmental guidelines order — Alberta building dam on Oldman River — Dam affecting areas of federal responsibility such as navigable waters and fisheries — Whether guidelines order applicable only to new federal projects — Whether Minister of Transport and Minister of Fisheries and Oceans must comply with guidelines order — Department of the Environment Act, R.S.C., 1985, c. E-10, ss. 4(1)(a), 5(a)(ii), 6 — Environmental Assessment and Review Process Guidelines Order, SOR/84-467, ss. 2 "proposal", "initiating department", 6 — Navigable Waters Protection Act, R.S.C., 1985, c. N-22, s. 5 — Fisheries Act, R.S.C., 1985, c. F-14, ss. 35, 37.

Crown — Immunity — Provinces — Whether Crown in right of province bound by provisions of Navigable Waters Protection Act, R.S.C., 1985, c. N-22 — Interpretation Act, R.S.C., 1985, c. I-21, s. 17.

Administrative law — Judicial review — Remedies — Discretion — Alberta building dam on Oldman River — Dam affecting areas of federal responsibility such as navigable waters and fisheries — Environmental group applying for certiorari and mandamus in Federal Court to compel Minister of Transport and Minister of Fisheries and Oceans to comply with federal environmental [page5] guidelines order — Applications dismissed on grounds of unreasonable delay and futility — Whether Court of Appeal erred in interfering with motions judge's discretion not to grant remedy sought.

The respondent Society, an Alberta environmental group, brought applications for certiorari and mandamus in the Federal Court seeking to compel the federal departments of Transport and Fisheries and Oceans to conduct an environmental assessment, pursuant to the federal Environmental Assessment and Review Process Guidelines Order, in respect of a dam constructed on the Oldman River by the province of Alberta -- a project which affects several federal interests, in particular navigable waters, fisheries, Indians and Indian lands. The Guidelines Order was established under s. 6 of the federal Department of the Environment Act and requires all federal departments and agencies that have a decision-making authority for any proposal (i.e., any initiative, undertaking or activity) that may have an environmental effect on an area of federal responsibility to initially screen such proposal to determine whether it may give rise to any potentially adverse environmental effects. The province had itself conducted extensive environmental studies over the years which took into account public views, including the views of Indian bands and environmental groups, and, in September 1987, had obtained from the Minister of Transport an approval for the work under s. 5 of the Navigable Waters Protection Act. This section provides that no work is to be built in navigable waters without the prior approval of the Minister. In assessing Alberta's application, the Minister considered only the project's effect on navigation and no assessment under the Guidelines Order was made. Respondent's attempts to stop the project in the Alberta courts failed and both the federal Ministers of the Environment and of Fisheries and Oceans declined requests to subject the project to the Guidelines Order. The contract for the construction of the dam was awarded in 1988 and the project was 40 per cent complete when the respondent commenced its action in the Federal Court in April 1989. The Trial Division dismissed the applications. On appeal, the Court of Appeal reversed the judgment, quashed the approval under s. 5 of the Navigable Waters Protection Act, and ordered the Ministers of Transport and of Fisheries and Oceans to comply with the Guidelines Order. This appeal raises the constitutional and statutory validity of the Guidelines Order as well as its nature and applicability. It also raises the [page6] question whether the motions judge properly exercised his discretion in deciding not to grant the remedy sought on grounds of

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unreasonable delay and futility.

Held (Stevenson J. dissenting): The appeal should be dismissed, with the exception that there should be no order in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the Guidelines Order.

Statutory Validity of the Guidelines Order

The Guidelines Order was validly enacted pursuant to s. 6 of the Department of the Environment Act, and is mandatory in nature. When one reads s. 6 as a whole, rather than focusing on the word "guidelines" in isolation, it is clear that Parliament has elected to adopt a regulatory scheme that is "law", and amenable to enforcement through prerogative relief. The "guidelines" are not merely authorized by statute but must be formally enacted by "order" with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister's authority.

The Guidelines Order, which requires the decision maker to take socio-economic considerations into account in the environmental impact assessment, does not go beyond what is authorized by the Department of the Environment Act. The concept of "environmental quality" in s. 6 of the Act is not confined to the biophysical environment alone. The environment is a diffuse subject matter and, subject to the constitutional imperatives, the potential consequences for a community's livelihood, health and other social matters from environmental [page7] change, are integral to decision making on matters affecting environmental quality.

The Guidelines Order is consistent with the Navigable Waters Protection Act. There is nothing in the Act which explicitly or implicitly precludes the Minister of Transport from taking into consideration any matters other than marine navigation in exercising his power of approval under s. 5 of the Act. The Minister's duty under the Order is supplemental to his responsibility under the Navigable Waters Protection Act, and he cannot resort to an excessively narrow interpretation of his existing statutory powers to avoid compliance with the Order. There is also no conflict between the requirement for an initial assessment "as early in the planning process as possible and before irrevocable decisions are taken" in s. 3 of the Guidelines Order, and the remedial power under s. 6(4) of the Act to grant approval after the commencement of construction. That power is an exception to the general rule in s. 5 of the Act requiring approval prior to construction, and in exercising his discretion to grant approval after commencement, the Minister is not precluded from applying the Order.

Applicability of the Guidelines Order

The scope of the Guidelines Order is not restricted to "new federal projects, programs and activities"; the Order is not engaged every time a project may have an environmental effect on an area of federal jurisdiction. However, there must first be a "proposal" which requires an "initiative, undertaking or activity for which the Government of Canada has a decision making responsibility". The proper construction to be placed on the term "responsibility" is that the federal government, having entered the field in a subject matter assigned to it under s. 91 of the Constitution Act, 1867, must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity. "Responsibility" within the definition of "proposal" means a legal duty or obligation and should not be read as connoting matters falling generally within federal jurisdiction. Once such a duty exists, it is a matter of identifying the "initiating department" assigned responsibility for its performance, for it then becomes the "decision making authority" for the proposal and [page8] thus responsible for initiating the process under the Guidelines Order.

The Oldman River Dam project falls within the ambit of the Guidelines Order. The project qualifies as a proposal for which the Minister of Transport alone is the "initiating department" under s. 2 of the Order. The Navigable Waters Protection Act, in particular s. 5, places an affirmative regulatory duty on the Minister of Transport. Under that Act there is a legislatively entrenched regulatory scheme in place in which the approval of the Minister is required before any work that substantially interferes with navigation may be placed in, upon, over or under, through or across any navigable water.

The Guidelines Order does not apply to the Minister of Fisheries and Oceans, however, because there is no

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equivalent regulatory scheme under the Fisheries Act which is applicable to this project. The discretionary power to request or not to request information to assist a Minister in the exercise of a legislative function does not constitute a "decision making responsibility" within the meaning of the Order. The Minister of Fisheries and Oceans under s. 37 of the Fisheries Act has only been given a limited ad hoc legislative power which does not constitute an affirmative regulatory duty.

The scope of assessment under the Guidelines Order is not confined to the particular head of power under which the Government of Canada has a decision-making responsibility within the meaning of the term "proposal". Under the Order, the initiating department which has been given authority to embark on an assessment must consider the environmental effect on all areas of federal jurisdiction. The Minister of Transport, in his capacity of decision maker under the Navigable Waters Protection Act, must thus consider the environmental impact of the dam on such areas of federal jurisdiction as navigable waters, fisheries, Indians and Indian lands.

Crown Immunity

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: The Crown in right of Alberta is bound by the Navigable Waters Protection Act by necessary implication. The proprietary right the province may have in the bed of the Oldman River is subject to the public right of navigation, legislative jurisdiction over which has been exclusively vested in Parliament. Alberta requires statutory [page9] authorization from Parliament to erect any obstruction that substantially interferes with navigation in the Oldman River, and the Navigable Waters Protection Act is the means by which it must be obtained. The Crown in right of Alberta is bound by the Act, for it is the only practicable procedure available for getting approval. The purpose of the Act would be wholly frustrated if the province was not bound by the Act. The provinces are among the bodies that are likely to engage in projects that may interfere with navigation. Were the Crown in right of a province permitted to undermine the integrity of the essential navigational networks in Canadian waters, the legislative purpose of the Navigable Waters Protection Act would effectively be emasculated.

Per Stevenson J. (dissenting): The province of Alberta is not bound by the Navigable Waters Protection Act. The Crown is not bound by legislation unless it is mentioned or referred to in the legislation. Here, there are no words in the Act "expressly binding" the Crown and no clear intention to bind "is manifest from the very terms of the statute". As well, the failure to include the Crown would not wholly frustrate the purpose of the Act or produce an absurdity. There are many non-governmental agencies whose activities are subject to the Act and there is thus no emasculation of the Act. If the Crown interferes with a public right of navigation, that wrong is remediable by action. There is no significant benefit in approval under the Act. Tort actions may still lie.

Constitutional Validity of the Guidelines Order

The "environment" is not an independent matter of legislation under the Constitution Act, 1867. Understood in its generic sense, it encompasses the physical, economic and social environment and touches upon several of the heads of power assigned to the respective levels of government. While both levels may act in relation to the environment, the exercise of legislative power affecting environmental concerns must be linked to an appropriate head of power. Local projects will generally fall within provincial responsibility, but federal participation will be required if, as in this case, the project impinges on an area of federal jurisdiction.

The Guidelines Order is intra vires Parliament. The Order does not attempt to regulate the environmental effects of matters within the control of the province but [page10] merely makes environmental impact assessment an essential component of federal decision making. The Order is in pith and substance nothing more than an instrument that regulates the manner in which federal institutions must administer their multifarious duties and functions. In essence, the Order has two fundamental aspects. First, there is the substance of the Order dealing with environmental impact assessment to facilitate decision making under the federal head of power through which a proposal is regulated. This aspect of the Order can be sustained on the basis that it is legislation in relation to the relevant subject matters enumerated in s. 91 of the Constitution Act, 1867. The second aspect of the Order is its procedural or organizational element that

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coordinates the process of assessment, which can in any given case touch upon several areas of federal responsibility, under the auspices of a designated decision maker (the "initiating department"). This facet of the Order has as its object the regulation of the institutions and agencies of the Government of Canada as to the manner in which they perform their administrative functions and duties. This is unquestionably intra vires Parliament. It may be viewed either as an adjunct of the particular legislative powers involved, or, in any event, be justifiable under the residuary power in s. 91.

The Guidelines Order cannot be used as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power. The "initiating department" is only given a mandate to examine matters directly related to the areas of federal responsibility potentially affected. Any intrusion under the Order into provincial matters is merely incidental to the pith and substance of the legislation.

Discretion

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: The Federal Court of Appeal did not err in interfering with the motions judge's discretion not to grant the remedies sought on the grounds of unreasonable delay and futility. Respondent made a sustained effort, through legal proceedings in the Alberta courts and through correspondence with federal departments, to challenge the legality of the process followed by the province to build the dam and the acquiescence of the appellant Ministers, and there is no evidence that Alberta has suffered any prejudice from any delay in taking the present action. Despite ongoing legal proceedings, the construction of the dam continued. The province was not prepared to [page11] accede to an environmental impact assessment under the Order until it had exhausted all legal avenues. The motions judge did not weigh these considerations adequately, giving the Court of Appeal no choice but to intervene. Futility was also not a proper ground to refuse a remedy in the present circumstances. Prerogative relief should only be refused on that ground in those few instances where the issuance of a prerogative writ would be effectively nugatory. It is not obvious in this case that the implementation of the Order even at this late stage will not have some influence over the mitigative measures that may be taken to ameliorate any deleterious environmental impact from the dam on an area of federal jurisdiction.

Per Stevenson J. (dissenting): The Federal Court of Appeal erred in interfering with the motions judge's discretion to refuse the prerogative remedy. The court was clearly wrong in overruling his conclusion on the question of delay. The common law has always imposed a duty on an applicant to act promptly in seeking prerogative relief. Given the enormity of the project and the interests at stake, it was unreasonable for the respondent Society to wait 14 months before challenging the Minister of Transport's approval. It is impossible to conclude that Alberta was not prejudiced by the delay. The legal proceedings in the Alberta courts brought by the respondent and others need not have been taken into account by the motions judge. These proceedings were separate and distinct from the relief sought in this case and were irrelevant to the issues at hand. The present action centres on the constitutionality and applicability of the Guidelines Order. It raises new and different issues. In determining whether he should exercise his discretion against the respondent, the motions judge was obliged to look only at those factors which he considered were directly connected to the application before him. Interference with his exercise of discretion is not warranted unless it can be said with certainty that he was wrong in doing what he did. The test has not been met in this case.

Costs

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: [page12] It is a proper case for awarding costs on a solicitor-client basis to the respondent, given the Society's circumstances and the fact that the federal Ministers were joined as appellants even though they did earlier not seek leave to appeal to this Court.

Per Stevenson J. (dissenting): The appellants should not be called upon to pay costs on a solicitor and client basis. There is no justification in departing from our own general rule that a successful party should recover costs on the usual party and party basis. Public interest groups must be prepared to abide by the same principles as apply to other litigants and be prepared to accept some responsibility for the costs.

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APPEAL from a judgment of the Federal Court of Appeal, *[1990] 2 F.C. 18*, *68 D.L.R. (4th) 375*, *[1991] 1 W.W.R. 352*, *108 N.R. 241*, *76 Alta. L.R. (2d) 289*, *5 C.E.L.R. (N.S.) 1*, reversing a judgment of the Trial Division, *[1990] 1 F.C. 248*, *[1990] 2 W.W.R. 150*, *30 F.T.R. 108*, *70 Alta. L.R. (2d) 289*, *4 C.E.L.R. (N.S.) 137*. Appeal dismissed, with the exception that there should be no order in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the Guidelines Order. Stevenson J. is dissenting.

D.R. Thomas, Q.C., T.W. Wakeling and G.D. Chipeur, for the appellant, Her Majesty the Queen in right of Alberta. E.R. Sojonky, Q.C., B.J. Saunders and J. de Pencier, for the appellants, the Minister of Transport and the Minister of Fisheries and Oceans. B.A. Crane, Q.C., for the respondent.

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J.-K. Samson and A. Gingras, for the intervener, the Attorney General of Quebec. P.H. Blanchet, for the intervener, the Attorney General for New Brunswick. G.E. Hannon, for the intervener, the Attorney General of Manitoba. G.H. Copley, for the intervener, the Attorney General of British Columbia. R.G. Richards, for the intervener, the Attorney General for Saskatchewan. B.G. Welsh, for the intervener, the Attorney General of Newfoundland. R.A. Kasting and J. Donihee, for the intervener, the Minister of Justice of the Northwest Territories. P.W. Hutchins, D.H. Soroka and F.S. Gertler, for the intervener, the National Indian Brotherhood/Assembly of First Nations. J.J. Gill, for the interveners, the Dene Nation and the Metis Association of the Northwest Territories, and the Native Council of Canada (Alberta). G.J. McDade and J.B. Hanebury, for the interveners, the Sierra Legal Defence Fund, the Canadian Environmental Law Association, the Sierra Club of Western Canada, the Cultural Survival (Canada) and the Friends of the Earth. M.W. Mason, for the intervener, the Alberta Wilderness Association.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ. was delivered by

LA FOREST J.

1 The protection of the environment has become one of the major challenges of our time. To respond to this challenge, governments and international organizations have been engaged in the creation of a wide variety of legislative [page17] schemes and administrative structures. In Canada, both the federal and provincial governments have established Departments of the Environment, which have been in place for about twenty years. More recently, however, it was realized that a department of the environment was one among many other departments, many of which pursued policies that came into conflict with its goals. Accordingly at the federal level steps were taken to give a central role to that department, and to expand the role of other government departments and agencies so as to ensure that they took account of environmental concerns in taking decisions that could have an environmental impact.

2 To that end, s. 6 of the Department of the Environment Act, R.S.C., 1985, c. E-10, empowered the Minister for

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> When a government considers it necessary to regulate a situation through norms of behaviour, it may have a law passed or make a regulation itself, or act administratively by means of directives. In the first case, it is bound by the formalities surrounding the legislative or regulatory process; conversely, it knows that once these formalities have been observed, the new norms will come within a framework of "law" and that by virtue of the Rule of Law they will be applied by the courts. In the second case, that is, when it chooses to proceed by way of directives, whether or not they are authorized by legislation, it opts instead for a less formalized means based upon hierarchical authority, to which the courts do not have to ensure obedience. To confer upon a directive the force of a regulation is to exceed legislative intent. It is said that the Legislature does not speak without a purpose; its implicit wish to leave a situation outside the strict framework of "law" must be respected.

The word "guidelines" cannot be construed in isolation; s. 6 must be read as a whole. When so read it becomes clear that Parliament has elected to adopt a regulatory scheme that is "law", and thus amenable to enforcement through prerogative relief.

38 Alberta also argues that the Guidelines Order is ultra vires on the ground that the scope of the subject matter covered in the delegated legislation goes far beyond that authorized by the Department of the Environment Act. More specifically, it contends that the authority to establish guidelines for the purposes of carrying out the Minister's duties related to "environmental quality" does not comprehend a process of environmental impact assessment, [page37] such as found in the Guidelines Order, in which the decision maker is required to take into account socio-economic considerations. Rather, it is argued, the Act only permits the enactment of delegated legislation that is strictly concerned with matters relating to environmental quality as understood in a physical sense.

39 I cannot accept that the concept of environmental quality is confined to the biophysical environment alone; such an interpretation is unduly myopic and contrary to the generally held view that the "environment" is a diffuse subject matter; see R. v. Crown Zellerbach Canada Ltd., *[1988] 1 S.C.R. 401*. The point was made by the Canadian Council of Resource and Environment Ministers, following the "Brundtland Report" of the World Commission on Environment and Development, in the Report of the National Task Force on Environment and Economy, September 24, 1987, at p. 2:

> Our recommendations reflect the principles that we hold in common with the World Commission on Environment and Development (WCED). These include the fundamental belief that environmental and economic planning cannot proceed in separate spheres. Long-term economic growth depends on a healthy environment. It also affects the environment in many ways. Ensuring environmentally sound and sustainable economic development requires the technology and wealth that is generated by continued economic growth. Economic and environmental planning and management must therefore be integrated.

Surely the potential consequences for a community's livelihood, health and other social matters from environmental change are integral to decision-making on matters affecting environmental quality, subject, of course, to the constitutional imperatives, an issue I will address later.

40 I have therefore concluded that the Guidelines Order has been validly enacted pursuant to the [page38] Department of the Environment Act, and is mandatory in nature.

Inconsistency With the Navigable Waters Protection Act and Fisheries Act

41 The appellants Alberta and the federal Ministers argue that the Guidelines Order is inconsistent with and therefore must yield to the requirements of the Navigable Waters Protection Act for obtaining an approval under s. 5 of that Act. Specifically, they say, the Minister of Transport is confined by the Act to a consideration of matters pertaining to marine navigation alone, and that the Guidelines Order cannot displace or add to the criteria

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mentioned in the Act. Alberta also submits that the Guidelines Order is similarly inconsistent with the Fisheries Act, but for the reasons set out later I do not find it necessary to address that issue.

42 The basic principles of law are not in doubt. Just as subordinate legislation cannot conflict with its parent legislation (Belanger v. The King *(1916), 54 S.C.R. 265*), so too it cannot conflict with other Acts of Parliament (R. & W. Paul, Ltd. v. Wheat Commission, [1937] A.C. 139 (H.L.)), unless a statute so authorizes (Re George Edwin Gray *(1918), 57 S.C.R. 150*). Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation. However, as a matter of construction a court will, where possible, prefer an interpretation that permits reconciliation of the two. "Inconsistency" in this context refers to a situation where two legislative enactments cannot stand together; see Daniels v. White, *[1968] S.C.R. 517*. The rule in that case was stated in respect of two inconsistent statutes where one was deemed to repeal the other by virtue of the inconsistency. However, the underlying rationale is the same as where subordinate legislation is said to be inconsistent with another Act of Parliament -- there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments. There is also some doctrinal similarity to the principle of paramountcy in constitutional division of powers cases where inconsistency [page39] has also been defined in terms of contradiction -- i.e., "compliance with one law involves breach of the other"; see Smith v. The Queen, *[1960] S.C.R. 776*, at p. 800.

43 The inconsistency contended for is that the Navigable Waters Protection Act implicitly precludes the Minister of Transport from taking into consideration any matters other than marine navigation in exercising his power of approval under s. 5 of the Act, whereas the Guidelines Order requires, at a minimum, an initial environmental impact assessment. The appellant Ministers concede that there is no explicit prohibition against his taking into account environmental factors, but argue that the focus and scheme of the Act limit him to considering nothing other than the potential effects on marine navigation. If the appellants are correct, it seems to me that the Minister would approve of very few works because several of the "works" falling within the ambit of s. 5 do not assist navigation at all, but by their very nature interfere with, or impede navigation, for example bridges, booms, dams and the like. If the significance of the impact on marine navigation were the sole criterion, it is difficult to conceive of a dam of this sort ever being approved. It is clear, then, that the Minister must factor several elements into any cost-benefit analysis to determine if a substantial interference with navigation is warranted in the circumstances.

44 It is likely that the Minister of Transport in exercising his functions under s. 5 always did take into account the environmental impact of a work, at least as regards other federal areas of jurisdiction, such as Indians or Indian land. However that may be, the Guidelines Order now formally mandates him to do so, and I see nothing in this that is inconsistent with his duties under s. 5. As Stone J.A. put it in the Court of Appeal, it created a duty which is "superadded" to any other statutory [page40] power residing in him which can stand with that power. In my view the Minister's duty under the Guidelines Order is indeed supplemental to his responsibility under the Navigable Waters Protection Act, and he cannot resort to an excessively narrow interpretation of his existing statutory powers to avoid compliance with the Guidelines Order.

45 Section 8 of the Guidelines Order already recognizes that the environmental impact assessment thereunder will not apply where it would conflict with other statutory provisions. It reads:

> 8. Where a board or an agency of the Government of Canada or a regulatory body has a regulatory function in respect of a proposal, these Guidelines shall apply to that board, agency or body only if there is no legal impediment to or duplication resulting from the application of these Guidelines.

A broad interpretation of the application of the Guidelines Order is consistent with the objectives stated in both the Order itself and its parent legislation -- to make environmental impact assessment an essential component of federal decision-making. A similar approach has been followed in the United States with respect to their National Environmental Policy Act. As Pratt J. put it in Environmental Defense Fund, Inc. v. Mathews, 410 F.Supp. 336 (D.D.C. 1976), at p. 337:

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> NEPA does not supersede other statutory duties, but, to the extent that it is reconcilable with those duties, it supplements them. Full compliance with its requirements cannot be avoided unless such compliance directly conflicts with other existing statutory duties.

To hold otherwise would, in my view, set at naught the legislative scheme for the protection of the environment envisaged by Parliament in enacting [page41] the Department of the Environment Act, and in particular s. 6.

46 Nor do I think s. 3 of the Guidelines Order, which requires that the assessment process be initiated "as early in the planning process as possible and before irrevocable decisions are taken", is in any way inconsistent with s. 6 of the Navigable Waters Protection Act. Section 6 is largely concerned with empowering the Minister to remove or take other remedial action in relation to works constructed without complying with s. 5, but the appellants draw attention to s. 6(4) which permits the Minister to approve of a work that has already been built. On this point, I am in complete agreement with Stone J.A. where, at p. 41, he stated:

> As I see it, the provisions of section 6 of that Act pertain to the remedial powers of the Minister in deciding what action he might take in the event of a failure to secure a section 5 approval prior to the commencement of construction. Subsection (4) thereof is an exception to the general rule, is entirely discretionary and clearly subservient to the fundamental requirement set out in paragraph 5(1)(a) that an approval be obtained prior to the commencement of construction. Nor can I see anything in the Guidelines Order that would prevent the Minister from complying with its terms to the fullest extent possible in exercising his discretion under subsection 6(4) of the Navigable Waters Protection Act. That being so, I can find no inconsistency or conflict between these two pieces of federal legislation.

47 It is thus clear to me that the Guidelines Order not only falls within the powers given by the Department of the Environment Act, but is completely consistent with the Navigable Waters Protection Act. It therefore falls to be decided whether the order applies in the instant case.

[page42]

Obligation of the Ministers to Comply with the Guidelines Order

Section 4(1) of the Department of the Environment Act

48 Section 4(1)(a) of the Department of the Environment Act reads as follows:

> 4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to
>
> (a) the preservation and enhancement of the quality of the natural environment, including water, air and soil quality;

Alberta contends that by restricting the Minister of the Environment's jurisdiction to "matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada" (emphasis added), s. 4 has rendered the Guidelines Order inoperative in the present case. Because the Fisheries Act regulates the management of Canada's fisheries resource, it is argued, the Minister of the Environment's jurisdiction has been ousted in respect of all matters affecting fish habitat. This argument can be dealt with shortly. Its premise entirely misapprehends the "matters" covered by the respective pieces of legislation. The Guidelines Order establishes an environmental assessment process for use by all federal departments in the exercise of their powers and the performance of their duties and functions, whereas the Fisheries Act embraces the substantive matter of protecting fish and fish habitat. There is, of course, a connection between the two, but the crucial difference is that one is fundamentally procedural while the other is substantive in nature. Again, the approach

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