

Advanced Workers' Compensation Advocacy

**Litigating Charter Rights:
The Experience of the Workplace Safety and Insurance
Appeals Tribunal**

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Continuing Legal Education

Litigating Charter Rights at the Workplace Safety and Insurance Appeals Tribunal

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In this paper, I attempt to provide an update regarding the law of the *Charter* on the matters that have been litigated before the Workplace Safety and Insurance Appeals Tribunal. These matters have been identified by my co-panelist, Ann Somerville, in her excellent paper entitled “Litigating Charter Rights: The Experience at the Workplace Safety and Insurance Appeals Tribunal”.

The application of s. 52 of the Constitution Act, 1982

Ann’s paper identifies a number of decisions of the Tribunal on either side of the issue whether the Tribunal can find that legislation is of no force or effect under s. 52 of the *Constitution Act, 1982*.

I tend to agree with those decisions that suggest that the Tribunal possesses this jurisdiction, especially in light of the Supreme Court’s recent decision in *Nova Scotia (Workers’ Compensation Board) v. Martin; Nova Scotia (Workers’ Compensation Board) v. Laseur*.¹

In *Martin*, the Supreme Court clarified whether administrative tribunals can use s. 52 of the *Constitution Act, 1982* to refuse to apply unconstitutional laws. It answered this in the affirmative, by confirming that if a tribunal has an implied power to determine *any* legal questions, it has the jurisdiction to decide the constitutional validity of its provisions.² The Tribunal likely qualifies as such a Tribunal.

In answering the question placed before it in *Martin*, the Supreme Court resolved years of uncertainty.³ But plenty of uncertainty remains.

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¹ [2003] 2 S.C.R. 504.

² *Ibid.*, at para. 48.

³ The Court had confirmed the ability of tribunals to refuse to apply unconstitutional laws in *Douglas/Kwanten Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570 at 594, *Cuddy*

Suppose that an administrative tribunal has the power to refuse to apply unconstitutional laws under s. 52 of the *Constitution Act, 1982*. Does the tribunal have *all* of the remedial powers that a court has under that section? For example, a court has the power to delay a declaration of invalidity in order to give the Legislature an opportunity to enact a new law. Does a tribunal have this power? There is a good case to suggest that a tribunal does not have this power: the remedial jurisdiction of tribunals is not inherent and is likely limited to what has been granted to them under statute.⁴

Is the Tribunal a “Court of Competent Jurisdiction” Under Section 24?

Does the Tribunal have the jurisdiction to use the other major remedial provision, s. 24 of the Charter? Section 24 of the *Charter* reads as follows:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Interestingly, the test for whether the Tribunal has the is not the one set out in *Martin*, whether the authority to grant s. 24 remedies has been granted, expressly or impliedly, by legislation. Instead, the court has specified a “functional-structural” approach, an approach that seeks to determine legislative intent by

Chicks Ltd. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5 at 13 and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at 35 but seemed to retreat from that position in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, when the majority held that there was a requirement of an express or implied authorization to determine questions of law. McLachlin J.’s dissent in *Cooper* (especially at para. 70) underscored the fact that there was a retreat. The open question, after *Cooper*, was what constituted implied authorization. An implied authorization to consider the tribunal’s governing legislation was not enough. The Court in *Martin* ended this distinction – an authorization, express or implied, to determine questions of law is sufficient.

⁴ *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575.

looking at the function and structure of the tribunal in question to see whether the tribunal is suited to grant the remedy sought.⁵

It is noteworthy that so far the only tribunal that has been held *not* to have s. 24 jurisdiction is a preliminary inquiry court under the *Criminal Code*.⁶ Key to the relevant decision of the Supreme Court was that a preliminary inquiry court was not a full adjudicative body charged with the responsibility of determining guilt or innocence. Instead, it functioned only as a screening body, to ensure that unmeritorious charges that had no chance of success did not proceed to trial.

The Tribunal is obviously in a different position from a preliminary inquiry court. It is a body that is a fully adjudicative body, charged with the responsibility of adjudicating disputes. It is very likely, in light of the Supreme Court's most recent decisions, that the Tribunal has the power to grant remedies under s. 24(1) and 24(2) of the *Charter*. Obviously, this matter will remain in doubt until such time as the matter is formally litigated and brought to a reviewing court.

If this assessment is correct, then the Tribunal may grant "appropriate and just" remedies under s. 24(1) of the *Charter* and may exclude evidence under s. 24(2) of the *Charter*.

There are few limits on the discretion to grant an "appropriate and just" remedy under s. 24(1) of the *Charter*. This is evident from the Supreme Court's decision on s. 24(1) in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*.⁷

The decision of the Supreme Court in *Doucet-Boudreau* is noteworthy in two respects. It sets out a general "recipe" for s. 24(1) remedies and it affirms the jurisdiction of courts to supervise the implementation of their remedies.

The recipe for s. 24 Charter remedies

In *Doucet-Boudreau*, the Supreme Court set out a general basis or "recipe" upon which remedies under s. 24 of the *Charter* should be granted, a basis which may give rise to innovative remedial approaches.⁸ The Supreme Court has set out a five-fold test for what is "just and appropriate" under s. 24 of the *Charter*:

⁵ *R. v. Hynes*, [2001] 3 S.C.R. 623 and *R. v. 974649 Ontario Inc.*, *ibid*.

⁶ *R. v. Hynes*, *ibid*.

⁷ [2003] 3 S.C.R. 3.

⁸ *Doucet-Boudreau*, *supra*, n. 7, at paras. 54-59.

- *Meaningful remedy for the plaintiff/applicant.* The remedy must be “meaningful” by “ [taking] account of the nature of the right that has been violated and the situation of the claimant”, being “relevant to the experience of the claimant” and addressing “the circumstances in which the right was infringed or denied”. A remedy that is “ineffective” or “smothered in procedural delays and difficulties” is not a “meaningful vindication of the right” and therefore not appropriate and just.⁹
- *Fairness to the defendant/respondent.* The remedy must be “fair to the party against whom the order is made” by not imposing “substantial hardships that are unrelated to securing the right.”¹⁰
- *Democratic concerns.* The remedy “must employ means that are legitimate within the framework of our constitutional democracy”, respecting “the relationships with and separation of functions among the legislature, the executive and the judiciary”.
- *Institutional capability.* The remedy must “invoke “the function and powers of a court” (or, of course “tribunal” in the case of a tribunal. A tribunal should not “leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited”. Guidance on this “can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent”.¹¹
- *Openmindedness, flexibility and evolution.* While historical remedial practice is important, “tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand”, so the lack of precedent is not a bar. A court must “remain flexible and responsive to the needs of a given case”.¹²

As will be discussed below, this five-fold test may mean that earlier remedial approaches may have to be reassessed. It may also promote the development of new, innovative remedies.

The remedy of supervision

⁹ *Ibid.*, at para. 55.

¹⁰ *Ibid.*, at para. 58.

¹¹ *Ibid.*, at para. 57.

¹² *Ibid.*, at para. 59.

In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, a majority of the Supreme Court of Canada held that in certain circumstances, it will be “appropriate and just” for a court to remain seized of a matter under subsection 24(1) of the *Charter* in order to oversee the implementation of a remedy.

The Supreme Court in *Doucet-Boudreau* was concerned with the implementation of the right to minority-language instruction under s. 23 of the *Charter*. In this case, there was a long history of delays on the part of the Nova Scotia government in providing French-language secondary instruction and facilities in five communities in Nova Scotia. Combined with this was a significant assimilation rate for the French-language minority in those communities. In other words, the need for the remedy was pressing and it was necessary that the remedy quickly be made effective.

The trial judge, LeBlanc J. of the Nova Scotia Supreme Court, found that the claim for a remedy under s. 23 of the *Charter* was made out. There was a sufficient number of children to justify the establishment of homogeneous French-language secondary instruction and facilities. He ordered the government to use its best efforts to establish such programs and facilities by specified dates in each of the five areas.

LeBlanc J. went further. He decided to retain jurisdiction to hear reports from the province respecting its compliance with his order. He conducted compliance hearings in furtherance of that order. Only this aspect of his order was in issue on appeal.

The majority of the Nova Scotia Court of Appeal allowed the appeal and found that once the trial judge had decided the issues between the parties, he had no further jurisdiction under subsection 24(1) to oversee his order.

The majority of the Supreme Court of Canada allowed the appeal. Iacobucci and Arbour JJ., writing for the narrow 5-4 majority, found that the “appropriate and just in the circumstances” language found in ss. 24(1) of the *Charter* gives the court a wide discretion to fashion a remedy that works.

Traditionally, courts and tribunals have been reluctant to supervise remedies. For example, this has been a traditional bar to specific performance in the law of contract. However, the Supreme Court applied the five-fold set of factors, discussed above,¹³ concerning what is an “appropriate and just” remedy under s.

¹³ See text to nn. 9-12, *supra*.

24 of the *Charter* and dismissed this concern, observing that “tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand”.¹⁴

The majority upheld the supervision order made by LeBlanc J. It was aimed at vindicating the rights of the *Charter* complainants. The order took into account the role of the courts in our constitutional democracy by leaving the decisions concerning the means to implement the order to the executive branch of the government. The order did not take the court beyond the functions and powers commonly exercised by courts.¹⁵ Nor did it undermine the ability of a party to launch an appeal and thus, did not violate the doctrine of *functus officio*. Finally, in the circumstances of this case, the remedy was clear enough to allow the government the ability to participate fairly in the proceedings.

In my view, this type of supervisory remedy will be granted very rarely. The need for a supervisory remedy is likely only where the court has made an order that government perform some positive steps to implement *Charter* rights. Such mandatory orders have been quite rare. Even in the rare case where a mandatory order or something akin to a mandatory order is made, it is clear that a supervision order does not have to be made.¹⁶

The Supreme Court was not explicit about when supervisory orders should be made. Given the emphasis on vindicating the right at stake, it would seem that a supervisory order should only be made when it is absolutely necessary, such as where the discretion of a party regarding how to carry out a mandatory order should be carefully guided either because that discretion deals with certain important matters that go to the heart of the right involved or because the particular government has shown that it has been quite recalcitrant on the matter.¹⁷

¹⁴ *Doucet-Boudreau*, *supra*, n. 7, at para. 59.

¹⁵ For example, the Supreme Court analogized to bankruptcy proceedings, where courts exercise a high degree of supervision.

¹⁶ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Auton v. British Columbia (Attorney General)*, 2002 BCCA 538; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.

¹⁷ Arguably, both factors were present in *Doucet-Boudreau*. The discretion of the government arguably had to be guided carefully in order to ensure that the concerns about assimilation are adequately and promptly met. Section 23 rights are also quite nuanced and detailed, involving such matters central to the s. 23 right such as the facilities that must be built and the management systems that must be put in place, and so there is a good case for guiding the government’s discretion. Finally, the government in question had neglected its constitutional obligations over a period of several years, with assimilative pressures threatening the community – it was necessary to impose a supervision regime in order to ensure that the government implements the s. 23 right

What we are seeing in *Doucet-Boudreau* is a constellation comprised of extreme circumstances, a recalcitrant party and an unusual right, a constellation which made a supervisory remedy palatable to the Supreme Court.

In my view, rare will be the case where supervisory regimes are warranted and most bodies would be reluctant to take on the burden of supervision unless it were absolutely necessary on the facts of the case.

The use of the Charter as an interpretive aid

Ann identifies some situations where the Tribunal has been asked to use the *Charter* as an interpretive aid. She cites *Decision No. 302/88*¹⁸ (1989) as an example. In that case, the Tribunal was encouraged to adopt an interpretation of the Act which was consistent with the protection of rights as guaranteed by section 15 of the *Charter*. She notes that the Tribunal did not rule on the matter.

The *Charter* should only be used as an interpretive aid only when legislation is ambiguous.¹⁹ *Charter* values are not imported in interpreting a statute that is clear and unambiguous. Where statutory provisions are open to more than one interpretation, the courts will prefer the interpretation that is consistent with the *Charter*. However, provisions that are unambiguous must be assessed directly for validity against the *Charter*, including the justification requirements of section 1. Otherwise, the *Charter*, with its checks and balances in section 1, may be circumvented.²⁰

Although s. 32 provides that the *Charter* applies to Parliament and the legislatures and although the case law is clear that the *Charter* does not apply to purely private disputes, it is interesting that the Supreme Court in the *Sierra Club* case has recently applied a constitutional “fair trial” right to the private civil litigation context.²¹ It has not always been so welcoming to the introduction of *Charter*

completely. Compare *Vriend v. Alberta*, [1998] 1 S.C.R. 493, where the Court adopted the relatively intrusive remedy of “reading in” against a recalcitrant government.

¹⁸ *Decision No. 302/88* (1989) 10 W.C.A.T.R. 162.

¹⁹ *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513.

²⁰ See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, per Lamer J. at 1078; *Symes v. Canada*, [1993] 4 S.C.R. 695 at 752; *R. v. Zundel*, [1992] 2 S.C.R. 731, per McLachlin J. at 771; *Bell Express Vu Jasper Partnership v. Rex*, [2002] 2 S.C.R. 559 at 598-599.

²¹ *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, at para. 50.

values into the private civil litigation context.²² Some foreign courts are very aggressive in using constitutional norms to develop private law jurisprudence.²³ While it may not be possible to use the *Charter* to interpret clear and unambiguous legislation, *Charter* values may inform the “common law” used by the Tribunal.

Procedures before the Tribunal

Ann comments that the Tribunal has accepted that it should only deal with constitutional matters when these cannot be fairly avoided (*Decision No. 534/90I*), and that it is wrong to consider the invalidity of a section if the same result can be achieved without affecting validity (*Decision No. 434*). As a result, she notes that the merits of the worker’s compensation claim are generally heard first, and the *Charter* issues only considered if the appeal on the merits is unsuccessful.

This is perfectly acceptable. There is no legal requirement on a tribunal or a court for that matter to hear a constitutional argument if it need not be considered.²⁴ Indeed, it is not uncommon for courts to sever *Charter* issues from other issues and to hold separate hearings on each or even to separate issues of constitutional invalidity / rights breach from the issue of appropriate remedy and to hold a separate hearing on each.²⁵ In the end, tribunals are “masters of their own procedure” and may hold hearings in the matter they see fit, provided that the requirements of natural justice and fairness are met.²⁶

One matter not mentioned in Ann’s paper is the requirement that notice of constitutional question must be served on both the federal and provincial Attorneys General when: (1) the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a

²² *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

²³ See, e.g., *Campbell (Appellant) v. MGN Limited (Respondents)*, unreported, H.L., May 6, 2004. (The 3:2 majority aggressively used provisions from the European Convention on Human Rights to define a tort of breach of privacy.)

²⁴ In fact, there is a highly influential book which advocates this very approach: Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999). See also D. Stratas, “*R. v. B.(S.A.)* and the Right Against Self-Incrimination: A Confusing Change of Direction” (2004), 14 C.R. (6th) 227 at 229 (discussion under the heading, “In praise of judicial minimalism”).

²⁵ See, e.g. *Auton v. British Columbia (Attorney General)*, *supra*, n. 16.

²⁶ *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653.

regulation or by-law made under such an Act or of a rule of common law is in question; or (2) a remedy is claimed under ss. 24 (1) of the *Charter* in relation to an act or omission of the Government of Canada or the Government of Ontario.²⁷ Service must happen as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued. The requirement of service is mandatory: failure to serve is a bar to the granting of relief, although the Tribunal may grant an adjournment in order to allow service of the notice to take place.²⁸

I turn now to one thorny issue that Ann does not deal with in her paper, the issue of the standard of review on constitutional questions. The situation is confused at the present time.

Clarification of standards of review on constitutional questions

There have been many cases concerning the standard of judicial review of decisions of administrative tribunals.

Alongside of this development is the recent decision of the Supreme Court in *Housen v. Nikolaisen*²⁹ concerning the standard of review of trial judgments. *Housen v. Nikolaisen* has been applied in judicial review proceedings in support of holdings that findings of fact and findings of mixed fact and law by administrative tribunals should receive substantial deference.³⁰

What about decisions of administrative tribunals that have constitutional content?
What about first instance decisions of trial courts that have constitutional content?
What is the standard of review?

One area seems settled: declarations of invalidity made by tribunals are reviewable on the basis of a correctness standard and do not bind courts, other tribunals or even another panel of the same tribunal.³¹

²⁷ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 109.

²⁸ *Paluska v. Cava* (2002) 212 D.L.R. (4th) 226 (Ont. C.A.) (decision on a constitutional issue set aside in the Court of Appeal because of the failure to serve a notice under s. 109 of the *Courts of Justice Act*).

²⁹ [2002] 2 S.C.R. 235.

³⁰ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2002] 4 F.C. 3 (C.A.).

³¹ *Martin*, *supra*, n. 1, para. 31.

In the rest of this area, however, it would seem that there is some confusion and uncertainty about the extent to which *Housen v. Nikolaisen* applies in the constitutional realm and some clarification from the Supreme Court of Canada would be helpful. It is expected that this will be a major issue over the next five years.

There is a line of cases that applies *Housen v. Nikolaisen* to constitutional adjudications by tribunals. In *Canada (Attorney General) v. Misquadis*,³² Human Resources Development Canada refused to enter into Aboriginal Human Resources Development Agreements with organizations mandated by certain aboriginal communities. The Federal Court Trial Division held that the refusal constituted a violation of s. 15 of the *Charter*. The Federal Court of Appeal, however, held, applying *Housen v. Nikolaisen*, that the standard of review of that decision, a decision of mixed law and fact, was a matter on which the Federal Court of Appeal should defer.³³ The Court stated that *Housen v. Nikolaisen* “applies to Charter cases in the same way as to other cases”.³⁴

The Federal Court of Appeal is not alone in this view. Two other Courts of Appeal support its decision and both of those decisions are cited by the Federal Court of Appeal in *Misquadis*. In both *R v. Coates*³⁵ and in *R. v. Chang*,³⁶ the Ontario Court of Appeal and the Alberta Court of Appeal respectively adopted deferential approaches to questions of mixed fact and law.

This approach is also consistent with other areas of constitutional law. In the area of exclusion of evidence under s. 24(2) of the *Charter*, the Supreme Court of Canada has long held the view that decisions by trial judges on questions of mixed fact and law (*i.e.*, whether evidence should be excluded or not) are subject

³² 2003 FCA 473.

³³ *Ibid.*, at para. 16.

³⁴ *Ibid.*

³⁵ [2003] O.J. No. 2295, at para. 20 (C.A.): “The decision in *Housen, supra*, stressed very strongly the need for great caution and deference on the part of appellate courts when they review the assessment of facts by a trial court. The rule in *Housen, supra*, does not, however, preclude an appellate court from identifying errors in the findings of fact where those errors are sufficiently palpable and important and have a sufficiently decisive effect that they would justify intervention and review on appeal: *Prudhomme v. Prudhomme*, [2002] S.C.C. No. 85.”

³⁶ 2003 ABCA 293, at para. 7: “An appeal against a determination of whether a private citizen was acting as an agent of the state or whether s. 8 of the *Charter* was violated involves the application of a legal standard to a set of facts, which raises a question of mixed fact and law for which the standard of review lies along a spectrum: *Housen v. Nikolaisen* (2002), 286 N.R. 1, 211 D.L.R. (4th) 577, 2002 SCC 33 at para. 36.”

to high levels of deference³⁷, though in some cases the standard is expressed at different levels.³⁸ The Court has made similar statements concerning other classic mixed fact and law questions with constitutional content, such as whether a confession is voluntary and thus compliant with s. 7,³⁹ whether a press ban or sealing order should be made,⁴⁰ whether a prosecution constitutes an abuse of process under s. 7⁴¹ and whether reasonable and probable grounds are present.⁴²

However, there are authorities that seem to the contrary.

How do we reconcile the language of deference in these cases involving decisions with constitutional content with the statement of the majority of the Supreme Court in *Doucet-Boudreau* that “[d]eference ends, however, where the constitutional rights that the courts are charged with protecting begin”?⁴³

There have been suggestions that review of “social” or “legislative” facts should be subject to a standard lower than palpable and overriding error.⁴⁴ In the words of the Supreme Court, “an appellate court may interfere with a finding of a trial judge respecting a legislative or social fact in issue in a determination of constitutionality whenever it finds that the trial judge erred in the consideration or appreciation of the matter.”⁴⁵ This makes sense: the rigid application of that rule

³⁷ *R. v. Buhay*, [2003] 1 S.C.R. 631, at paras. 44-45. The appreciation of whether the admission of evidence would bring the administration of justice into disrepute “is a question of mixed fact and law as it involves the application of a legal standard to a set of facts” and “[t]his question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law”.

³⁸ Compare the standard discussed in *Buhay*, *ibid.*, with the standard expressed in *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 68 (adopted later in *R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 35): “some apparent error as to the applicable principles or rules of law or has made an unreasonable finding”.

³⁹ *R. v. Oickle*, [2000] 2 S.C.R. 3, para 22.

⁴⁰ *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, paras. 188-189.

⁴¹ *Semle, R. v. Regan*, [2002] 1 S.C.R. 297. The Supreme Court held that appellate courts were entitled to intervene with the trial judge’s finding of facts because of fundamental errors of principle and some palpable and overriding errors, though one could fairly state that a less deferential standard of review was in fact applied.

⁴² *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 30.

⁴³ *Doucet-Boudreau*, *supra*, n. 7, para. 36, citing McLachlin J. in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136.

⁴⁴ *RJR*, *ibid.*, at para. 80, per La Forest J. dissenting.

⁴⁵ *Ibid.*, at para. 81.

would deny appellate courts their proper role in developing legal principles of general application.⁴⁶

For example, determinations concerning the scope of a *Charter* right, which are often part and parcel of the question of the application of *Charter* to a set of facts (i.e. a question of mixed fact and law) have been said to be subject to a standard of correctness.⁴⁷

In *Westcoast Energy Inc. v. Canada (National Energy Board)*,⁴⁸ the majority of the Court ruled that questions of mixed law and fact reached by a tribunal are to be accorded some measure of deference, but not in every case. The majority held that it would be particularly inappropriate to defer to a tribunal whose expertise lies completely outside the realm of legal analysis on a question of constitutional interpretation. In its view, questions of this type must be answered correctly and are subject to being overridden by the courts. In the case before it, the National Energy Board's assessment regarding whether a set of pipelines constituted an interprovincial work or undertaking, normally a question of characterization or of mixed fact and law, was not entitled to deference. It was an opinion as to the constitutional significance of facts and, as such, was not entitled to deference.

The Supreme Court of Canada in *R. v. Jarvis*⁴⁹ held that the question of whether a particular investigation was a criminal investigation (and thus subject to stringent s. 8 *Charter* standards) or a regulatory investigation (and thus not subject to stringent s. 8 *Charter* standards) was a question of mixed fact and law which was "not immune from judicial review", suggesting perhaps that a measure of deference is warranted.⁵⁰ It then proceeded to examine the issue without much deference⁵¹ and it did the same in the companion case of *Ling*.⁵²

Finally, in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, the Supreme Court recently held that administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard.⁵³ An error of law by an administrative tribunal

⁴⁶ *Ibid.*, at para. 80. See also *Dunagin v. City of Oxford, Mississippi*, 718 F.2d 738 (1983) (en banc), cert. denied, 467 U.S. 1259 (1984), cited in *RJR*.

⁴⁷ *R. v. Ngo*, (2003) 175 C.C.C. (3d) 290, 2003 ABCA 121.

⁴⁸ [1998] 1 S.C.R. 322.

⁴⁹ *R. v. Jarvis*, [2002] 3 S.C.R. 757.

⁵⁰ *Ibid.*, at para. 100.

⁵¹ *Ibid.*, at paras. 100-105.

⁵² *R. v. Ling*, [2002] 3 S.C.R. 814.

⁵³ 2003 SCC 54, applying *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, at p. 17. The Court added that "an error of law by an administrative tribunal interpreting

interpreting the Constitution can always be reviewed fully by a superior court. This seems consistent with earlier decisions.⁵⁴ But nothing was said in the decision about the standard of review for findings of constitutionally significant facts or questions of mixed fact and law imbued with constitutional content.

What is the standard of review of an interpretation of a statute on the basis of *Charter* values? Normally, tribunals seem to enjoy “reasonableness” standard of review for questions of interpretation of their own legislation⁵⁵ but does this change when questions of interpretation are imbued with issues of constitutional law? This has not been tested.

Many of these decisions seem to be at odds with each other or at least inconsistent at the conceptual level or, when taken together, quite fuzzy in concept. Why should a lower court’s decision on a question of mixed fact and law involving a constitutional issue receive deference and an administrative tribunal’s decision on the same point not receive deference?

Westcoast provides a particular answer: “courts are in a better position than administrative tribunals to adjudicate constitutional questions” but this is not always the case, particularly where the administrative tribunal is comprised of legally trained individuals and the assessment of the issue of mixed fact and law is better placed with the tribunal because of its particular expertise on the factual elements of the question of mixed fact and law.⁵⁶ And in the end, “[d]eference ends, however, where the constitutional rights that the courts are charged with protecting begin”,⁵⁷ so what role should deference play when constitutional issues are a key part of a question of mixed fact and law before a court or a tribunal?

These are questions that the courts will have to answer in the years to come.

the Constitution can always be reviewed fully by a superior court”, perhaps leaving open the status of errors on questions of mixed fact and law”.

⁵⁴ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 (*Seemingly*, a standard of correctness was applied when considering whether a school board’s decision was consistent with s. 15. Arbour J.A. in the Court of Appeal ((1995), 22 O.R. (3d) 1 at 7) specifically noted that the school board was normally entitled to deference but on constitutional questions the standard was correctness.)

⁵⁵ *Macdonell v. Quebec (Commission d’accès à l’information)*, [2002] 3 S.C.R. 661.

⁵⁶ *Supra*, n. 48, at para 40.

⁵⁷ *Doucet-Boudreau, supra*, n. 7, para. 36, citing McLachlin J. in *RJR-MacDonald Inc. v. Canada (Attorney General)*, *supra*, n. 43, at para. 136.