

Constitutional Practice and Procedure in Administrative Tribunals: An Emerging Issue

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Introduction

After much controversy,¹ the Supreme Court of Canada has confirmed that tribunals that have a power to decide questions of law also have the power to decide constitutional law issues.² They may also award remedies under s. 24 of the *Charter* if they have the structures and functions for that purpose.³

This creates new procedural challenges for those tribunals that have the power to consider and determine constitutional law issues and for the litigants who have constitutional law issues to raise.

A particular challenge arises due to the fact that superior courts normally have the jurisdiction to deal with constitutional law issues.

The potential for conflict is obvious. If some tribunals and superior courts, in certain appropriate circumstances, have jurisdiction over constitutional law issues, where should a constitutional law issue be raised first? Does a litigant have to go to the tribunal first?

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¹ See the sharp differences between majority and dissent in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 and the Supreme Court's reversal in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504.

² *Supra*, n. 1.

³ *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 at para. 43 (Supreme Court's structural and functional test for determining whether a tribunal has the jurisdiction to award *Charter* remedies): "whether the court or tribunal in question is suited to grant the remedy sought under s. 24 in light of its *function* and *structure*". See also *R. v. Hynes*, [2001] 3 S.C.R. 623 at para. 27: if "Parliament or a legislature confers on a court or tribunal a function that engages *Charter* issues, and equips it with procedures and processes capable of fairly and justly resolving these incidental *Charter* issues, then it must be presumed that the legislature intended the court or tribunal to exercise this power." For examples of s. 24 determinations (where the "structural functional test" has been met, see *Chrysler Credit Canada Ltd. v. Arnold*, [2006] O.J. No. 1568 (S.C.J.); *Canada v. O'Neill Motors Ltd.*, [1998] 4 F.C. 180 (C.A.); *Donovan v. Canada (Attorney General)*, [2000] 4 F.C. 809 (C.A.); *Huerto v. College of Physicians and Surgeons*, [2001] S.J. No. 572 (Q.B.) at para. 25; *Toronto Transit Commission v. Amalgamated Transit Union, Local 113*, [2004] O.L.A.A. No. 327 (labour arbitrator); *Law v. Canada (Solicitor-General)*, [1983] 2 F.C. 181 (T.D.), reversed on a subsidiary issue: [1985] 1 F.C. 62 (C.A.) (Immigration Appeal Board).

Or can one go straight to court? Can one go to court before the tribunal starts its hearing? Can one go to court in the middle of the tribunal's hearing?

Courts are just beginning to examine these questions, questions that are suddenly thrust upon us by the fact that many tribunals now have the jurisdiction to consider and determine constitutional issues. In fact, there is only one first-instance Ontario case at the present time that deals directly with many of these questions.⁴ It is not likely to be the last word on the issue.⁵

In this short note, I examine some of the operative principles that have been established by the case law, and then briefly examine what the Ontario case decided.

Operative principles

There are several operative principles that come to bear on the conflict between tribunals and courts concerning the jurisdiction to decide constitutional issues. Ultimately, the job of any court dealing with the conflict is to recognize these principles and determine what the demarcation among them should be.

⁴ *Kelly et al. v. Ontario*, unreported, May 6, 2008, Ont. S.C.J. (*per* Himel J.). I was one of the counsel for the College of Physicians and Surgeons in the case. In this paper, I merely identify the operative principles for the benefit of the profession. I will refrain from a full analysis of the case until all appeals are exhausted and the decision is final. The decision is not yet available online. Until it is online, it may be found here: <http://davidstratas.com/Kelly.pdf>.

⁵ Leave to appeal has been sought and oral argument will take place in August, 2008. Whether or not leave to appeal is granted, the issues are sure to be considered elsewhere in Ontario and across Canada. The law must be regarded as unsettled until appellate courts deal with these issues.

The following are the central operative principles:

- In favour of immediate court jurisdiction:
 - Litigants normally have full access to the courts to raise constitutional issues.⁶ There are only limited exceptions.⁷
 - Where there are rights, there should be remedies⁸ and timely access to them.⁹
 - The remedy of declaration¹⁰ can only be granted by Superior Courts.¹¹ In the case of certain tribunals, there may be remedial gaps.¹²
 - Convenience and savings of expense.¹³

⁶ See, e.g., *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048.

⁷ *R. v. Hynes*, [2001] 3 S.C.R. 623: preliminary inquiry judges do not have jurisdiction to grant s. 24 Charter remedies. This is based on the “structural functional test” devised by the Supreme Court of Canada in *R. v. 974649 Ontario Inc.*, *supra*, n. 3.

⁸ *R. v. Gamble*, [1988] 2 S.C.R. 595.

⁹ See s. 11(b) (right against unreasonable delay) and s. 7 (principles of fundamental justice). See also *Mills v. The Queen*, [1986] 1 S.C.R. 863 at 882: “...a person whose Canadian *Charter* rights have been infringed or denied has the right to obtain the appropriate and just remedy under the circumstances. A corollary which flows from this is the fundamental principle that there must always be a court available to grant, not only a remedy, but the remedy which is the *appropriate* and *just* one under the circumstances” [emphasis in original].

¹⁰ For example, declarations of invalidity under s. 52(1) of the *Constitution Act, 1982*.

¹¹ See *Martin*, *supra*, n. 1 and, in Ontario, *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 97(3). However, in *Martin*, the Supreme Court held that although administrative tribunals do not have the power to grant declarations, they can disregard or decline to apply legislation that they find to be unconstitutional.

¹² For example, certain tribunals may not be able to grant s. 24 *Charter* remedies because they fail the “structural functional test” in *R. v. 974649 Ontario Inc.*, *supra*, n. 3. See also *Mills*, *supra*, n. 9 at p. 893: “...a “special law” is not sufficient to oust the jurisdiction of the superior courts, for a constitutional remedy and its accessibility should not in principle be open to statutory limitation. While limitation of the remedial power to inferior courts may well be permissible, this, in my view, can only be possible if the superior court is available to fill the remedial vacuum that would result.”

¹³ It is usually the case that determinations of constitutional tribunals on constitutional issues will be brought to court by way of judicial review. The standard of review will be correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 25; *Martin*, *supra*, n. 1 at para. 31. So why not get to court right away anyway?

- In certain cases, the need for relief may be immediate and pressing.
- Where panels of tribunals hear the same issue, they may reach differing results. This is because a constitutional determination by a tribunal panel that a provision is unconstitutional and should not be followed has no precedential effect.¹⁴ Courts render decisions that have precedential effect and that bind tribunals.
- In some challenges, the fact-finding jurisdiction of tribunals is not relevant because the challenge is to the legislation itself – all of the facts are “adjudicative facts” that can be placed before a court.¹⁵
- Against immediate court jurisdiction:
 - Tribunals have the exclusive jurisdiction under their statutes to make decisions concerning the matters that come before them. If they have the jurisdiction to decide constitutional issues that arise in the matters before them, then it follows that they have the exclusive jurisdiction to decide those matters.¹⁶
 - The tribunal may decide the merits of the non-constitutional matters in favour of the person asserting the constitutional claim. As a result, the tribunal (and thus the courts) might not have to deal with the constitutional issue at all.

¹⁴ *Martin*, supra, n. 1. See also *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 at 17.

¹⁵ *Falkiner v. Ontario (Ministry of Community and Social Services)*, [1996] O.J. No. 3737 (Div. Ct.).

¹⁶ *Okwuobi v. Lester B. Pearson School Board*; *Casimir v. Quebec (Attorney General)*; *Zorrilla v. Quebec (Attorney General)*, [2005] 1 S.C.R. 257 at paras. 38-39. See also *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 at para. 36: “Section 35 is not, any more than the *Charter*, ‘some holy grail which only judicial initiatives of the superior courts may touch’.”

- A corollary of that is that courts should not interfere in tribunal processes while they are ongoing. Judicial review normally cannot be had until a tribunal decision is final.¹⁷
- Interlocutory forays to court should be discouraged. This can result in fragmentation of and delays to administrative tribunal proceedings.¹⁸
- The Supreme Court has recognized that the power of tribunals to disregard unconstitutional statutes is sufficient. The lack of power to award declarations is not reason enough to proceed to court.¹⁹
- End-runs around tribunal jurisdiction are to be discouraged.²⁰
- Administrative tribunals are well-suited to the finding of facts relevant to the constitutional issue,²¹ and they are entitled, where appropriate, to bring their specialized expertise to bear on the issue.

¹⁷ *Gervasio v. British Columbia Association of Optometrists*, [1994] B.C.J. No. 1476 (S.C.); *Ontario College of Art v. Ontario (Human Rights Commission)*, [1993] O.J. No. 61 (Div. Ct.); *Jafine v. College of Veterinarians of Ontario*, [1991] O.J. No. 1847 (Gen. Div.); *Hughes v. College of Physicians and Surgeons of Ontario* (1994), 112 D.L.R. (4th) 253 (Div. Ct.).

¹⁸ *Ontario College of Art v. Ontario (Human Rights Commission)*, [1993] O.J. No. 61 (Div. Ct.); *Howe v. Institute of Chartered Accountants of Ontario*, [1994] O.J. No. 1803 (C.A.); *Partington v. Institute of Chartered Accountants of Alberta*, [2005] A.J. No. 787 (C.A.) at para. 15; *Sears Canada Inc. v. Davis Inquest (Coroner of)*, [1997] O.J. No. 1424 (Div. Ct.).

¹⁹ *Okwuobi*, *supra*, n. 16, at para. 44.

²⁰ *Okwuobi*, *supra*, n. 16, at paras. 38-39.

²¹ See *Martin*, n. 1 at para. 30 and *Pharmascience Inc. v. Binet*, [2006] 2 S.C.R. 513. Many tribunals' home statutes vest them with far-reaching powers to gather necessary evidence, in addition to the powers granted *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

The Kelly case

Recently, for the first time, the Ontario Superior Court of Justice dealt with the issue of how to reconcile these competing principles.²² Before it were two discipline cases presently being heard by the Discipline Committee of the College of Physicians and Surgeons²³ and two other cases being investigated by the College. All four cases raised similar issues concerning alleged violations of s. 8 of the *Charter* in the acquisition of evidence by the College.²⁴ The College's Discipline Committee had already asserted jurisdiction to determine the constitutional issues in the two cases. In the other two cases, College investigators had issued summonses to acquire material in the hands of police relevant to the physicians being investigated, but neither summons had yet been complied with. In the case of one of those summonses, the College had brought a stated case to the Divisional Court in order to try to enforce it.²⁵

Although the investigations and hearings had not yet been completed, the four physicians each brought proceedings in the Superior Court, raising the constitutional issues. The College, supported by the Attorney General of Ontario, brought Rule 21 motions, asking that the four proceedings be struck. As is evident from the court's decision, during the motion the parties raised many of these competing principles. The court concluded:

Generally speaking, proceedings before administrative tribunals should not be fragmented and it is desirable that administrative proceedings be allowed to conclude before resorting to the courts. However, where exceptional circumstances exist and there is neither the need for a full factual record to determine the matter, nor does the tribunal offer an

²² *Supra*, n. 4.

²³ Under the *Health Professions Procedural Code* (Schedule 2 of the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18).

²⁴ The central s. 8 issues concerned an alleged failure, contrary to s. 8 of the *Charter*, to follow the requirements of *D.P. v. Wagg* (2004), 71 O.R. (3d) 229 (C.A.), the constitutional validity of certain summonses issued by the College to obtain Crown briefs in prosecutions, and the constitutional validity of s. 76(1) of the *Health Professions Procedural Code* (Schedule 2 of the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18).

²⁵ Under the College's power under the *Public Inquiries Act*, s. 8 to seek a contempt order (see *Health Professions Procedural Code* [Schedule 2 of the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18], s. 76(1)).

adequate alternative remedy, it cannot be said that the application is premature. The matter should be heard in the Superior Court which has the inherent jurisdiction to consider direct constitutional challenges to a legislative scheme.²⁶

Leave to appeal to the Divisional Court has been sought. Whether or not the Divisional Court grants leave to appeal, the decision of the Ontario Superior Court of Justice is unlikely to be the last word on this complicated and important subject!

²⁶ *Supra*, n. 4 at para. 62.