

**CAVALLUZZO**

# The *Charter* and the Tribunal

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**Adrienne Telford**

Cavalluzzo Shilton McIntyre Cornish LLP  
atelford@cavalluzzo.com

# Presentation Overview

**(1) Scope of a tribunal's *Charter* jurisdiction**

**(2) Types of *Charter* issues that arise before a tribunal**

- Validity of governing legislation
- Statutory aid to interpretation
- Limits on exercise of discretion
- Other issues

**(3) *Charter* remedies**

**(4) Procedural issues**

- Notice
- Formality of proceedings, evidentiary issues
- Intervenors
- Bifurcation

# (1) Scope of a tribunal's *Charter* jurisdiction

## Expansion of the role of administrative tribunals in interpreting and applying the *Charter*:

“The *Charter* is not some holy grail which only judicial initiates of the superior courts 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.**”

McLachlin CJ in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 SCR 854, para. 70 (dissenting) (aff'd in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 SCR 504, para. 29)

# (1) Scope of a tribunal's *Charter* jurisdiction

## Benefits

- Prevents bifurcated proceedings
- Promotes early and accessible adjudication of *Charter* rights
- Less expensive and time-consuming
- Specialized competence of tribunals is of invaluable assistance in constitutional interpretation
- A full record established by a specialized tribunal fully apprised of the policy and practical issues relevant to the *Charter* claim

# (1) Scope of a tribunal's *Charter* jurisdiction

## Drawbacks

- Lack of expertise
- Any gains in efficiency may be lost through judicial review
- Loose evidentiary rules of tribunals are unsuited to constitutional litigation
- Constitutional matters will bog down the tribunal system

# (1) Scope of a tribunal's *Charter* jurisdiction

## Bottom line

- SCC expects tribunals to apply the *Charter* to issues that arise in the proper exercise of their statutory functions
- This includes *Charter* issues falling within their specialized jurisdiction and also in exercising their statutory discretion in accordance with the *Charter*

## **(2) Types of *Charter* issues that arise before a tribunal**

**(a) Validity of governing legislation**

**(b) Statutory aid to interpretation**

**(c) Limits on exercise of discretion**

**(d) Other *Charter* issues**

# (a) Validity of governing legislation

- ***Nova Scotia (Workers' Compensation Board) v. Martin, 2003 SCC 54***
- Constitutional challenge to a statutory provision
- **“4 part” test** for determining tribunal’s jurisdiction to determine constitutionality of legislative provisions (para. 48)



## (a) Validity of governing legislation

### *Nova Scotia (Workers' Compensation Board) v. Martin*

Test summarized in *R v. Conway*, [2010] 1 SCR 765 (para. 68):

(1) Under the tribunal's enabling statute, does the administrative tribunal **have jurisdiction, explicit or implied, to decide questions of law** arising under a legislative provision? If so, the tribunal is presumed to have the jurisdiction to determine the constitutional validity of that provision under the *Charter*.

(2) Does the tribunal's enabling statute clearly demonstrate that the **legislature intended to exclude the *Charter*** from the tribunal's jurisdiction? If so, the presumption in favour of *Charter* jurisdiction is rebutted.

## (a) Validity of governing legislation

### *Nova Scotia (Workers' Compensation Board) v. Martin* test

#### Express jurisdiction:

- Tribunal explicitly authorized to "determine all questions of fact and law"
- Tribunal's decisions could be appealed "on any question of law"
- Presumption that Tribunal authorized to decide *Charter*

# (a) Validity of governing legislation

## Implied jurisdiction (para. 48):

- statutory mandate of the tribunal and whether deciding questions of law is necessary to fulfilling this mandate
- interaction of the tribunal with other elements of the administrative system
- whether the tribunal is adjudicative in nature
- practical considerations: the tribunal's capacity to consider questions of law. (However, practical considerations cannot override a clear implication from the statute itself.)

## (b) Statutory aid to interpretation

Only where there is a **genuine ambiguity** can *Charter* values play a role in statutory interpretation:

“ . . . to the extent this Court has recognized a “*Charter* values” interpretive principle, **such principle can *only* receive application in circumstances of genuine ambiguity**, i.e., where a statutory provision is subject to differing, but **equally plausible**, interpretations.”

*Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 559, para. 62

## (b) Statutory aid to interpretation

- The presumption that a provision is consistent with *Charter* values only comes into play as an interpretive principle if the provision is genuinely ambiguous
- Prior to considering the *Charter*, the statute must be construed in the ordinary manner according to the modern approach to statutory construction

## (b) Statutory aid to interpretation

- If statute is unambiguous, tribunal must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result
- **Policy:** upsetting the balance between the legislatures and the courts

*Bell ExpressVu*, para. 66

## (b) Statutory aid to interpretation

### What constitutes a genuine ambiguity?

“... an **ambiguity must be “real”**... . The words of the provision must be **“reasonably capable of more than one meaning”** ... . By necessity, however, one must consider the “entire context” of a provision before one can determine if it is reasonably capable of multiple interpretations. ... “It is only when genuine ambiguity arises between **two or more plausible readings, each equally in accordance with the intentions of the statute**, that the courts need to resort to external interpretive aids” ..., to which I would add, “including other principles of interpretation”.”

*Bell ExpressVu, para. 29*

## (b) Statutory aid to interpretation

**“... ambiguity cannot reside in the mere fact that several courts -- or, for that matter, several doctrinal writers -- have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the “higher score”, it is not appropriate to take as one’s starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if “the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning” ... .”**

*Bell ExpressVu*, para. 30 [underlining in original]



## (b) Statutory aid to interpretation

### High threshold for “genuine ambiguity”

- ***Taylor-Baptiste v. OPSEU*, 2015 ONCA 495**
- Human rights complaint before HRTO regarding offensive blog posting made by union official
- S. 5(1) of the *Human Rights Code* “with respect to employment” is not genuinely ambiguous

## **(b) Statutory aid to interpretation**

**High threshold for “genuine ambiguity”**

- ***ONA and SEIU v. Participating Participating Nursing Homes*, [2016] OPEd No. 5**
- Tribunal: it is neither required nor appropriate to do so as the Act was not ambiguous (para. 140)
- Even though Tribunal itself stated that the provisions of the Act make for "difficult reading"

## (b) Statutory aid to interpretation

### High threshold for “genuine ambiguity”?

- *R. v. Mabior*, [2012] 2 SCR 584, para. 44:

"*Charter* values are always relevant to the interpretation of a disputed provision of the *Criminal Code*."

## (b) Statutory aid to interpretation

- ***R. v. Clark***, 2014 SCC 28, para. 12-15
- ***Sarnia (City) v. River City Vineyard Christian Fellowship of Sarnia***, 2015 ONCA 494
- ***Durham District School Board et al***, 2015 CanLII 30160 (ON LRB), para. 91

## (c) Limits on exercise of discretion

The *Charter* applies to a statutory body, such as a tribunal, as part of the apparatus of government or as a delegate of statutory authority.

P.W. Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> ed., at 37.2(c)&(e)

32. (1) This *Charter* applies

**a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament ...; and**

**b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.**

## (c) Limits on exercise of discretion

- The *Charter* applies to a statutory body when it exercises its statutory discretion under its enabling legislation
- *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038, pp. 1077-79
- *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 SCR 570, pp. 584-85

## (c) Limits on exercise of discretion

***R. v. Conway*, [2010] 1 SCR 765, para. 78:**

Administrative tribunals "must act consistently with the *Charter* and its values when exercising their statutory functions."

## (c) Limits on exercise of discretion

***Doré v. Barreau du Québec*, [2012] 1 SCR 395**

(1) guidance on how tribunals should apply *Charter* values in the exercise of statutory discretion; and

(2) guidance for courts on judicial review of tribunal decisions.



## (c) Limits on exercise of discretion

### ***Doré v. Barreau du Québec*, [2012] 1 SCR 395**

Applying *Charter* values in the exercise of statutory discretion (para. 56):

- (1) first consider the statutory objectives; and
- (2) then ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This "requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives“.

## (c) Limits on exercise of discretion

### ***Doré v. Barreau du Québec*, [2012] 1 SCR 395**

- Decision-making process is about ensuring "balance and proportionality".
- Tribunal must strike “an appropriate balance between rights and objectives” to ensure that “the rights at issue are not unreasonably limited.”
- Tribunal must ensure that any decision “interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives.” (para. 6-7)

## (c) Limits on exercise of discretion

***Doré v. Barreau du Québec*, [2012] 1 SCR 395**

Judicially reviewing tribunal decisions:

- deferential standard of review is consistent with *Dunsmuir* = reasonableness (para. 30)
- Must assess the adjudicative decision under the administrative law approach, not s. 1 *Oakes* analysis

## (c) Limits on exercise of discretion

### ***Doré v. Barreau du Québec*, [2012] 1 SCR 395**

"In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one."

(para. 7)

## (c) Limits on exercise of discretion

*Doré v. Barreau du Québec*, [2012] 1 SCR 395

**BUT**

When a tribunal is determining the constitutionality of a **law**, the standard of review is **correctness**

(*Dunsmuir*, para. 58; *Doré*, para. 43.)

## (c) Limits on exercise of discretion

***Trinity Western University v. The Law Society of Upper Canada*, 2016 ONCA 518**

"On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play."

(para. 65-69)

## (d) Other *Charter* issues that may arise

### Tribunal has jurisdiction over government actors

- Eg. Police discipline cases, Security Intelligence Review Committee (CSIS)
- **But beware:** HRTO line of decisions limiting the ability of the Tribunal to directly challenge government action as violating the *Charter*

Eg. *R. C. v. District School Board of Niagara*, 2012 HRTO 1591, para. 15 (& cases cited therein)

# Tribunal has no jurisdiction

## Express denial of jurisdiction in enabling statute

- eg. Social Benefits Tribunal: explicit limit in statute providing that the Tribunal "shall not inquire into or make a decision concerning ... the constitutional validity of a provision of an Act or a regulation".
- eg. Health Services Appeal and Review Board, Consent and Capacity Board



# Tribunal has no jurisdiction

Express denial of jurisdiction in enabling statute?

*Martin v. Canada (Attorney General)*, 2013 FCA 15

- Statute gave express jurisdiction to decide questions of law to Umpire but silent re Referee Board
- **FCA:** SCC decision in *Tétreault-Gadoury* applies notwithstanding *Nova Scotia v. Martin*, *R. v. Conway*, *Doré*

# Tribunal has no jurisdiction

*Martin v. Canada (Attorney General)*, 2013 FCA 15

“Because the Act affirmatively gives this responsibility to the Umpire, and is silent on the role of the Board with respect to questions of law, **the necessary conclusion is that the Board does not have this authority.**”

(para. 99)

\* Nb: statute has been amended since.

# Tribunal has no jurisdiction

## Constitutionally challenging denial of jurisdiction?

- *H.(E.) v. Ontario (General Manager, Health Insurance Plan)*, 2012 ONSC 5106 (Ont. Div. Ct.)
- Section 6(3) of *Act* “the Board shall **not** inquire into or make a decision concerning the **constitutional validity of a provision of an Act or a regulation**”.

# Tribunal has no jurisdiction

***H.(E.) v. Ontario (General Manager, Health Insurance Plan), 2012 ONSC 5106 (Ont. Div. Ct.)***

- Div. Ct. dismissed the challenge (para. 6-7):

*R. v. Conway* recognized that the legislature may impose clear limits on a tribunal's jurisdiction. However, restrictions on constitutional jurisdiction ought to be narrowly interpreted.

# Tribunal has no jurisdiction

*H.(E.) v. Ontario*, para. 8

“Section 6 (3) does not foreclose [the] ability to **tender evidence or seek a remedy on the basis that ... individual *Charter* rights have been infringed by the application of the statutory and regulatory regime ... or [that the] **policies** of the respondent in withdrawing its funding are contrary to the *Charter* and invalid and of no effect. Section 6 (3) only forecloses inquiry into, or making a decision concerning, the constitutional validity of an Act or regulation.”**

# Tribunal has no jurisdiction

Tribunals typically do not have authority to decide stand-alone constitutional issues:

***MacLennan v. Ontario (Transportation)*, 2013 HRTO 714**

- HRTO has **no** jurisdiction over *Charter* challenge to provision in regulation not connected to *Code*
- **But** has jurisdiction over *Charter* challenge to provision in regulation that precludes the application of *Code*

## (3) *Charter* remedies

### Section 24(1) of the *Charter*

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.

## **(3) *Charter* remedies**

***R. v. Conway*, [2010] 1 SCR 765**

- Is an administrative tribunal a “court of competent jurisdiction”?
- Institutional as opposed to case-by-case approach



## **(3) *Charter* remedies**

***R. v. Conway*, [2010] 1 SCR 765**

### **2 step analysis:**

- (1) Does 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.

### (3) *Charter* remedies

*R. v. Conway*, [2010] 1 SCR 765

(2) Can the tribunal can grant the particular remedy sought, given the relevant statutory scheme?

- an exercise in discerning **legislative intent**
- whether the remedy sought is the **kind of remedy** that legislature intended would fit within the statutory framework of the particular tribunal
- **Relevant considerations:** those that have guided the courts in past cases, such as the tribunal's **statutory mandate, structure and function** (*Dunedin*).

## **(3) *Charter* remedies**

### **s. 24(1) Remedies**

#### ***Chaudry (Re)*, 2015 ONCA 317**

- Ontario Review Board does **not** have jurisdiction to award **costs** as s. 24(1) remedy

#### ***Starz (Re)*, 2015 ONCA 318**

- Ontario Review Board does **not** have jurisdiction to award **costs, damages or declaratory relief** as s. 24(1) remedies

## **(3) *Charter* remedies**

### **s. 24(1) Remedies**

#### ***Chaudry (Re) and Starz (Re)***

- Detract from the Board's ability to meet its statutory mandate and functions
- Heighten adversarial tenor of proceedings
- Prolong hearings
- Board's role focused on individual not systemic
- *Charter* rights vindicated through exercise of statutory powers and processes

## **(3) *Charter* remedies**

### **s. 52(1) of *Constitution Act, 1982***

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of **no force or effect.**

## **(3) *Charter* remedies**

### **s. 52(1) of *Constitution Act, 1982***

Tribunal cannot make a general declaration of invalidity; it may treat an impugned provision as invalid for the purposes of the matter before it.

*Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*,  
[1991] 2 SCR 5, p. 17

*RE Starz*, 2015 ONCA 318 para. 106 et seq.

## **(3) *Charter* remedies**

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

***Decision No. 1945/10, 2015 ONWSIAT 223***

- Tribunal followed earlier decision of Tribunal on same issue (*Charter* challenge to statutory provision)
- Declined to apply the impugned provision in the proceedings before it on basis of previous finding of unconstitutionality

# **(4) Procedural issues**

(a) Notice

(b) Formality of proceedings, evidentiary issues

(c) Intervenors

(d) Bifurcation



# (4) Procedural issues

## (a) Notice Of Constitutional Question

Section 109 of the *Courts of Justice Act*

109. (1) Notice of a constitutional question shall be served on the **Attorney General of Canada and the Attorney General of Ontario** in the following circumstances:

1. **The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.**
2. **A remedy is claimed under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario. ...**

## (4) Procedural issues

Section 109 of the *Courts of Justice Act cont'd:*

(6) This section applies to **proceedings before boards and tribunals as well as to court proceedings.**

See also Rule 4.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, which provides that notice of a constitutional question shall be made with Form 4F.

# **(4) Procedural issues**

## **(a) Notice Of Constitutional Question**

- **Notice is required when challenging legislation or government action**
- **Notice is NOT required when using *Charter* values as aid for interpretation**

See eg.: *Decision No. 480/111 (Re)*, 2011 ONWSIAT 1032

## (4) Procedural issues

### Failure to comply with notice?

*Eaton v. Brant County Board of Education*, [1997] 1 SCR 241, para. 53:

- provision is **mandatory and failure to give the notice invalidates a decision** made in its absence without a showing of prejudice.
- absence of notice is in itself prejudicial to the public interest.

## (4) Procedural issues

Failure to comply?

**BUT**

- Failure to serve notice **may not** be fatal either where the AG consents to the issues being dealt with or there has been *de facto* notice which is equivalent to written notice.

*Eaton v. Brant County Board of Education*, [1997] 1 SCR 241, para. 54

# (4) Procedural issues

## (b) Formality of proceedings, evidentiary issues

- Some tribunals vary their standard practices and adopt alternative approaches for addressing *Charter* issues which are more formalized
- Tension between desire for expediency in the administrative context vs. the complexity and public interest aspects of many *Charter* issues
- Eg. *Decision No. 2157/0912 (Re)*, ONWSIAT 1886

## (4) Procedural issues

***MacKay v. Manitoba*, [1989] 2 SCR 357:**

**“*Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. ***Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.**” (para. 9)**

## (4) Procedural issues

*Trinity Western University v. BC College of Teachers*, 2001 SCC 31 required “**concrete evidence**” that training teachers at TWU would foster discrimination in schools (para. 36)

**Vs.**

*Saskatchewan (HRC) v. Whatcott*, 2013 SCC 11: “[a] court is entitled to **use common sense and experience** in recognizing that certain activities, hate speech among them, inflict societal harms.” (para. 132)



## (4) Procedural issues

*M. D. v Canada Employment Insurance Commission*,  
2014 SSTAD 352

**“Making a constitutional challenge is not a casual undertaking. As noted by the courts, any constitutional case could have potentially far-reaching consequences, and must rest on a firm factual foundation. The Appellant has failed to provide a sufficient basis to ground a *Charter* claim. This appeal cannot succeed.”** (para. 9)

# (4) Procedural issues

## (c) Intervenors

- Standing and scope of participation
- HRTO refused CCLA's intervention on basis that it sought to raise *Charter* issues that were not raised by the parties

*R. C. v. District School Board of Niagara*, 2012 HRTO 1591

## (4) Procedural issues

***Talos v. Grand Erie District School Board*, 2015 HRTO 349, para. 13 – test:**

- i. Whether the intervenor has a significant interest or special contribution to make on the issues;
- ii. Whether the intervenor is likely to provide assistance to the Tribunal that will not otherwise be provided;
- iii. Whether the intervention will unduly delay, disrupt or prejudice the determination of the rights of the parties; and
- iv. If intervention is appropriate, are there conditions that should be placed on the intervention.

# (4) Procedural issues

## (d) Bifurcation

### General approach: deal with *Charter* second

- Tribunals inclined to resolve issues by administrative law principles first
- More efficient, less expensive, more comfortable for tribunal
- Eg. *Decision No. 480/111 (Re)*, 2011 ONWSIAT 1032

# (4) Procedural issues

## (d) Bifurcation

Deal with *Charter* issue first or together with merits

- Eg. *ONA and SEIU v. Participating Nursing Homes*, [2016] OPED No. 5: two phases
- (1) determine the employers' duties under the *Pay Equity Act*, including a constitutional challenge to the provisions setting out those duties;
- (2) determine whether the employers had complied with their duties.

## The *Charter* and the Tribunal

**Adrienne Telford**

Cavalluzzo Shilton McIntyre Cornish LLP

[atelford@cavalluzzo.com](mailto:atelford@cavalluzzo.com)

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