

The *Charter* as a Useful Addition to Canadian Law: The View From the Tribunal Perspective

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When I was initially asked to participate in the present panel, it was introduced to me under the topic: Administrative Tribunals and the *Charter*.¹ My initial reaction to the topic was immediately favourable because I felt that with the twentieth anniversary of the *Charter* occurring in 2002, this would be an appropriate time to retrospectively consider and evaluate our experience with the *Charter*. However, rather than looking at the *Charter* and tribunals from the perspective of whether or not the manner and modes of operating of tribunals have been revised following the *Charter*'s objectives, it was my thought that the most valuable approach that I could take as current Chairperson of one of Canada's largest tribunals was to ask whether the *Charter* had served the objectives of the tribunals. In other words, rather than ask whether tribunals have served *Charter* values well, the question to be posed is, has the *Charter* and the manner in which its values and standards have been introduced into Canadian law allowed the values of tribunals to be preserved and to advance?

This short note will therefore look at the *Charter* from the totally selfish perspective of whether the operation and functioning of a tribunal in the time of the *Charter* is something that has become more difficult, whether very little has changed or whether in fact the operation of tribunals in the *Charter* age has become easier and better. Needless to say, as a tribunal chairperson, whose work and practical experience has been mostly in a tribunal charged with adjudicating labour disputes, many of

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¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

the examples I will use to try to illustrate the operation of tribunals under the *Charter* will focus on labour tribunals.

Following the coming into force of the *Canadian Charter of Rights and Freedoms* on April 17, 1982, some 20 years ago, there was considerable speculation about what impact the *Charter* would have upon the functioning of tribunals. It was hoped at that time that the *Charter* would be a positive influence in tribunal functioning and that it would at the same time allow tribunals to meet their own objectives. At the same time, there were initial concerns in the tribunal community that the *Canadian Charter of Rights and Freedoms* might lead to the development of proceduralized and legalistic standards, that the rules that developed in respect of the application of the *Charter* to tribunal process might be expected to limit the interventionist function of tribunals or to delineate and heighten the level of definition of the procedural principles that might apply to quasi-judicial functions of tribunals to a point where their use as an alternative to the governmental and judicial systems might be significantly impaired. This short paper looks at what has been the *Charter's* impact, but looks at it critically from the perspective of the tribunal and its concerns and interests.

Before asking whether the interests of tribunals are well served, it is useful to consider what those interests are. The most recent and useful statement of the reasons for creating a tribunal is set out in a document prepared by the Constitutional and Administrative Law section of the Department of Justice of Canada, which published a manual in 1999 entitled: *Designing Administrative Tribunals*.² That manual reflected on the reasons for creating a tribunal. It indicated that the main reasons for the creation of the tribunal were to address the inability of the existing governmental structure to perform a new interventionist function in the economic or social spheres, the need to remove the tribunal from the political sphere and finally the need for a level of objectivity consistent with a more judicious approach.

Although the Department of Justice study did not address it, it is also important to recall that quasi-judicial tribunals in particular are frequently called upon to undertake decision-making consistently with the law in a manner that allows greater flexibility, informality and expedition than might be possible in the Courts.

² Canada, Constitutional and Administrative Law Section, *Designing Administrative Tribunals* (Ottawa: Department of Justice, 1999).

In considering the general nature of tribunals, a further perspective of tribunals, which I believe is important for these considerations, is often overlooked. Unlike courts and government, which have general perspectives on the resolution of problems, disputes, and conflicts, tribunals function through the perspective of the statute that established them, that is, their constituent statute. Such statutes typically state the general purposes of tribunals and contain in their specific provisions clear indications respecting the kind of problems they seek to provide solutions to and the general directions in which tribunals must move in resolving such problems. The *Canada Labour Code*,³ which is the constituent statute establishing the Canada Industrial Relations Board, is no different in this respect. It sets out a series of general objectives in its Preamble and then sets out the functions the Board is to perform in pursuing these general objectives. The kinds of questions and decisions to be resolved arise clearly and distinctly from the provisions of the *Canada Labour Code*. The purposes of the *Code* became the focus of the tribunal's activities.

Also, like many other statutes setting up administrative tribunals, the *Canada Labour Code* and its statutory perspective make it clear that the matters identified in the *Code* to be resolved by the tribunal are not to be resolved by the courts. They are matters that the *Code* directs shall be finally decided by the Board and that shall only be subject to judicial review in the courts on a relatively limited basis.

The interests of the tribunal, then, in most cases are like those of the Canada Industrial Relations Board. Under its statute, the tribunal is expected to carry out the purposes of the statute, make decisions, resolve issues, and conduct proceedings in the manner contemplated by the statute, free and independently of any interference by the courts. This is to be done in an expeditious and informal manner, which does not rely on the more disciplined and formal processes developed by the courts. A particular characteristic of tribunals is that generally they are enjoined not to apply strict rules of evidence as courts might do.

From the perspective of 20 years ago, the question that could have been asked was if the courts are primarily to be responsible for upholding the *Charter* and insuring that the conduct of business subject to its jurisdiction is to be according to that standard, how are the expedition, informality and accessibility of the tribunal system to be maintained? It is

³ R.S.C. 1985, c. L-2 [hereinafter *Code*].

also useful to consider the experience of the past 20 years from the perspective of the legislative purposes, functions and mandate of the tribunal. The question to be asked, and it will not be fully answered here, is how have the individual legislative and statutory functions and purposes of tribunals survived in the *Charter* era?

It is possible to list a host of concerns about tribunal structure, which might have been affected by the *Charter*, including the composition of the tribunals, their independence, their organization and structure, their authority to apply laws of general application other than their own constituent statutes, the scope and manner of exercise of their powers, the definition and specifications of their procedures, the manner and form in which tribunal processes are to be conducted, their relationships with the courts, and the impact and enforceability of their decisions; however, it is the intention of this short paper to focus on those areas that have received the most attention from the courts in considering and applying the *Charter* and to briefly consider each in turn before considering the question as to whether the *Charter* has indeed served tribunals well. It is not the intention of the paper to answer this question. It is instead hoped that the specific questions posed and some illustrative answers will instead focus attention upon the importance of continuing to carefully consider whether the changes brought about by the *Charter* have and will serve tribunals well.

The specific questions that have tended to surface in the courts to an extent more than others and that will be considered here will therefore be the following:

- The first question is: Has the *Charter* seriously eroded the functioning, powers, and manner of operation of tribunals in respect of the achievement of their legislative purposes?
- Has the *Charter* unduly prevented tribunals from carrying out their statutory mandates?
- The second question is: What happened to tribunal functioning in respect of the *Charter* itself? Were tribunals empowered to decide *Charter* questions? How does the legal approach created stand up to examination?
- The third question concerns the day-to-day business of tribunals and the manner in which this is carried out. Has this been impeded in any significant degree by the *Charter*?

- The fourth question concerns the decision-making of tribunals. Has their resolution of problems by the application of legal values and other relevant standards been aided or impeded by the *Charter*?
- Finally, it may be asked whether the *Charter* has had a significant impact on the institutional nature of tribunals and upon their relationships with the courts and other legal processes? Have our fundamental concepts concerning the institutional nature and functioning of tribunals been changed or altered by the *Charter*?

It will not be possible of course to definitively resolve these issues; rather, it is simply proposed to illustrate their importance by a limited number of examples, in the hope that the perspectives raised may more frequently be considered when the operations of tribunals raise *Charter* concerns. It is hoped that since tribunals have such a large dispute resolution role and function in society, the application of *Charter* standards to their operations will enhance rather than impede their operations. If this is to be the case, we cannot relax our efforts. We must ensure that the way in which the *Charter* is utilized appropriately balances all relevant concerns including the perspective of continuing tribunal effectiveness.

Let us return then to the first question, that is, whether the *Charter* has had a significant impact upon the statutory purposes of tribunals. Obviously, labour tribunals make a useful point of reference. Such tribunals typically operate in a statutory context where they receive applications to certify bargaining agents as exclusive representatives of groups of employees, if appropriate, certify them, and supervise the ensuing process of collective bargaining between employers and bargaining agents. At the same time, labour tribunals attempt to ensure that neither the bargaining agent nor the employer engage in unfair practices, which would unduly distort either the certification process or the bargaining process.

In general, the *Charter* has left the statutory context of labour tribunals intact. Some illustrative decisions may be considered.

In reference to *Reference Re Public Service Employee Relations Act (Alta)*,⁴ the majority of the court held that the constitutional guarantee of

⁴ [1987] 1 S.C.R. 313.

freedom of association in section 2(d) of the *Charter* does not include a guarantee of the right to bargain collectively and to strike because these rights are not fundamental rights or freedoms. Freedom of association did not include the right to bargain collectively as defined in the relevant statutory context. By defining the statutory context as involving a balancing of interests, the court consciously avoided constitutionalizing in general and distinct terms rights expressed within a carefully defined and balanced legislative scheme. The Supreme Court of Canada consequently avoided constitutionalizing the legislative policy and balance set out in the *Labour Relations Act*⁵ in this decision. In other words, if genuine fundamental rights and interests are not engaged, the subtle balancing of a legislative scheme and of the rights and interests concerned are best left to the tribunal charged under the legislative scheme with the job of finding that balance.

The same restraint characterized the Supreme Court in *Public Service Alliance of Canada v. Canada*,⁶ where the same issue of freedom of association and its impact on collective bargaining was being considered. In that case, the issue arose from the removal of collective bargaining by legislated salary provisions, the now long forgotten 6 and 5 plan. The Court affirmed that the right to bargain collectively was beyond the purview of the notion of freedom of association. Collective bargaining was left to be defined as a statutory right subject to its statutory context.

A second illustration from the labour context is also valuable because it illustrates how a genuine interference with a fundamental right may isolate the statutory context of labour while at the same time preserving the fundamental right. For a lengthy period in Canada, dating back to an Ontario Court of Appeal decision in 1963, *Hersees of Woodstock Ltd. v. Goldstein et al.*,⁷ it had been the law that secondary picketing, that is, commercial picketing of an employer's products or place of business in support of collective bargaining dispute, was illegal. This was reflected in British Columbia's *Labour Relations Code*⁸ by a definition of picketing that defined leafleting at secondary sites as picketing and prohibited it. In *U.F.C.W., Local 1518 v. KMart Canada Ltd.*,⁹ the definition of picketing

⁵ R.S.A. 1980, c. L-1.1.

⁶ [1987] 1 S.C.R. 424.

⁷ [1963] 2 O.R. 81 [hereinafter *Hersees of Woodstock*].

⁸ S.B.C. 1992, c. 82.

⁹ [1999] 2 S.C.R. 1083.

was found by the Court to be overbroad and to infringe the guarantee of freedom of expression set out in section 2(b) of the *Charter*. In *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*,¹⁰ *Hersees of Woodstock* was expressly overruled and peaceful, lawful secondary picketing held to be permissible. Importantly in *Pepsi-Cola*, the Court noted that the value given to the freedom of expression must reflect the balances previously struck by the law whether those values were reflected in common law rights or in the legislatively mandated principles of collective bargaining put in place following the Second World War.

The legislated scheme applicable to collective bargaining was limited by freedom of expression. However, this was done only to the extent that labour and non-labour expressions were consistently treated.

The flexibility inherent in the Court's approach is that *Charter* values will be given recognition, but that this will be done in a manner that respects both the common law and the legislative framework. The legislative framework is not immune, but it will be abridged only to the extent necessary to preserve general standards.

The decisions of the Supreme Court of Canada applying the *Charter* to the legislative scheme of labour statutes generally appear then to reflect this sort of approach. Issues of delicate statutory balance are generally left undisturbed, as intended by the statute. If genuine issues of generally applicable and fundamental rights arise, these will be reconciled with the statute in a nuanced and balanced way.

The next issue that arises concerns tribunal functioning in the *Charter* area. Here the initial debate was fast and furious until a 1990-1991 series of cases¹¹ established that if the relevant legislation gave the Board jurisdiction over the parties, the subject matter and the remedy, the tribunal itself could apply the *Charter*. This finding was extended even further in the labour field, in *Weber v. Ontario Hydro*,¹² where a narrow majority upheld the perspective that even an arbitrator appointed to

¹⁰ [2002] SCC 8 [hereinafter *Pepsi-Cola*].

¹¹ *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570; *Tétrault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.

¹² [1995] 2 S.C.R. 929.

resolve a collective agreement dispute could go so far as to not only consider *Charter* questions, but also to grant *Charter* remedies.

The basis on which an arbitrator might do this was that the legislator chose to allow the adjudicator to do this under the relevant statutory scheme.

This issue is illustrative and, although its resolution in a labour context does not necessarily resolve it for all purposes, the trend of the case law in respect of this issue too is encouraging as respects the future utility of the tribunal. In general, the tribunal can expect that it will be able to carry out its legislated functions even when *Charter* issues arise. If the tribunal should be the institution to find and consider *Charter* facts initially and to provide insight into how those facts should be viewed in the legislative context, or even to resolve the problem and provide the remedy, it is free to do so. From the perspective of the tribunals, this is a big win.

What about day-to-day functioning? Again it is suggested that tribunals are significant beneficiaries. The Supreme Court has generally restricted fundamental rights and freedoms to only those set out in the *Charter*; economic interests disguised as fundamental rights have not provided the basis for repeated pressure upon legislated schemes with a social purpose and the balance they strike. A good illustrative case in this respect was the *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*,¹³ case, where a stay was requested to prevent the Manitoba Labour Board from continuing a proceeding based upon *Charter* challenged provisions of the *Manitoba Labour Relations Act*¹⁴ allowing it to impose a first contract. Stays are fatal to labour relations processes and to the operation of statutory processes designed to rapidly restore labour peace. In deciding that the public and statutory interests in continuing the impugned process could be taken into account in considering a stay application, the Court appears to have recognized at least implicitly that the nature of the process being conducted by a tribunal may be balanced even against an allegation of a violation of a *Charter* right.

While this is only one illustration, the sensitivity of the Court in this instance to tribunal realities is reflected in most decisions, which have a significant impact on tribunal process. In general, this respect for tribunal processes is an aspect in which, while the *Charter* has had an influence,

¹³ [1987] 1 S.C.R. 110.

¹⁴ C.C.S.M., c. L10.

the actual effect of the *Charter* provisions has been balanced and sensitive to tribunal realities.

For the answer to the fourth question, the impact of the *Charter* on Board legal values and standards, I turned particularly to the experience of my own board, the Canada Industrial Relations Board (CIRB), and its predecessor, the Canada Labour Relations Board (CLRB). The first question I was concerned with was how frequently Board decisions had related to or involved *Charter* issues, in the period for which statistics were readily available, *i.e.*, 1982 to 2001. During that period, 37 decisions of the Board discussed *Charter* issues. Not surprisingly, the majority of these decisions, 20 in all, involved the section 2(d) right of freedom of association.

Freedom of expression came up in four matters, and the right to life, liberty and security of the person in six. Equality rights arose on ten occasions and the right to be presumed innocent on five.

Notable decisions included the notion that a portion of the RCMP was not denied its freedom of association under the *Code* because it could not be certified. This finding originally made by the CLRB in *The Royal Canadian Mounted Police*¹⁵ was eventually confirmed by the Supreme Court of Canada.

In other decisions, the Board confirmed that arbitrators under the *Canada Labour Code* provisions could be a “court of competent jurisdiction” under the *Charter*, as set out in *Weber*,¹⁶ that religious convictions did not require an exemption from union dues, that the prohibition of employer captive audience meetings did not unduly restrict freedom of expression under section 2(d), that freedom of association did not include the right not to be represented by a certified collective bargaining agent and that “liberty” in section 7 of the *Code* did not include economic liberty.

This examination shows that Board prohibitions on captive meetings, Board positions on the effect of its certification orders and the restrictions on the economic liberty of employers imposed by the Board, as well as numerous other legal values and standards established by Board

¹⁵ (1986), 14 C.L.R.B.R. (N.S.) 46 (CLRB No. 587).

¹⁶ *Weber v. Ontario Hydro*, *supra* note 11.

jurisprudence, have generally survived an examination conducted by the Board itself in light of *Charter* values, as set out by the courts.

In respect of this aspect as well, while tribunals have been required to re-examine and reconsider their values, the *Charter* has not brought about a significant re-examination of the legal values and standards applied by at least our tribunal. They have generally been reaffirmed.

The institutional issues that have developed concerning tribunals may be illustratively grasped by considering two Supreme Court of Canada decisions. The first of these is the decision in *Dunmore v. Ontario (Attorney General)*.¹⁷ While generally, as mentioned previously, collective agreement rights were found to be beyond the purview of the *Charter*, in *Dunmore*, taking the perspective that the statutory exclusion of agricultural workers might lead to an impairment of their general freedom of association, the Court was willing to expand the coverage of the *Ontario Labour Relations Act*¹⁸ to the previously uncovered group. While this decision is difficult in principle to reconcile with the earlier decisions, it nevertheless is worth noting that the modest expansion of the legislative scheme that results is not in any way harmful to the *Labour Relations Act* nor the functioning of the Ontario Labour Relations Board. Thus, though the legislative process is challenged by the courts, the fundamental legislative goals and the role of the governing tribunal remain intact.

The decision in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*,¹⁹ is also of interest. While the British Columbia Court of Appeal felt that a constitutional guarantee of tribunal independence might be compromised, the Supreme Court of Canada felt otherwise. It was of the view that if legislative provisions create an administrative body or tribunal that is clearly not a court, without a constitutional role, the tribunal created may clearly serve a proper role and function, which is unobjectionable from a constitutional, *Charter*, standpoint.

While many of my tribunal colleagues would prefer, on a personal level, that our status be elevated constitutionally, the decision in *Ocean Port Hotel* preserves the flexibility of the legislator to choose the flexibility, informality and efficiency of the tribunal model in the long

¹⁷ [2001] 3 S.C.R. 1016 [hereinafter *Dunmore*].

¹⁸ R.S.O. 1980, c. 228.

¹⁹ [2001] 2 S.C.R. 781 [hereinafter *Ocean Port Hotel*].

term. In this respect too, tribunals and the *Charter* appear ready to live together harmoniously.

What conclusion then? It is submitted that in the *Charter* era tribunals have been able to continue to effectively carry out their statutory mandate. Their role in applying the *Charter*, legislative intent permitting, has been confirmed. On a day-to-day level, the trend of *Charter* decisions has not impaired functioning. The jurisprudence of at least labour tribunals appears not to have been significantly altered or dislocated by *Charter* values. On an institutional level, the *Charter* seems accepting of the role of tribunals. All in all, one would have to conclude that the *Charter* has served tribunals well.

