Challenges to the Integrity of Legislation on Constitutional Grounds: What Role for Administrative Tribunals?

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Introduction

Since patriation, the institution of judicial review of legislation has been grounded in two provisions of the *Canada Act, 1982*[1] — sections 24(1) and 52(1) — the former remedial in formulation and limited to the *Charter*,[2] the latter declaratory in formulation and of general application. The two provisions read 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.
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> 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]

What, if any, is the role of administrative tribunals in reviewing legislative action? It is only with the enactment of the *Charter* that this issue has arisen for consideration by the Courts.

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1 *Constitution Act, 1982*, schedule B to *Canada Act* 1982, U.K., 1982, c. 11.

2 *Ibid*, Part I.

3 As recently noted by Chief Justice McLachlin in *R.* v. *974649 Ontario Inc., et al* (2002), 279 NR 345 (*Dunedin Construction*), section 24 provides for relief from government action inconsistent with the *Charter*, whereas section 52 provides for relief from any law inconsistent with the Constitution of Canada (at para. 14).

True, administrative tribunals were called upon in the pre-*Charter* era to determine whether or not the division of powers as between the federal Parliament and a provincial Legislature forestalled their jurisdiction to entertain a particular matter before them.[4] That is, they would measure the facts presented against the demands of the division of powers to ensure that they fell within the reach of their enabling statutes. But there is no reported instance, of which I am aware, of an administrative tribunal exercising "the high duty of [a] Court to ensure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power", by measuring its enabling statute against sections 91 and 92 of the *Constitution Act, 1867*.[5] Nor is there any discussion whatsoever in the jurisprudence, much less acknowledgement, that they could do so. Rather, it is the constitutional entrenchment of rights and freedoms in the *Constitution Act, 1982* which precipitated the question, the focus being whether and to what extent administrative tribunals should have a role in reviewing legislative action against *Charter* norms.

This question quickly engaged the attention of a broad spectrum of administrative tribunals, courts and commentators and, broadly speaking, three lines of reasoning developed. On one side of the debate there were those who argued that administrative tribunals, as primary decision-

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4 *R.* v. *Ontario Labour Relations Board, ex parte Dunn* (1963) 39 DLR 92(d) 346 (Ont. H.C.).

5 *Amax Potash Ltd.* v. *Government of Saskatchewan*, [1977] 2 SCR 576, per Justice Dickson at p. 590. Thus, for example, on a challenge to the dependant contractor provisions of its enabling legislation as *ultra vires* the Ontario legislature in the face of combines legislation, the Ontario Labour Relations Board held: "Whatever the merits of the respondent's argument the Board is of the opinion that we are without competence or expertise to deal with it. The Legislature, in introducing the "dependent contractor: provisions into *The Labour Relations Act*, ought to be presumed to have conferred upon the Board the authority to deal with "employees" properly falling under the Legislative umbrella of Provincial jurisdiction. The Board's mandate is to apply and interpret the relevant provisions of *The Labour Relations Act.* Should the Act, or any of its provisions, allegedly conflict with the provisions of another statute falling outside Provincial jurisdiction any steps taken by this Board under those provisions may, in any event, be deemed without legal effect. The Board is of the view that the appropriate forum for litigating issues pertaining to the *ultra vires* nature of *The Labour Relations Act* is before the courts. Until the Board is in receipt of any decision, direction or emanation from the courts indicating the nullity of the Act, or any portion thereof, we intend to operate under the assumption that the impugned portions of *The Labour Relations Act* are properly conceived. *Indusmin Ltd*. [1997] OLRB Rep. (Sept.) 552 at para. 3.

makers under their enabling legislation, are vested with the full plenitude of jurisdiction to address constitutional issues and competent to strike down legislation, whether pursuant to section 24(1) as courts of competent jurisdiction or section 52(1). At the other end of the debate were those who argued that, irrespective of their enabling legislation, administrative tribunals are simply not fitted to engage in the review of legislation against constitutional norms, whether *Charter* or otherwise. That task is reserved in its fullness and plenitude to section 96 Courts and neither section 24 nor section 52 of the *Constitution Act, 1982* can ground jurisdiction in administrative tribunals to engage in that process. The third strand of reasoning, while acknowledging that the striking down of legislation may be the exclusive province of section 96 Courts, argued that the logic of section 52 requires that administrative tribunals measure their enabling statutes against constitutional norms, and if found wanting, it is the Constitution, not the tribunal, which renders them 'of no force and effect'.[6] It is this latter view which the Supreme Court came quickly to embrace, developing in three phases over the past fifteen years a body of doctrine on administration review of legislation action, grounded in the invalidating effect of section 52(1).[7]

In the remainder of this paper, I trace the development of that jurisprudence. I conclude by discussing some of the difficulties integral to it, as well as the challenge of integrating that jurisprudence with the greater body of law which the Court has developed on the relationship generally between courts, legislatures and tribunals.

The Jurisprudence

(a) The Trilogy[8]

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[6] I discuss these conflicting approaches of tribunals, courts and commentators in the years immediately following enactment of the *Charter*, in my earlier study of the issue "Courts, Labour Tribunals and the *Charter*, (1990) 39 UNBLJ 85 at pp. 87-89.

[7] The Court recognized in *Weber* v. *Ontario Hydro* (1995), 183 NR 241, that an administrative tribunal may be a court of competent jurisdiction within the meaning of section 24(1). And see as well *Dunedin Construction supra* n. 3. However, its section 52(1) jurisprudence is so expansive as to have orphaned section 24(1) as a significant source of jurisdiction for administrative review of legislation, and I do not propose to treat that provision in this paper.

[8] In this section I have drawn upon the very insightful discussion by Philip Anisman in his study "Jurisdiction of Administrative Tribunals to Apply the Canadian Charter of

In a trilogy of cases released in 1990 – 91, the Supreme Court of Canada, speaking through Justice LaForest, articulated its approach to the jurisdiction of administrative tribunals to review legislative action against *Charter* norms. These are the decision in *Douglas College*,[9] which came down in December 1990 and those in *Cuddy Chicks*[10] and *Tétreault-Gadoury*[11] both of which were issued six months later on the same day in June 1991. In *Douglas College*, the question was whether an arbitrator appointed under the terms of a collective agreement pursuant to the governing labour legislation[12] had jurisdiction to consider a challenge to the mandatory retirement provisions of the agreement as violative of the section 15 equality rights of the *Charter*. In *Cuddy Chicks*, the issue was whether, on an application for certification brought on behalf of a group of agricultural workers, the Ontario Labour Relations Board could consider a challenge to the provisions of its enabling statute[13] excluding such workers from its ambit, premised upon the section 2(b) freedom of association and section 15 equality rights of the *Charter*. In *Tétreault-Gadoury*, the issue was whether a Board of Referees established pursuant to the *Unemployment Insurance Act* [14] had jurisdiction to consider a challenge to provisions of the Act limiting access to ordinary benefits by persons over 65 years of age, again premised on the section 15 equality rights of the *Charter*.

In all three cases the Court eschewed consideration of whether any of the three tribunals could be characterized as a court of competent jurisdiction for the purposes of section 24(1) of the *Charter*. Rather, it directed its full attention to whether or not each of the challenged tribunals had jurisdiction to consider the constitutional validity of its enabling legislation in the ordinary course of exercising its statutory mandate, and where found constitutionally infirm, to disregard such mandate by virtue of the section 52(1) supremacy provisions of the *Constitution Act, 1982.*

Rights and Freedoms" in *Administrative Law: Principles, Practice and Pluralism, Law Society of Upper Canada, Special Lectures* (1992) 99-130.

9 *Douglas/Kwantlen Faculty Association* v. *Douglas College* (1990), 118 NR 340.

10 *Cuddy Chicks Ltd.* v. *Ontario Labour Relations Board* (1991), 122 NR 361.

11 *Canada Employment & Immigration Commission* v. *Tétreault-Gadoury* (1991) 126 NR 1.

12 *Labour Code*, RSBC 1979 c. 212.

13 *Labour Relations Act*, RSO 1980, c. 228, s. 2(b).

14 RSC 1985, c. U-1, s. 31.

In his analysis, Justice LaForest fashioned an approach to the question of tribunal jurisdiction to review and determine the constitutional integrity of enabling legislation which can be summarized in the following propositions:

1. The intention of the Legislature is determinative of the question whether an administrative tribunal has jurisdiction to entertain and determine constitutional issues. The authority to do so must be found in the tribunal's enabling statute, whether expressly or by necessary implication;[15]

2. Legislative conferral of the power to interpret law includes, by necessary implication, conferral of a "concomitant power to determine whether that law is constitutionally valid".[16] This is the logic of section 52(1), for the Constitution, being the supreme law of Canada "must be respected by an administrative tribunal called upon to interpret law";[17]

3. Section 52(1) of the *Constitution Act, 1982* is not itself an independent source of jurisdiction. Rather, by virtue of its enabling or other legislation, a tribunal mandated to interpret law must already have jurisdiction over (i) the subject matter, (ii) the parties before it, and as well (iii) the remedy sought. Where it has such jurisdiction, then "it can in the exercise of its mandate, find a statute invalid under the *Charter*" by virtue of section 52(1).[18]

4. In the resolution of constitutional issues administrative tribunals attract no curial deference, as "They are not there acting within the limits of their expertise."[19] They cannot issue formal declarations of invalidity — a remedy exercisable only by section 96 Courts — but may merely treat a constitutionally infirm provision of their enabling legislation as invalid for the purposes of the matter before them. Such a ruling has no precedential value and "is a totally different function from a formal

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15 *Douglas College*, *supra*, note 9 at para. 37; *Cuddy-Chicks*, *supra* note 10 at para. 12; *Tétreault-Gadoury*, *supra* note 11 at para. 12.

16 *Cuddy Chicks*, *supra* note 10 at para. 11.

17 *Ibid*.

18 *Douglas College supra* note 9 at para. 37.

19 *Ibid* at para. 59.

declaration of invalidity".[20] Nor is it "tantamount to such a declaration".[21]

On the basis of these broad propositions, the Court had no difficulty in concluding in both *Douglas College* and *Cuddy Chicks* that the tribunal in each had jurisdiction to entertain a constitutional challenge to the integrity of its enabling legislation, and in the process of granting relief, to disregard that legislation to the extent that it conflicted with *Charter* norms. In each, the tribunal was vested with a general jurisdiction to determine all questions of fact and law which might arise in proceedings before it, thereby attracting the concomitant power to determine whether or not the enabling statute (or in the case of *Douglas College,* the collective agreement) was valid in relevant part, this by virtue of section 52(1). Practical considerations too were brought to bear, including the advantages of ease of access to simple, inexpensive and efficient decision making bodies without requiring a party first to seek relief through the more unwieldy and expensive court process. Moreover, the specialized expertise of an administrative agency and its specialized competence "can be of invaluable assistance in constitutional interpretation,"[22] and this "particularly at the section 1 stage where policy concerns prevail".[23] The calibre of the tribunal is also relevant and in the case of *Cuddy Chicks* was said to be the "overarching consideration" in the analysis of its institutional characteristics[24] particularly given its mode of decision-making on the adjudicative model.

In *Tétreault-Gadoury* the question was whether a Board of Referees had jurisdiction to consider *Charter* issues on an appeal from a decision of the Employment and Immigration Commission denying benefits to an applicant. The relevant legislation provided for a two-stage appeal process vesting in the Umpire at the second level, a general jurisdiction to decide any question of law or fact necessary to dispose of the appeal.[25] But the legislation was silent on the extent of the jurisdiction of the Board of Referees to make determinations of law in entertaining an

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20 *Ibid* at para. 50.

21 *Cuddy Chicks supra* note 10 at para. 17.

22 *Douglas College supra* note 9 at para. 58.

23 *Cuddy Chicks supra* note 10 at para. 19.

24 *Ibid* at para. 16.

25 *Supra* note 14, at s. 96.

appeal from the initial decision of the Commission. Justice LaForest concluded that, given this three-tiered process for the disbursement of unemployment benefits, one could conclude that the legislative intent was to confer constitutional relief jurisdiction solely on the Umpire. Practical considerations of efficiency and case management would preclude the Commission itself from exercising such jurisdiction. Although arguable that the Board of Referees on an appeal could entertain a *Charter* challenge, the explicit conferral on the Umpire of a broad jurisdiction to determine questions of law led to the conclusion that Parliament had not conferred that same jurisdiction upon the Board. Although it had jurisdiction over the parties, it had none over the subject matter or the remedy.[26]

(b) The decision in Cooper[27]

In *Cooper* the Court had an opportunity to revisit the doctrine on administrative review of legislation articulated by Justice LaForest in the trilogy, which had attracted the consensus of the full bench.[28] Within the intervening five years fissures had developed and these became apparent in the several reasons for decision in *Cooper*. There, the question was whether either the Canadian Human Rights Commission or an adjudicative tribunal appointed by it to inquire into a complaint, had jurisdiction to test the provisions of the enabling statute saving harmless from the prohibition against age discrimination, mandatory retirement at the normal age of retirement for persons similarly employed.[29] Speaking for the majority, Justice LaForest reiterated the jurisprudence laid down in the trilogy that the question was one of parliamentary intent, to be deduced by determining whether or not the administrative agency was vested with jurisdiction to consider questions of law. If so, then by virtue of section 52(1) it follows that it has jurisdiction to consider constitutional issues, including the constitutionality of its enabling legislation.[30]

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26 *Supra* note 11 at paras 21-22.

27 *Cooper* v. *Canadian Human Rights Commission* (1996) 204 NR 1.

28 In their concurring opinions, Justice Wilson, joined by Justice l'Heureux-Dubé, in *Douglas College* and in *Cuddy Chicks*, and Justice l'Heureux-Dubé in *Tétreault-Gadoury*, left open the question of whether a tribunal has jurisdiction to consider the constitutional integrity of its enabling legislation absent definitive legislative conferral of a mandate to do so.

29 *Canadian Human Rights Act*, RSC 1985 c., H-6, s. 15(c).

30 *Supra* note 27 at paras. 15-16.

Again practical concerns, including the composition and structure of the tribunal, its procedures, recourse to the courts from its decisions, and its expertise are considerations which assist in determining the legislative mandate of the particular tribunal. In addition, pragmatic and functional policy concerns, whether for or against a tribunal having constitutional jurisdiction are relevant.[31] The Commission had a general superintending jurisdiction over the Act, including a broad range of public activities aimed at fostering compliance with it, and as well was the statutory body mandated to receive, process and investigate complaints of discriminatory practices violative of the Act. This included the discretion to appoint an adjudicative tribunal to inquire into the complaint, and grant remedial relief where warranted.[32]

Several factors led to the conclusion that Parliament had not mandated the Commission to engage in *Charter* review. There was no provision in the Act conferring on the Commission jurisdiction to determine questions of law; the Commission was not an adjudicative body but rather had the task of screening complaints and determining upon assessment of the evidence before it whether or not they warranted fuller inquiry by a tribunal. Though master of its own proceedings, the Commission had a limited power to interpret and apply its enabling statute so as to determine whether it had jurisdiction at all over a complaint, but this cannot be equated to jurisdiction to address general questions of law. To hold otherwise would be to hold that all administrative decision-makers may question the constitutional integrity of their enabling statutes simply by virtue of the fact that they must, in the performance of their statutory mandates consider their reach.

> "The process of the Commission in determining its jurisdiction over a given complaint through reference to the provisions of the *Act* is conceptually different from subjecting the same provisions to *Charter* scrutiny. The former represents an application of Parliament's intent as reflected in the *Act*, while the latter involves ignoring that intent."[33]

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31 *Ibid* at para. 17.

32 *Ibid* at paras. 18-21.

33 *Ibid* at para. 27.

Practical considerations supportive of the conclusion that Parliament had not intended that the Commission have the power to consider questions of law were its lack of expertise, and its non-adjudicative informal process for considering complaints, without the strictures of the traditional rules of evidence. As to the adjudicative tribunals established under the *Act* to inquire into a complaint, theirs was a special expertise limited to "the area of factual determinations in the human rights context".[34] Although admittedly vested with the jurisdiction to address questions of law, and hence constitutional questions arising concomitantly, these nevertheless lack jurisdiction to measure their enabling Act against constitutional norms. The same practical considerations that militate towards lack of constitutional jurisdiction in the Commission apply in the case of the tribunal, and in addition the complexity, cost and time required to hear a constitutional question would undermine the primary objective of efficient and timely adjudication of human rights complaints.[35]

Chief Justice Lamer, although concurring in the result, called for the Court to revisit the entire question of administrative review of legislative action, having concluded that:

> "…the previous judgments of this court may have misunderstood and distorted the web of institutional relationships between the legislature, the executive, and the judiciary which continue to form the background of our constitutional system…"[36]

In his view separation of powers doctrine, coupled with a commitment to parliamentary democracy, require "as a matter of constitutional principle" that the power to review the enabling legislation of a tribunal against constitutional norms "must be reserved to the courts and should not be given over to bodies that are mere creatures of the legislature."[37] To hold otherwise is to allow administrative tribunals, themselves extensions of the executive, to invert and disrupt the proper hierarchical relationship between the executive and the legislature, and a

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[34] *Ibid* at para 35, drawing on the Court's decision in *Canada (Attorney General)* v. *Mossop* (93) 149 NR 1.

[35] *Ibid* at paras. 33-35.

[36] 204 NR at para. 41.

[37] *Ibid* at para. 40.

tribunal which has engaged in *Charter* review has "unconstitutionally usurped power which it did not have."[38] Although the Court had recognized in *Cuddy Chicks* that only a section 96 Court could make a declaration of invalidity, given the practical consequence of a tribunal disregarding its enabling legislation as constitutionally invalid, it has in effect allowed tribunals to do so. In short, the operation of section 52 should be limited to the courts.[39]

Justice McLachlin came at the matter from a position diametrically opposite to that of the Chief Justice. She was of the view that "the majority approach depreciates the language of section 52 of the *Constitution Act, 1982*" and, in ringing language, rejected the view of the Chief Justice that it was the preserve of the courts, writing:

> "The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals."[40]

Emphasizing that "Laws are struck down not by judicial fiat, but by operation of the *Charter* and s. 52 of the *Constitution Act*,"[41] Justice McLachlin criticized the majority, in effect, for resiling from its stated position in the trilogy that the power to make determinations of law carries with it the concomitant power to make determinations as to the constitutional integrity of the law. Further, she implicitly rejected the view of the majority that, in considering its enabling legislation to determine whether a matter falls within its jurisdiction, the Commission is not considering a question of law within the meaning of the trilogy. Justice McLachlin was of the view that, to the contrary, in the performance of its gatekeeper function the Commission has the power to

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38 *Ibid* at para. 63.

39 *Ibid* at para. 55; 66-67. See as well my earlier study "Courts, Labour Tribunals and the *Charter*" *supra* n. 6, which Chief Lamer partially draws upon in his analysis.

40 204 NR 1 at para. 70.

41 *Ibid* at para. 83.

consider questions of law and in doing so, by reason of section 52, to consider and determine *Charter* issues.[42]

(c) The decision in Martin[43]

There is no question but that the gloss put on the trilogy by *Cooper* had the effect of restricting the class of administrative decision-makers whom the courts would recognize as having jurisdiction to review their enabling legislation so as to ensure its constitutional integrity. All that could be said with certainty was that an adjudicative tribunal, possessed of recognized expertise to further the particular legislative policy entrusted to it, and vested with a broad jurisdiction to make all determinations of fact and law within the reach of its enabling legislation, had the concomitant jurisdiction to consider and decide constitutional issues as they arose before it. Beyond that, there was uncertainty. A more limited power to determine a question of law, particularly where exercised by an administrative decision-maker in a non-adjudicative mode, would be unlikely to attract power to review its enabling legislation on constitutional grounds. Even where power was exercised in an adjudicative mode, constitutional review jurisdiction could be limited by a countervailing legislative intent, as was the case in *Cooper* itself, which forestalled such review at any level within the administrative scheme there under consideration.

The decision of Justice Gonthier, speaking for the full court in *Martin* has overridden the *Cooper* gloss and quelled any doubt there raised, in favour of a broad and expansive approach to an administrative tribunal's jurisdiction to consider and decide constitutional challenges to the integrity of its enabling legislation. The question there, was whether the administrative scheme established under the enabling legislation[44] conferred upon either the Workers' Compensation Board or the Workers' Compensation Appeals Tribunal, jurisdiction to consider and decide a challenge to provisions of the Act and Regulations. These excluded chronic pain from the ambit of the Workers' Compensation system and were challenged as violative of the section 15 equality rights under the *Charter*. The Nova Scotia Court of Appeal, adopting the *Cooper*

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42 *Ibid* at para. 91.

43 *Workers' Compensation Board (N.S.)* v. *Martin et al* (2003), 310 NR 22.

44 *Workers' Compensation Act*, SNS 1994-95 c. 10.

approach, had determined that neither the Board nor the Appeals Tribunal had such jurisdiction, their power to determine questions of law being limited to the interpretation and application of the enabling legislation itself.[45]

At the outset, Justice Gonthier observed that *Martin* provided the Court with an opportunity to reappraise and restate "as a clear set of guidelines" the jurisprudence laid down in the trilogy as to the jurisdiction of administrative tribunals to apply the *Charter,* pointedly noting that the majority reasons in *Cooper*, to the extent that they are inconsistent with the restated approach, can no longer be relied upon.[46] The case is a vindication of Justice McLachlin's dissent in *Cooper*, championing an expansive approach to the issue. Driving the analysis are several policy considerations, first and foremost section 52(1) of the *Constitution Act 1982* itself, by virtue of which "the question of constitutional validity inheres in every legislative enactment", its invalidity where inconsistent with the *Charter* arising not by reason of judicial declaration but rather, by operation of section 52(1), "from the moment it is enacted."[47] Flowing from this principle of constitutional supremacy is the practical corollary "that Canadians should be entitled to assert the rights and freedoms that the *Constitution* guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts."[48] Secondly, should the constitutional issue proceed to curial review, the court will benefit invaluably in its consideration of the justificatory criteria under section 1, not only from the factual findings and record of the tribunal, but as well from its expertise and experience in articulating the legislative policy underpinning the impugned enactment.[49] Thirdly, because the remedial power of administrative tribunals does not include general declarations of invalidity — the relief granted having no prospective binding effect, and any determination being subject to judicial review on a correctness standard — the constitutional role of courts as final arbitrators of constitutionality in our polity is preserved.[50]

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45 (2000) 192 DLR (4th) 611.

46 *Supra* note 43 at para. 3.

47 *Ibid* at para. 28.

48 *Ibid* at para. 29.

49 *Ibid* at para. 30.

50 *Ibid* at para. 31.

With those general policy considerations in mind, Justice Gonthier articulated the 'current, restated approach' to determine whether any particular administrative tribunal has jurisdiction to review its enabling legislation against *Charter* norms, summarized in Cartesian fashion as a series of propositions, as follows:

1. "The first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision.

2. a) Explicit jurisdiction must be found in the terms of the statutory grant of authority.

b) Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself.

3. If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the *Charter.*

4. The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption by

a) pointing to an explicit withdrawal of authority to consider the *Charter*; or

b) convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* (or a category of questions that would include the *Charter*, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should

> generally arise from the statute itself, rather than from external considerations."[51]

The thrust of the decision is towards a robust institution of administrative review of legislative action and its tenor dismissive of passages in the earlier jurisprudence, whether the trilogy or *Cooper*, which might indicate a more restrictive tribunal jurisdiction to engage in the review of legislation on constitutional grounds. Thus, a broad grant of jurisdiction to determine all questions of fact or law arising in the tribunal process is not necessary; it is sufficient that the tribunal have jurisdiction "to interpret or to decide <u>any</u> question of law,"[52] and so long as there is such power "arising under the challenged provision,… the tribunal will be presumed to have jurisdiction to decide the constitutional validity of that provision."[53] This is so whether the grant of jurisdiction is explicit or implicit.[54] Although practical considerations may be brought to bear in determining a tribunal's authority to decide questions of law, they ought not "surreptitiously find their way back into the courts' analysis of a particular tribunal's jurisdiction…"[55]

Notwithstanding Justice Gonthier's assertion to the contrary, it is doubtful that the result in *Cooper* would have been the same under the restated rules in *Martin*.[56] This necessarily follows from his disapproval of the distinction drawn in *Cooper* between 'general' and 'limited' questions of law, which the Nova Scotia Court of Appeal had relied upon to conclude that neither the Board nor the Appeals Tribunal had jurisdiction to subject the enabling legislation to *Charter* review. Justice Gonthier's opposite conclusion that both the Board and the Appeals Tribunal had jurisdiction generally to determine question of law, and as such not only the right, but the duty to consider the constitutionality of the enabling legislation and its subordinate regulations, would militate towards a similar outcome in *Cooper*. In addition, of note is his approval of a multi-tiered administrative scheme which allows for referral of constitutional issues by one level of decision-maker, vested with the

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51 *Ibid* at para. 48.

52 *Ibid* at para. 36.

53 *Ibid* at para. 39.

54 *Ibid* at para. 41.

55 *Ibid* at para. 32.

56 *Ibid* at para. 47.

jurisdiction to make determinations of law, to another better suited to the task, all the while avoiding parallel proceedings in the courts.[57] Equally noteworthy is that Justice Gonthier explicitly refrained from addressing the question of whether the legislator may remove *Charter* jurisdiction from a tribunal absolutely, without allowing for an effective alternative route within an administrative scheme for making *Charter* claims,[58] leaving recourse to the courts as the only avenue of relief. My sense is that the Court may well decide that a legislature cannot do so.

Although *Martin* is framed in terms of a *Charter* challenge, it is clear from the concurrently released decision of the Court in *Paul*[59] that the same approach is to apply generally when determining whether or not a tribunal has jurisdiction to review its enabling legislation against any constitutional norm whatsoever. There the enabling legislation itself was not challenged,[60] but rather the jurisdiction of the Commission to hear and determine a claim of aboriginal rights pursuant to section 35 of the *Constitution Act, 1982*, raised as a defense to a charge under section 96 of the *Code* prohibiting the cutting of timber on crown lands. As in the case of *Charter* challenges, the principle of constitutional supremacy found in section 52 of the *Constitution Act, 1982* drives the analysis. Writing for the full bench, Justice Bastarache wrote:

> "The power of an administrative board to apply valid laws is the power to apply valid laws only to those factual situations to which they are constitutionally applicable, or to the extent that they do not run afoul of s. 35 rights."[61]

Having determined the Code vested in the Commission the power to determine questions of law, it followed that it had "concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision."[62]

Some Observations

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57 *Ibid* at para. 64.

58 *Ibid* at para. 44.

59 *Paul* v. *Forest Appeal Commission (BC) et al* (2003), 310 NR 122.

60 *Forest Practices Code of British Columbia Act*, RSBC 1996, c. 159.

61 *Supra* note 59 at para. 39.

62 *Ibid* at paras. 39, 46.

Despite its apparent coherence, there remain underlying tensions in *Martin's* 'current, restated approach' to administrative review of legislation measured against constitutional norms. For instance, there is the Court's clearly articulated populist sensibility that as the Constitution belongs to the people, they must have ready access to a forum where their constitutional claims can be expeditiously, informally and inextensively vindicated, rather than requiring that this be done by way of time consuming and expensive court process. Yet, at the same time the Court insists that the effect of a constitutional determination made by an administrative tribunal is limited to the parties in the proceeding before it and it can have no prospective effect, as only a court may make a formal declaration of invalidity. Does this not merely prolong uncertainty as to the validity of impugned legislation and postpone its resolution to future judicial proceedings, so that the purported efficiency gained in avoiding bifurcated proceedings in any particular case is in reality a false economy when viewed globally over many?

Moreover, does the doctrine of administrative review of legislation not risk shifting the cost, complexity and lengthy duration of constitutional litigation from the Courts to tribunals, and so undermine the original intention that the latter dispense efficient, economical and speedy justice.[63] In a similar vein, the repeated assertion that the constitutional decisions of an expert tribunal are of invaluable assistance to a court, sits uneasily with the equally repeated assertion that such determinations are subject to the most stringent standard of judicial review - that of correctness. Is there not here an invitation to seek recourse to the courts for vindication of constitutional rights when rebuffed in tribunal proceedings? Compounding the problem is the parsing of a tribunal's enabling legislation provision by provision to determine whether there is in any a grant to determine questions of law, an approach which mirrors generally the recent balkanization of the Court's standard of review jurisprudence.[64] Moreover, given the penchant to constitutionalize questions of law, and the difficulty of disentangling constitutional issues from those over which a tribunal is given exclusive jurisdiction by the enabling legislation, the

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[63] cf the remarks of Justice LaForest in *Cooper supra* note 27 at para. 35.

[64] *Dr. Q.* v. *College of Physicians and Surgeons of British Columbia*, 2003 SCC 19; *Law Society of New Brunswick* v. *Ryan*, 2003 SCC 20.

danger of improperly subjecting the latter to the correctness standard of review attracted by the former must be guarded against.[65]

The Court's newly articulated doctrine of administrative review of legislative action comprises a self-contained body of jurisprudence. Apart from questions as to its intended coherence, we still await its integration with other strands of administrative law doctrine that address the relationship between courts, legislatures and tribunals. In its administrative review of legislation jurisprudence, the Court has placed administrative tribunals over against the executive and the legislature whose actions must be justified before the tribunal as constitutionally sound. The presumption is one of legislative invalidity. This is far removed from the presumption in the Court's independence and impartiality jurisprudence, premised on the validity of the enabling legislation over which a tribunal has superintendence. In its decision in *Ocean Port*,[66] the Court had rejected the argument that, as with judicial independence, the independence of administrative tribunals was a constitutional imperative. There Chief Justice McLachlin wrote:

> "Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention

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65 This is the error in which Justice Bastarache found his colleagues in the majority to have fallen in his dissent in *Barrie Public Utilities* v. *Canadian Cable Television Association* – 2003 SCC 28 at para. 47; 60-62; 124 and *passim*.

66 *Ocean Port Hotel Ltd.* v. *Liquor Control & Licencing Branch (British Columbia)* (2001), 274 NR 116.

> of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.[67]
>
> …
>
> Lamer, C.J. [*in Reference Re Remuneration of Judges of the Provincial Court (P.E.I.)* (1997), 217 NR 1] also supported his conclusion with reference to the traditional division between the executive, the legislature and the judiciary. The preservation of this tripartite constitutional structure, he argued, requires a constitutional guarantee of an independent judiciary. The classical division between court and state does not, however, compel the same conclusion in relation to the independence of administrative tribunals. As discussed, such tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts.[68]

As Chief Justice Lamer has written in his dissent in *Cooper*, it is by reason of their independence from both the executive and the legislature that judges have the right to review legislative action. It has traditionally been understood that only judges have the requisite degree of independence to do so. Chief Justice Dickson put it this way in *The Queen* v. *Beauregard*[69]

> "In Canada, since Confederation, it has been assumed and agreed that the Courts would play an important constitutional role of umpire of the federal system. Initially the role of the Courts in this regard was not exclusive; in the early years of Confederation, the federal government's disallowance power contained in s. 55 of the *Constitution Act, 1867* was also central to federal-provincial dispute resolution. In time, however, the disallowance power fell

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67 *Ibid*. at para. 24.

68 *Ibid*. at para. 32.

69 (1987) 30 DLR (4th) 481 at 493.

> into disuse and the Courts emerged as the ultimate umpire in the federal system. That role, still fundamental today, requires that the umpire be autonomous and completely independent of the parties involved in federal-provincial disputes.
>
> Secondly, the enactment of the *Canadian Charter of Rights and Freedoms* (although admittedly not relevant to this case because of its date of origin) conferred on the Courts another truly crucial role: the defence of basic order to play this deeply constitutional role, judicial independence is essential."

In its administrative review of legislation jurisprudence, the Court is silent on the issuance of independence. It has relied on section 52(1) of the *Constitution Act, 1982* as the source of authority, in fact of obligation, on the part of an administrative tribunal to measure its enabling legislation against constitutional norms, thereby assiduously avoiding any discussion of the fundamental underlying jurisprudential question: by what right do unelected officials override the decisions of democratically elected legislatures?

If as we are told, administrative review of legislation is a constitutional imperative, then Chief Justice Dickson's appreciation of the 'deeply constitutional role' which judges play in reviewing legislation, as grounded in their independence from both the executive and the legislature, is difficult to reconcile with the Court's characterization of administrative tribunals in *Ocean Port* as fulfilling 'a primary policy-making function' while operating 'as part of the executive branch of government'. That characterization allows for a degree of independence and impartiality much attenuated from that required of the courts, and envisages tribunals as located close to the executive side of the constitutional divide between the executive and the judicial branches of government. But in reviewing legislative action, surely administrative tribunals must be seen to be located close to the judicial side of that divide. If we are to have a coherent administrative justice system, then the task ahead for the Court will be to reconcile these two competing strands of its jurisprudence as to the relationship between tribunals, courts and the executive.[70]

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[70] The 'disguised claim of bias' in *Paul supra* note 64 at para. 35 would indicate that the Court will be called upon to begin this process sooner rather than later.