

2013 Atlantic Regional Roundtable on Administrative Law

*Martin - Ten Years Later*

*Experience with Constitutional Jurisdiction*

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**Nova Scotia Workers' Compensation Appeals Tribunal**

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## EXPERIENCE WITH CONSTITUTIONAL JURISDICTION

### Post Martin-the early years

***Jurisdiction:*** The Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504 [*Martin*] established that administrative tribunals such as the NSWCAT which have jurisdiction to decide questions of law arising under a legislative provision are presumed to have jurisdiction to decide the constitutional validity of that provision.

The Court pointed out that the Constitution is, under s. 52(1) of the *Constitution Act*, 1982, 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 [*Martin*, at paragraph 28]. Furthermore, the Court stated that from this principle of constitutional supremacy also flows, as a practical corollary, the idea 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 [*Martin*, at paragraph 29].

The Court added that the factual findings and record compiled by an administrative tribunal, as well as its informed and expert view of the various issues raised by a constitutional challenge, will often be invaluable to a reviewing court [*Martin*, at paragraph 30].

***In January 2005***, the NSWCAT issued two decisions considering the constitutional validity of the age-based limitations on earnings loss awards in s. 37 of the *Workers' Compensation Act*, S.N.S. 1994-95, c.10 (as amended). [The sections are reproduced at the end of this document]

In *Decision 2002-811-AD* (January 27, 2005, NSWCAT), a tribunal panel considered specifically a challenge to ss. 37(9)(b) and (10) of the *Act*. In July 2000 the worker, then 66 years of age, was badly injured on the Sable Gas Pipeline Project. The worker was

found entitled to, and received, earnings-replacement benefits in the form of temporary earnings-replacement benefits for a period of 24 months. By virtue of s.37(10) of the *Act*, the board terminated benefits. The worker then brought a challenge to that provision citing the rights and freedoms enumerated in the *Canadian Charter of Rights and Freedoms*. The panel, as a preliminary matter, found that the tribunal's jurisdiction was limited to a s.52(1) remedy. It can disregard an offending provision, however, the tribunal is without jurisdiction to read-in a rebuttable presumption as a remedy. The panel also found that the civil burden of proof - the balance of probabilities - and not s.187 of the *Act* (a reduced burden of proof in compensation matters) was applicable in considering a *Charter* challenge.

In terms of the merits of the challenge, the panel agreed with the worker that ss. 37(9)(b) and 37(10) of the *Act* infringe the equality rights guaranteed by s.15(1) of the *Charter*. The challenged provisions draw a distinction based on age, an enumerated class, which amounts to discrimination. Older persons were the subject of historical, stereotypical assumptions, the relationship between age and the actual circumstances of a worker was not taken into account, and the ameliorative purpose of the legislation was insufficient to remove the challenged provisions from s.15(1). The differential treatment to the worker was a substantive discrimination as it was significant and it had the effect of demeaning essential human dignity of the affected person.

However, the tribunal found that the infringement was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter* (the *Oakes* test). The objectives of the legislation were found to be pressing and substantial. The limits imposed by the challenged provisions were reasonable and

justifiable in a free and democratic society. Since s. 37(10) was upheld, it followed that, given his age, the worker was not entitled to earnings-replacement benefits beyond 24 months. The appeal was denied.

In a second decision, *Decision 2003-817-AD* (January 27, 2005, NSWCAT), the same panel considered a challenge to s. 37(9)(b). In 2001, the worker, then aged 61, was badly injured. He was provided a permanent impairment benefit and a partial, extended earnings-replacement benefit. He was able to return to the workplace part-time, on modified duties, earning less than his pre-injury earnings. His extended benefit was terminated in 2004 when he attained age 65 as provided by s. 37(9)(b) of the *Act*. The worker continued to work part-time after he turned 65 years of age.

The panel recapitulated many of its reasons in 2002-811-AD. At the outset, the panel considered s. 37(9) and s. 37(10) together as a "code." The panel found that s. 37(9)(b) infringed upon the worker's s. 15(1) *Charter* rights, but was saved under s. 1 of the *Charter*. Ultimately, the panel found that the worker's extended benefit was properly terminated at age 65.

**Record:** A substantial record was submitted to the tribunal panel that heard these constitutional challenges. The worker filed primarily documents relating to the issues of mandatory retirement and aging in Canada including statistical information. The Workers' Compensation Board's documentation included comparable legislative provisions from all provinces and territories as well as background materials from the policy discussions leading up to the adoption of the new earnings-replacement benefits scheme contained in the *Act* of 1996. The WCB's Chief Financial Officer testified with regards to the financial implications of the provisions and the WCB's Vice-President of Strategic Services gave evidence on the policy discussions which occurred prior to 1996. The Attorney General of Nova Scotia was also represented by counsel and

provided the panel with written submissions.

***Process:*** Under the Nova Scotia *Constitutional Questions Act*, 1989, R.S.N.S. c. 89, where, in a proceeding before an administrative tribunal, the constitutional validity or constitutional applicability of any law is brought into question, notice must be given to the Attorney General of Nova Scotia and, if federal legislation is involved, the Attorney General for Canada. The Attorney General for Canada and the Attorney General of Nova Scotia are entitled to file evidence and make submissions.

The NSWCAT Practice Manual contains a provision dealing with notice of constitutional questions or charter arguments and the tribunal has made an effort to explain to self-represented participants and non-lawyer representatives, the implication of raising a constitutional issue. The clause is worded as follows:

### **3.30 Notice of Constitutional Questions or Charter Arguments**

If an appeal raises a question about the constitutional validity or applicability of legislation, a regulation or a by-law, a violation of the Canadian Charter of Rights and Freedoms or a violation of Human Rights Legislation notice must be given to the Attorney General of Nova Scotia. [Section 10 of the *Constitutional Questions Act*, R.S.N.S., c.89, s.1(as amended)].

Notice to the Attorney General of Nova Scotia may be delivered to Edward A. Gores, Q.C., Senior Counsel, Department of Justice (NS), 4 Floor, 5151 Terminal Road, Halifax, Nova Scotia, B3J 2L6.

If the challenge is to federal legislation, notice must also be given to the Attorney General of Canada. Notice to the Attorney General of Canada may be delivered to David Hansen, Regional Director, Department of Justice (Canada), Duke Tower, 1400-5251 Duke Street, Halifax, Nova Scotia, B3J 1P3.

Notice must also be given to the other participants to the appeal and to the Tribunal as soon as possible. Notice can be given at the same time that notice of the appeal is filed with the Tribunal.

The Attorney General of Canada and the Attorney General of Nova Scotia are entitled to file evidence and make submissions to the Tribunal on the constitutional question or charter argument.

***Vague assertions of Charter violations:*** On occasion, the tribunal has had to deal with vague assertions that participants' rights have been violated under the *Charter*. In *Decision 2003-747-AD* (March 19, 2004, NSWCAT), for example, the worker challenged the constitutionality of the Nova Scotia WCB appeal process, the constitutionality of the AMA/PMI assessments, the constitutionality of anti-terrorism legislation as used by the WCB and the constitutionality of the Province exempting itself and its employees from legal and criminal liability. The Appeal Commissioner addressed the tribunal's authority to deal with charter

matters following *Martin* as follows:

The Worker's representative asserts that the Worker is entitled to relief under the *Canadian Charter of Rights and Freedoms* [the "*Charter*"]. His primary authority was the recent Supreme Court of Canada decision, *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504, 2003 SCC 54 [hereinafter, "*Martin and Laseur*"]. With respect, it is quite difficult to discern the precise nature of the Worker's *Charter* challenge. I say this with due regard for the fact that neither the Worker nor his representative are lawyers.

At the outset, I note that the general workers' compensation scheme, with its "historic trade-off", withstood a s. 15(1) *Charter* challenge and was found to be constitutionally permissible. [*In Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983* (1987), 44 D.L.R. (4<sup>th</sup>) 501 (Nfld. C.A.); cited with approval by the Supreme Court of Canada in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)* [1977], 2 S.C.R. 890, at paragraph 26.]

I further note that a constitutional challenge before a tribunal has additional considerations. In the case cited by the Worker (among others), the Supreme Court of Canada pointed out that the Tribunal does not enjoy the same power of constitutional review as a superior court. An administrative body such as this Tribunal is not permitted to make general declarations of invalidity. [*Martin and Laseur*, at paragraph 31.]

However, the Worker did not seek to have certain provisions of the *Act* found inapplicable to him, alone. Instead, he challenged provisions of the *Act* in broad terms. The Worker referred to features of the *Act* including: the 'WCB Appeal process'; the use of guidelines to categorize and assess the degree of injured workers' permanent medical impairments; the existence of statutory immunity in favour of the Board and Tribunal, etcetera. Hence, the Worker is attempting to seek a general declaration of invalidity, not a determination that the Tribunal is unable to apply one or more allegedly invalid provisions of the *Act*.

Assuming for the moment that I were to find that the 'Appeal process'

offended the *Charter* (which I do not find), it would seem to be equivalent to finding that the Tribunal is without jurisdiction to hear and decide *any* appeal. This is a conundrum because the Tribunal would not have jurisdiction to consider the Worker's appeal. The Worker's only remedy would lie in the courts.

In my opinion, there must be some rudimentary basis articulated by the Worker before the Tribunal should consider a *Charter* challenge. It is not sufficient to simply refer to the *Charter*, or a court decision relying upon the *Charter*, or use the word "discrimination". In the present appeal, the Worker has not set out facts and circumstances from which I can discern a *Charter* challenge. Presumably, the Worker seeks to have the Tribunal determine that some portion of the *Act* infringes upon s. 15(1) of the *Charter* as was found in *Martin and Laseur*. However, the Worker failed to provide even the most sketchy outline of the differential treatment he suffered based upon personal characteristics such as the nature of his impairment.

Section 15(1) of the *Charter* is not a general guarantee of equality. Differential treatment must be based upon grounds of discrimination enumerated in s. 15(1) or grounds similar to the enumerated grounds of the section. It seems unlikely, in light of the evidence, that the Worker's circumstances relate to treatment based upon personal characteristics. To the contrary, the Worker's concerns relate to the general nature of workers' compensation as it applies to all injured workers. Given the above discussion, it follows that the Tribunal is without jurisdiction to consider the Worker's allegations that the *Act* offends the *Charter*.

### **Martin-ten years later**

More recently, the tribunal dealt with a *Charter* challenge to the definition of "accident" in the *Act* which excludes stress other than an acute reaction to a traumatic event. The Worker had developed gradual onset stress.

A tribunal panel described the issue as follows:



**Does s. 2(a) of the Act offend s. 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.), 1982*, c. 11 [the “*Charter*”]?**

The panel answered as follows:

No. Although s. 2(a) draws a distinction on the basis of an enumerated ground of discrimination (disability), this distinction does not amount to discrimination because it does not create a disadvantage by perpetuating a prejudice or stereotype.

In this appeal, the Worker argued that s. 2(a) violates his equality rights as guaranteed by s. 15(1) of the *Charter*. He argued that the section discriminates against him by requiring him to meet a threshold of causation that is not required by those workers suffering physical injuries, or mental injuries linked to physical injuries.

The tribunal panel applied the tests as established by the Supreme Court of Canada which require, firstly, that the impugned provision create a distinction on an enumerated or analogous ground, and secondly, that the distinction create a disadvantage by perpetuating prejudice or stereotyping.

The panel found that a distinction on the ground of mental disability was created by the provision. The panel recognized that compensation can be paid in relation to mental disability that arises as a sequelae of a physical injury, but that to recognize mental disability in the first instance, s. 2(a) requires that it be triggered by one event and a particular kind of event. There is no such requirement in the *Act* for physical disability, and gradual onset physical injuries are commonly accepted.

The panel went on to find that the distinction did not amount to discrimination. It looked at the purpose of the provision within the context of the legislation as a whole. The purpose was to

enhance the financial health of the workers' compensation system, to ensure that workplace injuries could be adequately compensated, and to avoid the compensation of injuries that were not caused in or by the workplace.

The panel acknowledged that stress arises from a myriad of factors in a person's life only some of which will be work-related. It found that the legislature drew a reasonable line, given the inherent subjectivity of a claim for gradual onset stress and the difficulties in determining work-relatedness. It was reasonable to anchor a stress claim in the happening of a traumatic event, as it does not prohibit all stress-based claims but gives a desirable degree of clarity to the work-relatedness question.

In this case, the panel found that there was no evidence or a viable argument that to support an affront to human dignity or statutory stereotyping/prejudice. Since he failed to meet the onus required to establish a *Charter* violation, his appeal was denied.

This decision, *Decision 2011-359-AD*, [NSWCAT, December 6, 2012] in on appeal to the NS Court of Appeal.

***Procedural Issues.***

I noted earlier the notice requirement under the tribunal's practice manual. As most tribunals who desire to be transparent in their activities, the tribunal has adopted a comprehensive set of rules that prescribe the form of Notices of appeal, requirements for notice, pre-hearing processes, form of hearings, etc...A *Charter* challenge proceeds just like any other complex hearing with pre-hearing conferences, exchange of documents and possibly expert reports and testimony (as was the case in the age-related challenge).

The age-related challenge involved only a *Charter* challenge, no other issue was in dispute. In the more recent stress-related challenge, the appeal was bifurcated as described by the panel in their opening paragraphs:

This is an appeal of a decision of a Hearing Officer of the Board dated May 18, 2011, in which the Hearing Officer determined that the Worker had not sustained a personal injury by accident arising out of and in the course of his employment in the form of stress. The Worker appealed this decision to the Workers' Compensation Appeals Tribunal [the "Tribunal"] on June 16, 2011.

*Decision 2011-359-PAD* (March 9, 2012, NSWCAT) determined that the Worker had not suffered a personal injury by accident arising out of employment. The Tribunal held that the Worker's circumstances did not meet the definition of "accident" contained in s. 2(a) of the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "*Act*"], as he had not suffered an acute reaction to a traumatic event. The Worker is challenging the constitutionality of s. 2(a) of the *Act*.

This stage of the appeal proceeded by written submission. Written submissions were received from Counsel for the Worker on July 16, 2012 and October 9, 2012. Submissions were received from Counsel for the Employer and Counsel for the Attorney General of Nova Scotia on September 24, 2012; and from Counsel for the Board on September 11, 2012. Although notified of the appeal, the Attorney General of Canada elected not to participate.

In this case, had the panel found that the impugned section violated the *Charter*, it would have proceeded to hear s.1 arguments likely following an oral hearing where evidence would be presented.

It is not unusual for the tribunal to sever an appeal and issue a preliminary decision dealing with an issue of entitlement under the specific provisions of the *Act*. If necessary, the tribunal proceeds to the second phase and deals with the *Charter* challenge.

The majority of workers who appear before the tribunal are represented by the Workers' Advisors Program who have experience dealing with *Charter* challenges. The most

challenging *Charter* challenges are the ones brought by self-represented appellants. The difficulty is in articulating a proper basis for the challenge. The Attorney General's representative will require particulars of the claim, the remedies sought, the particular rights and grounds relied upon such as the grounds of discrimination under s. 15. The AG may refuse to participate if there is not a proper challenge articulated, leaving the tribunal with a difficult appeal to manage.

Other procedural issues that may arise include the question of intervenors; under the *Act*, a participant may be any person who has a direct and immediate interest in the matter. The tribunal has, on occasion, allowed intervenors. In an appeal challenging the validity of the Workers' Compensation Board policy on chronic pain adopted subsequent to *Martin*, the tribunal allowed an employer group and an injured worker group to participate in the proceedings. The WCB is a statutory participant in all appeals before the tribunal and also actively participated in the appeal.

In conclusion, our experience proves that an administrative tribunal such as the NSWCAT is an appropriate forum for the adjudication of a constitutional challenge to specific provisions of the legislation. It allows the tribunal to compile an appropriate record and to adjudicate the issues within its subject matter expertise prior to a review by the Courts. The tribunal's processes can accommodate a *Charter* challenge. While we strive to be accessible by explaining our processes, communicating openly and often with participants, requiring no formal pleadings and with relaxed rules of evidence, at the same time, we have the expertise to handle more complex matters.

## Statutory and Constitutional Provisions

Subsections 37(9) and (10) of the *Workers' Compensation Act*.

**9** Subject to subsection (10) and Sections 72 and 73, earnings-replacement benefits are payable until the earlier of

(a) the date the Board determines that the loss of earnings has ended or no longer results from the injury; and

(b) the date the worker attains the age of sixty-five years.

**10** Where a worker is sixty-three years of age or older at the commencement of the worker's loss of earnings, the Board may pay the earnings-replacement benefits for a period of not more than twenty-four months following the date the loss of earnings commences.

Section 187 of the *Act*:

**187** Notwithstanding anything contained in this Act, on any application for compensation an applicant is entitled to the benefit of the doubt which means that, where there is doubt on an issue respecting the application and the disputed possibilities are evenly balanced, the issue shall be resolved in the worker's favour.

Section 2(a) of the *Act*:

**2** In this Act,

(a) "accident" includes

(i) a wilful and intentional act, not being the act of the worker claiming compensation,

(ii) a chance event occasioned by a physical or natural cause, or

(iii) disablement, including occupational disease, arising out of and in the course of employment,

but does not include stress other than an acute reaction to a traumatic event;

The relevant provisions of the *Canadian Charter of Rights and Freedoms*:

**1** The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

**15** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 52(1) of the *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.