

***Martin and Laseur and some of
its progeny: Administrative
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Charter***

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Martin and Laseur* and some of its progeny: Administrative tribunals dealing with the *Charter

***Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 SCR 504**

Martin and Laseur signaled the Supreme Court of Canada's recognition of administrative tribunals as a normal feature of Canada's justice system. The decision reflected the Court's confidence that administrative tribunals had the capacity and ability to deal with important constitutional questions and other complicated legal issues.

Martin and Laseur also reflected the Supreme Court of Canada's acceptance that it should not be too difficult for ordinary citizens to argue constitutional questions in their dealings with government authorities.

The background to *Martin and Laseur* was the Nova Scotia legislature's attempt to impose a blanket prohibition on paying workers' compensation benefits for "chronic pain". Justice Gonthier, writing for the Supreme Court of Canada, noted that chronic pain syndrome and related medical conditions were generally considered to be pain that continued beyond the normal healing time for the underlying injury or was disproportionate to such injury, and whose existence was not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, according to Justice Gonthier, there was no doubt that chronic pain patients were suffering and in distress, and that the disability they experienced was real.

(para.1)

Nova Scotia's Workers' Compensation Appeals Tribunal (WCAT) decided that it had the authority to resolve constitutional questions and decided that the challenged provisions infringed Mr. Martin's and Ms. Laseur's equality rights under s.15(1) of the *Charter* and were not justified under s.1. The Nova Scotia Court of Appeal allowed the appeal by the Nova Scotia Workers' Compensation Board (WCB) from WCAT's decision and Mr. Martin and Ms. Laseur subsequently appealed to the Supreme Court of Canada.

The Supreme Court of Canada allowed the appeals, deciding that WCAT had the authority to resolve constitutional questions and that the challenged chronic pain provisions breached the injured worker's equality rights under s.15(1) of the *Charter* and were not justified under s.1.

In his reasons for judgment, Justice Gonthier set out a new approach to determine when an administrative tribunal has the authority to determine constitutional questions: If the administrative tribunal has the jurisdiction – express or implied - to decide questions of law arising under a legislative provision, the tribunal will be presumed to have the jurisdiction to decide the constitutional validity of that provision. This presumption may only be rebutted if it can be shown that the legislature clearly intended to exclude constitutional issues from the tribunal's authority over questions of law. (paras.3, 33-48)

In the legislative context in *Martin and Laseur*, it was quite clear to Justice Gonthier that both WCAT and the WCB had the authority to decide questions of law. (para.4, 49-65)

The former approach, set out in *Cooper v. Canada (Human Rights Commission)*, 1996 CanLII 152 (SCC), [1996] 3 S.C.R. 854, which Justice Gonthier expressly overruled, required consideration of whether the administrative tribunal's authority to decide constitutional questions could be found in the statute and it had to be shown that the tribunal's authority extended to the subject matter of the application, the parties, and the remedy sought. Part of the inquiry involved consideration of whether the tribunal could decide "general" as opposed to only "limited" questions of law under the governing statute. (paras.33-48)

In the course of his reasons, Justice Gonthier stated three reasons for the change in approach:

(1) Most importantly, s.52(1) of the *Constitution Act, 1982* states that the Constitution 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". The invalidity of a legislative provision because it is inconsistent with the *Charter* is not because a court has declared it unconstitutional, but because of the operation of s.52(1). In principle, such a provision was invalid from the moment it was enacted, and a judicial declaration to that effect is but one remedy among others to protect those whom it adversely affects. Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including administrative tribunals. From this principle of constitutional supremacy flows the practical corollary that Canadians should be able to assert their

constitutional rights and freedoms in the most accessible forum available, without the need for parallel proceedings before courts. (paras.28-29)

(2) *Charter* disputes do not take place in a vacuum. They require a thorough understanding of the objectives of the legislative scheme being challenged, as well as of the practical constraints it faces and the consequences of proposed constitutional remedies. This need is heightened when, as is often the case, it becomes necessary to determine whether a *prima facie* violation of a *Charter* right is justified under s.1. In this respect, 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. (para.30)

(3) Administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard. An error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court. In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases. Therefore, allowing administrative tribunals to decide *Charter* issues

does not undermine the role of the courts as final arbiters of constitutionality in Canada. (para.31)

***Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 SCR 585**

Paul was released concurrently with *Martin and Laseur* and confirmed the Supreme Court of Canada's new approach regarding the authority of administrative tribunals to deal with constitutional questions. In this case, Justice Bastarache, writing for the Supreme Court of Canada, upheld a provincial tribunal's authority to deal with aboriginal rights, ostensibly a federal area of constitutional authority under s.35 of the *Constitution Act, 1982*, while carrying out a valid provincial mandate, the management of forest resources.

The facts were that Mr. Paul, a registered Indian, cut three trees and found a fourth, and planned to use the wood to build a deck on his home. Mr. Paul asserted that he had an aboriginal right to cut timber for house modification, and, accordingly, that s.96 of British Columbia's *Forest Practices Code*, a general prohibition against cutting Crown timber, did not apply to him. Both the District Manager and the Administrative Review Panel agreed that Mr. Paul had contravened s.96.

Mr. Paul then appealed to the Forest Appeals Commission which decided, as a preliminary matter of jurisdiction, that it was able to hear and determine aboriginal rights in the appeal.

The BC Supreme Court concluded that the BC Legislature had validly conferred on the Commission the power to decide questions relating to aboriginal title and rights in the course of its adjudicative function in relation to contraventions of the Code. A majority of the BC Court of Appeal allowed the appeal, concluding that s.91(24) of the *Constitution Act, 1867*, which gives Parliament exclusive power to legislate in relation to Indians, precluded the Legislature from conferring jurisdiction on the Commission to determine questions of aboriginal title and rights in the forestry context. The dissenting judge in the Court of Appeal would have held that an administrative decision-maker must be able to decide questions of aboriginal rights necessary to the exercise of its statutory authority, specifically that the Commission had the capacity to hear and decide the issues in relation to Mr. Paul's aboriginal rights

The Supreme Court of Canada allowed the appeal from the BC Court of Appeal's decision, deciding that a province could give an administrative tribunal the authority to consider a question of aboriginal rights in the course of carrying out a valid provincial mandate.

Justice Bastarache's reasons relied on the new approach discussed *Martin and Laseur* – it had to be determined if the administrative tribunal was empowered to decide

questions of law. If so, was there any basis for concluding that the issues under review should be removed from the tribunal's authority? In this case, Justice Bastarache noted, the Code permitted a party to "make submissions as to facts, law and jurisdiction" to the Commission. Therefore, it was clear that the Commission had the power to determine questions of law. There was nothing in the Code to rebut the presumption that the Commission could decide questions of aboriginal law. (para.8)

Justice Bastarache stated the conclusion that a provincial board may adjudicate matters within federal legislative competence "fit comfortably within the general constitutional and judicial architecture of Canada". A provincial tribunal determining a question of aboriginal rights would apply constitutional or federal law in the same way as a provincial court, which is also a creature of provincial legislation. The safeguard of judicial review of administrative tribunals by courts of superior jurisdiction, derived from s.96 of the *Constitution Act, 1867*, integrated administrative tribunals into a unitary system of justice. (paras.21-22)

Justice Bastarache stated:

...While there are distinctions between administrative tribunals and courts, both are part of the system of justice. Viewed properly, then, the system of justice encompasses the ordinary courts, federal courts, statutory provincial courts and administrative tribunals. It is therefore incoherent to distinguish administrative tribunals from provincial courts for the purpose of deciding which subjects they may consider on the basis that only the latter are part of the unitary system of justice. (para.22)

The parties in *Paul* had argued about the relevance of whether the Commission was a “court of competent jurisdiction” for the purpose of making a remedy under s.24(1) of the *Charter* and the Commission’s authority to decide certain categories of legal questions. Justice Bastarache side-stepped this argument by stating that the authority under s.52(1) of the *Constitution Act, 1982*, to find a statutory provision was of no effect, is distinct from the remedial authority under s.24(1). That is, an administrative tribunal’s remedial powers were not determinative of its jurisdiction to hear and determine constitutional issues. Moreover, Justice Bastarache pointed out that while s.35 is part of the *Constitution Act, 1982*, it is not part of the *Charter*. Finally, Justice Bastarache noted that the Commission’s remedial powers were not before the Court in the appeal. (para.40)

***R. v. Conway*, 2010 SCC 22, [2010] 1 SCR 765**

This case is significant because the Supreme Court of Canada confirmed that an administrative tribunal – in this case the Ontario Review Board - could be a “court of competent jurisdiction” for the purpose of granting an appropriate and just remedy under s.24(1) of the *Charter* for an infringement or denial of a *Charter* right.

Justice Abella, writing for the Supreme Court of Canada, set out a new approach, attributing jurisdiction under s.24(1) to a tribunal as an institution rather than requiring the parties to test, remedy by remedy, whether the tribunal was a court of competent jurisdiction.

In the circumstances of this case, while finding that the Ontario Review Board was a court of competent jurisdiction under s.24(1), Justice Abella was not persuaded that the requested *Charter* remedies should be granted and, accordingly, she dismissed the appeal.

The facts of this case concerned Mr. Conway, who had been found not guilty by reason of insanity on a charge of sexual assault with a weapon in 1984. Since that verdict, Mr. Conway had been detained in mental health facilities across Ontario. He was diagnosed with an unspecified psychotic disorder, a mixed personality disorder with paranoid, borderline and narcissistic features, potential post-traumatic stress disorder and potential paraphilia. Prior to his annual review before the Ontario Review Board in 2006, Mr. Conway sent a Notice of Constitutional Question to the Board listing various grounds under which he alleged his constitutional rights had been violated and requesting an absolute discharge as a remedy for this violation under s.24(1) of the *Charter*.

After a hearing, the Ontario Review Board unanimously found that Mr. Conway was a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute discharge under the statute, which stated that an absolute discharge is unavailable to any patient who is a “significant threat to the safety of the public”. Accordingly, Mr. Conway was ordered to remain in custody.

Regarding Mr. Conway's application for a remedy under s.24(1) of the *Charter*, the Review Board concluded that it had no *Charter* jurisdiction in light of its statutory structure and function, its own past rulings, and those of other Canadian review boards denying s.24(1) jurisdiction.

Mr. Conway appealed to the Ontario Court of Appeal, which unanimously found that an absolute discharge was not an available remedy for Mr. Conway under s.24(1) of the *Charter*. The majority reasons for the Court of Appeal concluded that the Review Board lacked jurisdiction to grant an absolute discharge as a *Charter* remedy because granting such a remedy to a patient who, like Mr. Conway, was a significant threat to the public, would frustrate Parliamentary intent. Therefore, the Review Board was not a court of competent jurisdiction since it lacked jurisdiction over the particular remedy sought. One of the judges on the Court of Appeal agreed that an absolute discharge was unavailable to Mr. Conway, but she thought the Review Board was competent to make other orders that would be appropriate remedies for a breach of a patient's *Charter* rights. (para.16)

In the Supreme Court of Canada, Justice Abella noted the evolution of this area of the law, which served "to cement the direct relationship between the *Charter*, its remedial provisions and administrative tribunals". In light of this evolution, Justice Abella stated, it was no longer helpful to limit the inquiry to whether a court or tribunal is a court of competent jurisdiction only for the purposes of a particular remedy. The question instead should be institutional: Does the tribunal have the jurisdiction to grant *Charter* remedies

generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If the tribunal can decide questions of law, and *Charter* jurisdiction has not been excluded by statute, the tribunal is a court of competent jurisdiction that can grant s.24(1) remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate. The tribunal must then decide whether it can grant the requested s.24(1) remedy based on its statutory mandate. The answer to this question will depend on legislative intent. (paras.22, 81-82)

Following what the Supreme Court of Canada stated in earlier cases, Justice Abella accepted that expert and specialized tribunals with the authority to decide questions of law were in the best position to decide constitutional questions when a remedy is sought under s.52 of the *Constitution Act, 1982*. Such tribunals were also in the best position to assess constitutional questions when a remedy was sought under s.24(1) of the *Charter*. (para.80)

In her reasons, Justice Abella referred to *Martin and Laseur* and *Paul* and noted that the Ontario Review Board was a specialized, quasi-judicial body with significant authority over a vulnerable population (accused found not criminally responsible by reason of mental disorder). Unquestionably, the Board was authorized to decide questions of law and appeals could be made from its decisions on a question of law, fact, or mixed fact and law. It followed that the Board was entitled to decide constitutional questions in the course of its proceedings and it could grant appropriate and just remedies under s.24(1) of the *Charter*. (para.84)

However, Justice Abella did not agree with Mr. Conway's request for an absolute discharge as a remedy under s.24(1). The Review Board had determined that Mr. Conway was a significant threat to the safety of the public. For such patients, Parliament, through the *Criminal Code of Canada*, had prohibited the Review Board from granting either an absolute discharge to the patient or an order directing that a hospital authority provide the patient with particular treatment (para.97)

Mr. Conway's request for particular treatment was additionally problematic because allowing the Review Board to prescribe or impose treatment would be inconsistent with the constitutional division of powers. The authority to make treatment decisions lies exclusively within the mandate of provincial health authorities in charge of the hospital where a patient is detained, pursuant to various provincial laws governing the provision of medical services. (para.100)

Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 SCR 28

In this decision the Supreme Court of Canada, with Chief Justice McLachlin writing for the Court, addressed the question of when damages may be awarded as an appropriate and just remedy under s.24(1) of the *Charter*, and what should be the quantum of such damages.

Mr. Ward brought an action in tort in the British Columbia Supreme Court, alleging that the City of Vancouver and BC officials violated his *Charter* rights when they detained

him, strip-searched him, and seized his car without cause. The trial judge ruled that Mr. Ward's arrest for breach of the peace was lawful and dismissed the action against the individual police and corrections officers. However, although the trial judge decided that the Province and the City had not acted in bad faith and were not liable in tort for either incident, the strip search and the vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s.8 and from arbitrary detention and imprisonment under s.9 of the *Charter*. The trial judge awarded Mr. Ward damages for breaches of his *Charter* rights: \$5,000 for the strip search and \$100 for the vehicle seizure. A majority of the BC Court of Appeal upheld these awards.

Chief Justice McLachlin allowed in part the appeal, upholding the trial judge's award of \$5,000 damages for the strip search under s.24(1), but concluding that a declaration rather than damages was a sufficient remedy for the vehicle seizure.

Chief Justice McLachlin set out the following steps for determining if damages are an appropriate and just remedy under s.24(1):

- (1) it must be established that a *Charter* right has been breached.
- (2) it must be shown why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of (i) compensation, (ii) vindication of the right, and/or (iii) deterrence of future breaches;

- (3) the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust; and
- (4) if damages are an appropriate and just remedy, the quantum of damages must be assessed. (para.4)

Chief Justice McLachlin distinguished between damages under s.24(1) of the *Charter* and private law damages. A s.24(1) remedy is meant to require the state (or society at large) to compensate an individual for breaches of the individual's constitutional rights. An action for public law damages — including constitutional damages — lies against the state and not against individual actors. Actions against individual actors should be pursued in accordance with existing causes of action. However, the underlying policy considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state. (para.22)

The Chief Justice stated that a functional approach is to be used to determine if damages are an appropriate and just remedy under s.24(1) of the *Charter* - Do damages serve a useful function or purpose? This is the same approach used for awarding non-pecuniary damages in personal injury cases like *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 SCR 229. (para.24)

The three functions to be considered under s.24(1) are as follows:

- (1) Compensation – This function has been described as “fundamental” and is the most prominent of the functions. The goal is to compensate the claimant for the loss caused by the *Charter* breach. In so far as it is possible, the claimant should be placed in the same position as if the Charter right had not been infringed. The claimant’s personal loss could be physical, psychological, or pecuniary. In addition, the claimant could have suffered harm to an intangible interest, which could be distress, humiliation, embarrassment, or anxiety. (para.27)

- (2) Vindication – This function focuses on the harm the infringement of the *Charter* right causes society. This function recognizes that violations of constitutionally protected rights harm not only the particular victims, but society as a whole, because they “impair public confidence and diminish public faith in the efficacy of the [constitutional] protection”. (para.28)

- (3) Deterrence – This function, like vindication, has a societal purpose. Deterrence seeks to regulate government behaviour generally in order to achieve compliance with the Constitution. In other words, like the sentencing object of general

deterrence, deterrence seeks to send a message and ensure government compliance with the Charter in the future. (para.29)

In most cases, all three objects will be present. Harm to the claimant will evoke the need for compensation. Vindication and deterrence will support the compensatory function and bolster the appropriateness of an award of damages. However, the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award. (para.30)

Regarding the countervailing factors that the state may rely upon, the functional approach under s.24(1) may mean that an award of damages will serve no useful function and would not be appropriate and just. The state might be able to show that other remedies, such as a tort action and damages are sufficient. The existence of a potential claim in tort does not bar a claimant from obtaining damages under the *Charter*. Tort law and the *Charter* are distinct legal avenues. However, a concurrent action in tort, or other private law claim, bars s.24(1) damages if the result would be double compensation (paras.34-36, 55)

A judicial declaration may provide an adequate remedy for a *Charter* breach, particularly where the claimant has suffered no personal damage. (para.37)

Concern for good governance may negate the appropriateness of damages under s.24(1). For example, the rule of law would be undermined if governments were deterred from enforcing the law because of possible future damage awards if the law was, at some future date, declared invalid. In the context of laws later found to be unconstitutional, the government's conduct would have to be clearly wrong, in bad faith, or an abuse of power before courts would award damages for the harm to the claimants. Otherwise, in those situations, the only remedy would be a declaration of unconstitutionality. The Chief Justice left open the possibility that further defences could emerge as this area of the law matures. (paras.38-43)

Regarding the appropriate forum for awarding damages under s.24(1), the Chief Justice stated that the remedy must be one that the tribunal is authorized to grant. For example, provincial criminal courts not have the power to award damages and, thus, do not have the power to award damages under s.24(1). (para.58)

Applying the legal principles to the facts of the case, the Chief Justice explained why she characterized the breach of Mr. Ward's as serious, but which warranted a moderate damages award. The Chief Justice stated:

[71] The object of compensation focuses primarily on the claimant's personal loss: physical, psychological, pecuniary, and harm to intangible interests. The claimant should, in so far as possible, be placed in the same position as if his *Charter* rights had not been infringed. Strip searches are inherently humiliating and thus constitute a significant injury to an individual's intangible interests regardless of the manner in which they are carried out. That said, the present search was relatively brief and not extremely disrespectful, as strip searches go. It did not involve the removal

of Mr. Ward's underwear or the exposure of his genitals. Mr. Ward was never touched during the search and there is no indication that he suffered any resulting physical or psychological injury. While Mr. Ward's injury was serious, it cannot be said to be at the high end of the spectrum. This suggests a moderate damages award.

[72] The objects of vindication and deterrence engage the seriousness of the state conduct. The corrections officers' conduct was serious and reflected a lack of sensitivity to *Charter* concerns. That said, the officers' action was not intentional, in that it was not malicious, high-handed or oppressive. In these circumstances, the objects of vindication and deterrence do not require an award of substantial damages against the state.

[73] Considering all the factors, including the appropriate degree of deference to be paid to the trial judge's exercise of remedial discretion, I conclude that the trial judge's \$5,000 damage award was appropriate.

Regarding the seizure of Mr. Ward's car, the Chief Justice stated:

[77] The object of compensation is not engaged by the seizure of the car. The trial judge found that Mr. Ward did not suffer any injury as a result of the seizure. His car was never searched and, upon his release from lockup, Mr. Ward was driven to the police compound to pick up the vehicle. Nor are the objects of vindication of the right and deterrence of future breaches compelling. While the seizure was wrong, it was not of a serious nature. The police officers did not illegally search the car, but rather arranged for its towing under the impression that it would be searched once a warrant had been obtained. When the officers determined that they did not have grounds to obtain the required warrant, the vehicle was made available for pickup.

[78] I conclude that a declaration under s.24(1) that the vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s.8 of the *Charter* adequately serves the need for vindication of the right and deterrence of future improper car seizures.

Decision No. 312/12, 2012 ONWSIAT 1888 (CanLII)

The Ontario Workplace Safety and Insurance Tribunal (WSIAT) had occasion to consider its authority to grant a remedy under s.24(1) of the *Charter* in this decision, where a worker claimed monetary damages against an employer and the Ontario Workplace Safety and Insurance Board in the context of his workers' compensation claim for alleged breaches of his *Charter* rights and his rights under Ontario's *Human Rights Code*. WSIAT referred to *Conway* and confirmed its authority to consider and apply the *Charter* and human rights legislation. However, WSIAT denied the worker's request for monetary damages on the ground that it lacked the jurisdiction grant such damages. (para.85)

R. v. Caron, 2011 SCC 5 (CanLII), [2011] 1 SCR 78

This decision is significant for administrative law because it confirmed the inherent jurisdiction of provincial superior courts to intervene "to render assistance to inferior courts to enable them to administer justice fully and effectively". (para.26)

In this case Mr. Caron was prosecuted for a minor traffic offence — a wrongful left turn — in Alberta. Mr. Caron claimed the proceedings were a nullity because the court documents were only in English. He insisted that he had the right to use French in "proceedings before the courts" of Alberta as guaranteed in 1886 by the *North-West Territories Act* and the *Royal Proclamation of 1869*. His position was that Alberta could not abrogate French language rights and that the Alberta *Languages Act*, which

purported to do so, therefore was unconstitutional. At a point in the provincial court proceedings, Mr. Caron did not have the financial resources to continue and, as a result, the courts were faced with the prospect of the case ending without resolving what the Alberta courts saw as a fundamental constitutional issue.

The Alberta Court of Queen's Bench ordered interim funding for Mr. Caron's legal costs, which the Alberta Court of Appeal upheld on appeal by the Crown. Justice Binnie, writing for eight of the nine judges (Justice Abella wrote short concurring reasons), dismissed the Crown's appeal:

Justice Binnie stated:

[24] The inherent jurisdiction of the provincial superior courts, is broadly defined as "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p.51. These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p.27) to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (p.28). In equally broad language Lamer C.J., citing the Jacob analysis with approval (*MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, at paras. 29-30), referred to "those powers which are essential to the administration of justice and the maintenance of the rule of law", at para.38. See also *R. v. Cunningham*, 2010 SCC 10 (CanLII) 2010 SCC 10, [2010] 1 S.C.R. 331, at para.18, *per* Rothstein J., relying on the Jacob analysis, and *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626, at paras.29-32.

Justice Binnie agreed with Jacob's statement that, "The inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways" (p.23 (emphasis added))." In Justice Binnie's view, a "categories" approach was not appropriate. (para.29)

Justice Binnie accepted that a superior court's inherent jurisdiction extended to an order of interim funding of a litigant in a matter pending in the provincial court where that was "essential to the administration of justice and the maintenance of the rule of law." (paras.26, 35)

Drawing on *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 37, and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38, Justice Binnie stated that it would be appropriate for a superior court to order the interim funding in the following circumstances:

- (1) The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
- (2) The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice

for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

(3) The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases. (paras.38-39)

Justice Binnie qualified his reasons by stating that even where these criteria were met, there was no “right” to a funding order. The superior court would have to decide, considering all the circumstances, whether the case was sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. The superior court’s discretion allowed it to consider all relevant factors in the case. (para.39)

Applying the principles to the facts, Justice Binnie found that the interim funding order was justified in this case. Justice Binnie stated in conclusion:

[48] In my view, the Alberta Court of Queen’s Bench possessed the inherent jurisdiction to make the funding order that it did in respect of proceedings in the provincial court. There was no error of principle in taking into consideration the *Okanagan/Little Sisters (No. 2)* criteria in the exercise of that inherent jurisdiction. On the merits, I defer to what seems to me to be the reasonable exercise of the discretion by the Queen’s Bench judge. I would therefore affirm the decision of the Alberta Court of Appeal and dismiss the appeal.

[49] Although costs are not generally available in quasi-criminal proceedings (absent special circumstances such as Crown misconduct of which there is none here), this case is more in the nature of regular constitutional litigation conducted (as discussed) by an impecunious

plaintiff for the benefit of the Franco-Albertan community generally. In these unusual circumstances, Mr. Caron should have his costs on a party and party basis in this Court.

***Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 SCR 616**

Although *Nor-Man* did not involve a constitutional challenge and the decision did not expressly refer to *Martin and Laseur*, it follows in its spirit – judicial acceptance and confidence in administrative decision-makers as partners in Canada’s justice system who are well-suited to deal with complex legal issues within their respective areas of expertise.

In *Nor-Man*, a casual employee, employed continuously for 20 years with Nor-Man, filed a grievance arguing for entitlement to a “bonus” week of vacation when she reached 20 years of service. The union argued that under the collective agreement the employee was entitled to the bonus week despite her casual status.

The arbitrator agreed with the union’s interpretation of the collective agreement. However, the arbitrator held that the union’s claim for redress was barred because of its long-standing acquiescence in Nor-Man’s practice of excluding casual employees under the bonus week provisions of the collective agreement. Nor-Man had been consistent and open in excluding casual employees. The arbitrator found that Nor-Man had relied on the union’s acquiescence to this practice and that it would be unfair for the union now to hold Nor-Man to the strict terms of the collective agreement in this regard. Accordingly, the arbitrator imposed an estoppel on the union’s claim for redress.

The Manitoba Court of Queen's Bench applied the reasonableness standard of review and dismissed the union's application for judicial review. The Manitoba Court of Appeal applied correctness and allowed the union's appeal.

Justice Fish, writing for the Supreme Court of Canada, applied the reasonableness standard of review and allowed Nor-Man's appeal. Justice Fish found nothing unreasonable in the arbitrator's imposition of estoppel in this case. (paras.4-7, 43, 56)

In the course of his reasons, Justice Fish stated:

[44] Common law and equitable doctrines emanate from the courts. But it hardly follows that arbitrators lack either the legal authority or the expertise required to adapt and apply them in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context.

[45] On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates — and well equipped by their expertise — to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.

However, Justice Fish stated, there were limits:

[52] But the domain reserved to arbitral discretion is by no means boundless. An arbitral award that flexes a common law or equitable principle in a manner that does not reasonably respond to the distinctive nature of labour relations necessarily remains subject to judicial review for its reasonableness.

Marine Services International Ltd. v. Ryan Estate, 2013 SCC 44

For administrative tribunals struggling to reconcile possibly overlapping or conflicting federal and provincial statutes, *Ryan Estate*, which was just released in early August of this year, is essential reading.

In *Ryan Estate*, the workers were brothers who had owned and operated a fishing vessel. They drowned in September 2004 when their fishing vessel capsized in heavy seas off the coast of Newfoundland. The families of the brothers and their estates sued Universal Marine and Marine Services International and David Porter, alleging negligence and breach of contract in the design and construction of the vessel. They also sued the Attorney General of Canada alleging negligence in the vessel's inspection, notably stability testing.

The federal *Marine Liability Act* permitted dependants of deceased fishers to maintain an action in court for their losses. Section 6(2) stated:

6(2) If a person dies by the fault or neglect of another under circumstances that would have entitled the person, if not deceased, to recover damages, the dependants of the deceased person may maintain an action in a court of competent jurisdiction for their loss resulting from the death against the person from who the deceased would have been entitled to recover.

Newfoundland and Labrador's *Workplace Health, Safety and Compensation Act*, similar to other Canadian workers' compensation statutes, barred workers and their families from suing in court for the consequences of work-related injuries and deaths.

Section 44 of the *Act* stated:

44(1) The right to compensation provided by this Act is instead of rights and rights of actions, statutory or otherwise, to which a worker or his or her dependents are entitled against an employer or a worker because of an injury in respect of which compensation is payable or which arises in the course of the worker's employment.

(2) A worker, his or her personal representative, his or her dependents or the employer of the worker has no right of action in respect of an injury against an employer or against a worker of that employer unless the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer.

(3) An action does not lie for the recovery of compensation under this Act and claims for compensation shall be determined by the commission.

The Newfoundland and Labrador Workplace Health, Safety and Compensation Commission decided that the families and the estates could not sue and that their recourse was to claim the appropriate workers' compensation benefits. On judicial review, the trial judge overturned the Commission's decision and permitted the lawsuit to proceed. A majority of the Newfoundland and Labrador Court of Appeal confirmed the trial judge's decision.

The Supreme Court of Canada, with Justices LeBel and Karakatsanis writing for the unanimous Court, allowed the appeal and determined that Newfoundland and Labrador's workers' compensation statute barred the lawsuit.

Justices LeBel and Karakatsanis noted that workers' compensation comes under provincial jurisdiction pursuant to s.92(13) of the *Constitution Act, 1867*, whereas the *Marine Liability Act* was enacted pursuant to federal authority over navigation and shipping under s.91(10) of the *Constitution Act, 1867*. The justices referred to the so-called Meredith principles, which are fundamental to workers' compensation systems in Canada. These principles provide for a workers' compensation system that is a public insurance plan, funded from employers' premiums, that compensates injured workers in covered industries on a no-fault basis regardless of negligence. The "historic trade-off", under which injured workers gain the right to compensation in return for giving up the right to sue for their injuries, is fundamental to the system. (paras.26-32)

Justices LeBel and Karakatsanis drew attention to the fact that the federal Parliament has adopted statutes of its own based on the Meredith principles. (paras.33-39)

Before engaging in the constitutional analysis, Justices LeBel and Karakatsanis reviewed the Commission's consideration of the employment relationship required to trigger the operation of the workers' compensation statute and entitlement to compensation. The justices stated:

[45] This appeal is from a judicial review of the Commission's decision. The Commission's finding that the injury that led to the death of the Ryan brothers occurred "in the conduct of the operations usual in or incidental to the industry carried on" by Marine Services is entitled to deference. It is a question of mixed fact and law that the Commission answered by assessing the evidence and interpreting its home statute. Moreover, s. 19 of the WHSCA contains a privative clause. In light of these factors, the standard of reasonableness applies: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 52-55. On this standard, the Commission's finding should not be disturbed.

[46] Therefore, s. 44 of the WHSCA applies to this case and, if constitutionally applicable and operative, bars the action initiated by the Ryan Estates against the appellants. We must now turn to the constitutional questions raised by the application of s. 44. [emphasis added]

Thus, although correctness would be applied with respect to the Court's review of the Commission's ultimate decision on the constitutional issue, as noted above the Commission's essential role in defining the relevant legal issue and determining the facts had to be respected and was entitled to deference from the Court.

Justices LeBel and Karakatsanis went on to consider the doctrines of interjurisdictional immunity (paras.50-64) and paramountcy (paras.65-84) and determined that they did not apply to prevent the operation of the workers' compensation statute bar in this case.

Conclusion

The decisions discussed in this paper, starting with *Martin and Laseur*, reflect the Supreme Court of Canada's acceptance of administrative tribunals as a legitimate part of

Canada's justice system and as partners working with courts to resolve constitutional and other complicated legal issues as they arise in their various areas of expertise.

Since *Martin and Laseur*, if it can be shown that the legislature intended the tribunal to be able to decide questions of law, the presumption will be that this includes the authority to decide constitutional questions.

A reviewing court will reserve the authority to review the tribunal's decision on the constitutional question under the correctness standard. However, as *Ryan Estate* shows, even in such cases the tribunal can receive judicial deference regarding its factual or legal findings and the development of the record prior to dealing with the merits of the constitutional question.

The Supreme Court of Canada has been careful, though, to respect the proper place of administrative tribunals in Canada's constitutional hierarchy. Tribunals generally offer relative ease of access to Canadians and more informal processes compared to courts, and these factors, combined with tribunals' specialized expertise in the matters under consideration, favour recognizing tribunals' authority to decide constitutional questions. However, tribunals, whose authority is entirely statute-based, cannot make general declarations with respect to constitutional questions. Such authority remains the exclusive preserve of courts listed in s.96 of the *Constitution Act, 1867* and other courts of superior jurisdiction.

These factors directed the Supreme Court of Canada's consideration of tribunals' authority under s.24(1) of the *Charter*. If a tribunal has the authority to decide constitutional questions, it is a court of competent jurisdiction under s.24(1). But, in the constitutional context the tribunal's authority with respect to available remedies remains closely linked to its enabling statute and s.24(1) does not provide any free-standing remedial authority for a tribunal separate from its statutory context. Thus, a provincial court or administrative tribunal without the authority to award damages under its enabling statute cannot award damages for a breach of a claimant's constitutional rights.

Caron confirmed the idea of a partnership between administrative tribunals and courts of superior jurisdiction. The inherent jurisdiction of superior courts can be used to assist an administrative tribunal in basically any manner considered "essential to the administrative of justice and the maintenance of the rule of law." Again, however, the Supreme Court of Canada was careful to respect the constitutional hierarchy and did not give superior courts *carte blanche* to intervene in the internal workings of administrative tribunals.

I would like to conclude with the following quote from Justice McLachlin (as she then was), writing in dissent in *Cooper*, which Justice Binnie, at para.29, cited in *Martin and Laseur*.

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.

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October 2013

Appendix A

Key constitutional provisions

The following provisions of the *Constitution Act, 1982* (being Schedule B to the *Canada Act 1982 (UK), 1982, c.11*), are relevant to the decisions discussed in this paper.

Section 15(1) and s.1 of the *Canadian Charter of Rights and Freedoms*, respectively, state:

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.

...

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.

Section 24(1) of the *Charter* states:

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.

Section 52(1) of the *Constitution Act, 1982* states:

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.

Appendix B

Raising a constitutional question before an administrative tribunal: One approach

A two-step approach might be useful, if possible, when counsel raises a constitutional question before an administrative tribunal. This is the type of approach the Nova Scotia Workers' Compensation Appeals Tribunal followed for *Martin and Laseur* and in constitutional cases since.

If counsel sees that the tribunal has the authority to decide questions of law and there is nothing to rebut the presumption that this includes the authority to decide constitutional questions, then counsel should advise the tribunal as soon as possible that a constitutional challenge to one or more of the governing provisions will be raised.

The Attorney General for the province and/or Canada, depending on the case, must be given the required notice of the challenge under Nova Scotia's *Constitutional Questions Act*, which defines "court" to include an administrative tribunal in s.10(1)(a).

Counsel can suggest to the tribunal a two-step approach. In the first step, counsel would present evidence and legal arguments that could support the factual foundation for the challenge. Counsel's goal in the first step is to show that, but for the challenged provision(s), the applicant's claim would have succeeded.

The tribunal can issue an initial or preliminary decision which could establish the factual foundation for the challenge. It is possible that after the first step the tribunal will

allow the applicant's claim under the governing provisions without having to deal with the constitutional challenge.

In a case I did years ago dealing with a challenge to the stress provision under the *Workers' Compensation Act*, the worker and I attended a hearing and presented evidence and arguments. The Appeal Commissioner ended up deciding that the worker's stress was a compensable type of stress and allowed the worker's appeal, and we did not have to proceed with the constitutional challenge in the second step.

In the case of the impugned provisions preventing the payment of workers' compensation for chronic pain, it was important for the tribunal's preliminary decision to find that the worker actually had chronic pain. If the tribunal had found that the worker's impairment or disability was caused by some other medical condition, then there might have been no basis for counsel to proceed with the second step in the proceeding, the constitutional challenge.

An advantage with this approach that I have seen in my practice is that the Attorney General, and possibly other parties in the proceeding, might not actively participate in the first step. The Attorney General and others only become active participants if it is necessary to proceed to the second step, arguing that the provisions are unconstitutional.

In the second step, which may require reconvening the hearing or providing written submissions and/or other evidence, counsel's efforts are directed to the merits of the constitutional question.

At the end of this process, the tribunal's first or preliminary decision and the decision after the second step together would constitute one decision for the purpose of any further appeal.

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October 2013