

Charter Challenges Get More Challenging

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In April's edition of *Grey Areas* we discussed the handling of challenges under the *Canadian Charter of Rights and Freedoms* by administrative tribunals. A major theme of that article was that tribunals usually are required to rule on *Charter* issues that come before them. Earlier this month the Supreme Court of Canada expanded the role of tribunals in *Charter* cases even further.

In *R. v. Conway*, 2010 SCC 22, the Court dealt with two issues of interest to tribunals:

1. It simplified the test for when a tribunal can make *Charter* rulings; and
2. It broadened the ability of tribunals to grant remedies under the *Charter*.

In 1984 Mr. Conway was found not guilty of sexual assault with a weapon on the basis of insanity. He has been kept in various custodial mental health institutions since then. In 2006 he brought a *Charter* challenge, on various grounds, seeking his unconditional release or, failing that, specified treatment and relocation of his room which was near a construction site.

Ability of a Tribunal to Make a *Charter* Ruling

The Court simplified the test by which a tribunal can ascertain whether it can make *Charter* rulings:

Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's

jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* — and *Charter* remedies — when resolving the matters properly before it.

This means that most tribunals will be able to make *Charter* rulings in proceedings before them. Most regulatory tribunals, not just their Discipline Committees, will be so empowered. The Court concluded that this principle would make the *Charter* more accessible to the public. This approach would also permit the public to use the expertise of specialized tribunals in dealing with issues before them. Finally, this approach would prevent the splitting of proceedings between tribunals and the courts (i.e., with the tribunal dealing with non-*Charter* issues and the courts dealing with *Charter* matters).

Tribunals Ordering *Charter* Remedies

Perhaps more significantly, the Court went on to look into the sorts of remedies a tribunal could provide when it found that there had been a breach of the person's *Charter* rights. The Court said:

Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin*).

In the *Conway* case the Court held that the unrestricted release of a dangerous person was inconsistent with the tribunal's mandate. In addition, the prescribing of specific treatment was contrary to the legislative intent of the role of the tribunal (in fact that kind of order was expressly forbidden to the tribunal). In terms of relocating the room Mr. Conway resided in during nearby construction, the

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Court found it unnecessary to rely on the *Charter* as the tribunal could deal with that issue under its current legislation. However, one wonders even if that were not the case whether this would be the sort of remedy the tribunal could have ordered under the *Charter*.

For tribunals generally this expanded remedial power described by the Court may be significant. For example, could a Registration Committee order the registration of an applicant who was competent and ethical even though the applicant did not meet a non-exemptible registration requirement that was contrary to the *Charter*? Or could a Complaints Committee refuse to refer a member to discipline for a clear breach of professional misconduct that was protected by the *Charter* (e.g., freedom of speech)? Or could a Discipline Committee order that a party pay costs to another party or an intervener related to a *Charter* breach even though the legislation is silent on the point?

The last chapter has not been written on tribunal remedies under the *Charter*.

The *Conway* case may be found at www.canlii.org.

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