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Access to Justice, the Charter and Administrative Tribunals in Alberta: Who holds the Holy Grail?

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Cases Considered:

R. v. Conway, 2010 SCC 22

On June 11, 2010, the Supreme Court of Canada considered once again the jurisdiction of administrative tribunals to grant *Charter* remedies as "courts of competent jurisdiction" under section 24(1) of the *Charter* in *R. v. Conway*. This decision purports to broaden the power of administrative tribunals to award *Charter* remedies found in previous Supreme Court decisions by taking an "institutional" rather than "remedy by remedy" approach to the question of jurisdiction (at para. 23). However, Justice Rosalie Abella, writing for a unanimous Court, was also clear that a tribunal's remedial jurisdiction under the *Charter* could be constrained by statute (at para. 22). *Conway* must therefore be read subject to Alberta's *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3.

In *Conway*, Justice Abella traced what she called three waves of jurisprudence dealing with the relationship between the *Charter* and administrative tribunals. In the first wave, the Court laid the groundwork for administrative tribunals to be considered "courts of competent jurisdiction" capable of granting remedies under section 24(1) of the *Charter* if the particular tribunal had "jurisdiction over the person, the subject matter, and the remedy sought" (at paras. 4 and 27 to 40, citing *inter alia Mills v. The Queen*, [1986] 1 S.C.R. 863) and *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929). The second wave of cases decided that administrative tribunals were subject to the *Charter* in exercising their statutory powers (at paras. 5 and 41 to 48, citing the line of cases commencing with *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038). In the third wave, the Court held that administrative tribunals may have the authority to decide upon the constitutionality and applicability of their enabling laws under section 52 of the *Constitution Act, 1982*, depending on their jurisdiction to decide questions of law (at paras. 6 and 49 to 77, citing the trilogy *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 and subsequent cases such as *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R.). This part of the judgment is a helpful review of the case law in this area, allowing Justice Abella to draw out some important overarching principles.

"[F]irst and foremost", the question of administrative jurisdiction over remedies was said to be "a matter of discerning legislative intent" (*Conway* at para. 34). The Court's overall ruling that administrative tribunals with the express or implied power to decide questions of law have the jurisdiction to grant *Charter* remedies under s. 24(1) is repeatedly qualified by statements

indicating that the legislature has the ultimate authority to exclude constitutional jurisdiction from tribunals (see e.g. paras. 22, 34, 37, 78, 81, 97). Indeed, the threshold question of *Charter* jurisdiction (now broadly based on the power to decide questions of law) must be followed by consideration of "whether the tribunal can grant the particular remedy sought", which is "necessarily an exercise in discerning legislative intent" (at para. 82).

This qualification related to the delegated nature of the authority of administrative bodies is a key feature of constitutional and administrative law and is therefore not surprising. However, a second overarching theme of *Conway* and the decisions it cites is that timely access to justice, the avoidance of multiple proceedings, and the expertise of administrative tribunals have been important considerations in the Court's development of the jurisprudence in this area. For example, Justice Abella references (at para. 77) this quote from Justice Beverley McLachlin (as she then was) in *Cooper*:

> … 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. (at para. 70).

See also the reference (at para. 66) to Justice Gonthier's statement in *Martin* and *Laseur*:

> 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. … This accessibility concern is particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling legislation, so that forcing litigants to refer *Charter* issues to the courts would result in costly and time-consuming bifurcation of proceedings. (at para. 29)

These normative statements of the importance of access to *Charter* justice at the level of administrative tribunals come up against the doctrinal reality of Alberta's *Administrative Procedures and Jurisdiction Act*. This Act was amended in 2005 to provide as follows with respect to administrative decision makers:

> **11** Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so.

Under the *Designation of Constitutional Decision Makers Regulation*, Alta. Reg. 69/2006, Schedule 1, the Alberta government has stipulated what kind of constitutional questions particular administrative decision makers can decide. For example, the Energy Resources Conservation Board (ERCB) is given jurisdiction over "all questions of constitutional law", while the Alberta Securities Commission (ASC) can decide a narrower category of "questions of constitutional law that relate to the *Charter* or arising from the federal or provincial distribution of powers under the Constitution of Canada". Human rights panels (now "tribunals" under the *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5) are authorized to hear "questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada", but not *Charter* issues, while the Law Enforcement Review Board

(LERB) can decide "questions of constitutional law relating to the *Charter*", but not division of powers issues.

The Act and Regulation seem to amount to the sort of "clearly demonstrated … [legislative intent] to exclude the *Charter* from the tribunal's jurisdiction" that the Court required in *Conway* (at para. 81) in order to rebut the presumption that a tribunal which has been empowered to decide questions of law can apply the *Charter* and its remedies.

Will a broader range of administrative tribunals be permitted to "touch the holy grail" in Alberta following *Conway*, based on the considerations of timely access to justice, avoidance of multiple proceedings, and administrative expertise? The grail appears to be firmly in hands of the legislature for the giving. And why it has extended the *Charter* grail to the ERCB, ASC and LERB but not to human rights tribunals is something that only Monty Python could make sense of.