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R. v. Conway: UnChartered Territory for Administrative Tribunals

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I. INTRODUCTION

In *R. v. Conway*[1] the Supreme Court of Canada reformulated and simplified the test for when an administrative tribunal is considered a court of competent jurisdiction to consider constitutional questions and order *Canadian Charter of Rights and Freedoms*[2] remedies. In doing so, the Supreme Court has simplified the law in this area by making the primary consideration whether the administrative tribunal can consider questions of law.

In the second part of this paper, we review the law on the jurisdiction of administrative tribunals to consider the Charter as it stood prior to *Conway*. In the third and fourth parts, we outline the judicial history of *Conway*, the new test that the Supreme Court has set out and the possible implications of the decision. Finally, we consider the jurisprudence since *Conway* to see how the decision is being applied.

II. THE LAW PRIOR TO *CONWAY*

Prior to *Conway*, different tests were applied to determine whether a tribunal had jurisdiction under section 52 of the *Constitution Act*[3] and section 24(1) of the Charter. Thus, the analysis that was followed in determining whether a tribunal had jurisdiction to apply the Charter depended on the nature of the Charter question at issue:

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1 [2010] S.C.J. No. 22, 2010 SCC 22 (S.C.C.) [hereinafter "*Conway*"].

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

3 *Id.*

(1) If an applicant submitted that the tribunal should find a legislative provision constitutionally invalid or inapplicable, *then the analysis under section 52 applied*.
(2) If an applicant requested that the tribunal provide a personal remedy on the basis that his or her Charter rights had been infringed, *then the analysis under section 24(1) applied*.

However, as the jurisprudence developed, the two tests began to overlap. In particular, the test for jurisdiction under section 24(1) came to incorporate many of the same factors that were considered under the test for jurisdiction under section 52. Accordingly, it was rare for a tribunal to have jurisdiction to grant a remedy for a Charter violation under section 24(1), if it did not also have jurisdiction to consider the constitutional validity of a legislative provision under section 52.

In the next two sections, we discuss the different tests that were applied under section 52 and section 24, prior to the Supreme Court's decision in *Conway*.

1. The Test under Section 52 of the *Constitution Act, 1982*

Because administrative tribunals are not courts within the meaning of section 96 of the *Constitution Act, 1867*,[4] they have no jurisdiction to issue declarations of invalidity. However, they are still able to consider the constitutional validity of legislative provisions, albeit without the power to declare them invalid. If an administrative tribunal finds a law invalid, it would decline to apply it. The question of when an administrative tribunal has jurisdiction to consider the constitutional validity of a legislative provision was established by the Supreme Court of Canada in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*[5] and further clarified in *Nova Scotia (Workers' Compensation Board) v. Martin*.[6]

Writing for the majority, Gonthier J.'s analysis was based upon the following considerations:

(1) The invalidity of a legislative provision arises from the operation of section 52 itself, not from a declaration of invalidity by a court. Accordingly, a tribunal with the power to interpret laws also has the power to determine whether they are constitutionally valid.

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4 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.
5 [1991] S.C.J. No. 42, [1991] 2 S.C.R. 5 (S.C.C.) [hereinafter "*Cuddy Chicks*"].
6 [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (S.C.C.) [hereinafter "*Martin*"].

(2) Canadians should be able to assert their *Charter* rights in the most accessible forum available, without resorting to parallel court proceedings.
(3) A court that subsequently reviews a tribunal's decision will benefit greatly from the informed view of the tribunal as to the relevant facts and policy concerns engaged in a particular regulatory context.
(4) A determination by an administrative tribunal that a legislative provision infringes the Charter will be subject to judicial review on a standard of correctness. As such, the constitutional principle of the separation of powers is preserved.
(5) Finally, administrative tribunals possess no power to issue a declaration of invalidity, and accordingly their decisions as to constitutional validity will not bind future decision-makers. However, an administrative tribunal that has jurisdiction to find a law constitutionally invalid will, on that basis, decline to apply it.

The *Martin* test to determine whether a tribunal had jurisdiction to determine the constitutional validity of legislation was as follows:

(1) Does the administrative tribunal have jurisdiction, explicit or implied, to decide questions of law? The power to decide a question of law is the power to decide by applying *only valid laws*.
    - *Explicit* jurisdiction is that found in the terms of the statutory grant of authority.
    - Jurisdiction can also be *implied* by looking at the statute as a whole, including:
        (a) the statutory mandate of the tribunal in issue, and whether deciding questions of law is necessary to fulfil this mandate effectively;
        (b) the interaction of the tribunal in question with other elements of the administrative system;
        (c) whether the tribunal is adjudicative in nature; and
        (d) practical considerations, including the tribunal's capacity to consider questions of law.

    If the answer to this question is in the affirmative, this raises a presumption that the tribunal has jurisdiction.

(2) Has the presumption been rebutted?

- The presumption that a tribunal with authority to consider questions of law has jurisdiction to consider constitutional validity may be rebutted by:
  (a) an explicit withdrawal of authority to consider the Charter; or
  (b) showing that an examination of the statutory scheme itself 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.

Subsequent decisions have added additional elements to this test. For example, even if a tribunal did not have jurisdiction under section 52, it could apply "Charter values" to assist it in applying ambiguous legislative provisions. That is, if a legislative provision was open to more than one interpretation, but one interpretation would be inconsistent with the Charter, the tribunal would prefer the interpretation that is consistent with the Charter.[7]

2. The Test under Section 24(1) of the Charter

Section 24(1) permits a "court of competent jurisdiction" to grant a remedy to someone whose Charter rights have been infringed. It serves to remedy unconstitutional government acts, as opposed to unconstitutional laws.

The test under section 24 was primarily developed in the criminal law context. The first case to consider the phrase "court of competent jurisdiction" in the context of section 24 was *R. v. Mills*.[8] In *Mills*, the Supreme Court held that a preliminary inquiry judge was not a court of competent jurisdiction for the purposes of issuing the remedy of a stay under section 24(1) of the Charter in circumstances where there was an alleged breach of the accused's right to be tried within a reasonable time as guaranteed by section 11(b). The three-pronged *Mills* test was articu-

[7] *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety and Security)*, [2004] O.J. No. 1214, 13 Admin. L.R. (4th) 26 (Ont. Div. Ct.) [hereinafter "*Criminal Lawyers' Assn.*"], revd on other grounds [2007] O.J. No. 2038, 280 D.L.R. (4th) 193 (Ont. C.A.), revd on other grounds [2010] S.C.J. No. 23, [2010] 1 S.C.R. 815 (S.C.C.).

[8] [1986] S.C.J. No. 39, [1986] 1 S.C.R. 863 (S.C.C.) [hereinafter "*Mills*"].

lated by McIntyre J., who stated that a court of competent jurisdiction must possess:

(1) jurisdiction over the person;
(2) jurisdiction over the subject matter; and
(3) jurisdiction to grant the remedy.

In *Weber v. Ontario Hydro*,[9] the Supreme Court held that the *Mills* test should also be applied to administrative tribunals. A majority of the Court held that an administrative tribunal does have the power to grant Charter remedies like damages if the statute gives it the authority to grant that kind of remedy. The dissent held that while labour arbitrators may not apply provisions that violate the Charter, they are not courts of competent jurisdiction and cannot provide Charter remedies under section 24 of the Charter.

The diversity of views on the application of the *Mills* analysis continued in subsequent decisions. For example, in *Mooring v. Canada (National Parole Board)*,[10] the Court was divided as to whether the National Parole Board was a court of competent jurisdiction for the purposes of excluding evidence under section 24(2). The majority of the Court, in a decision written by Sopinka J., determined that the functions and structures of the Board were neither judicial nor quasi-judicial, and thus the Board was not a court of competent jurisdiction.

Subsequently, in the 2001 *Dunedin*[11] decision written by McLachlin C.J.C., the Court added a functional and structural analysis to the third branch of the *Mills* test, which considered whether a tribunal has jurisdiction to grant a particular remedy. This part of the test is discussed in more detail below.

Although the *Mills* test had three parts, as will be seen, the third part of the test was determinative in each case. Each aspect of the *Mills* test is discussed in further detail below.

(a) Jurisdiction over the Person

The first part of the *Mills* test was uncontroversial, as it had been admitted in all of the leading cases.

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[9] [1995] S.C.J. No. 59, [1995] 2 S.C.R. 929 (S.C.C.) [hereinafter "*Weber*"].

[10] [1996] S.C.J. No. 10, [1996] 1 S.C.R. 75 (S.C.C.) [hereinafter "*Mooring*"].

[11] *R. v. 974649 Ontario Inc.*, [2001] S.C.J. No. 79, [2001] 3 S.C.R. 575 (S.C.C.) [hereinafter "*Dunedin*"].

(b) Jurisdiction over the Subject Matter

The Supreme Court did not expressly articulate the applicable test for subject matter jurisdiction under section 24(1). This requirement was conceded in *Dunedin* and *Hynes*[12] and assumed in *Mooring*. The issue was briefly considered by McLachlin J., for the majority, in *Weber*, where it was held that as long as an alleged Charter breach or dispute arose from the collective agreement, a labour arbitrator would have the necessary subject matter jurisdiction.

The Ontario Court of Appeal considered the definition of subject matter jurisdiction in *obiter* in *Conway*.[13] The *amicus curiae* for Conway argued that subject matter jurisdiction existed as the allegations arose from and directly addressed the factual matters that fell squarely within the jurisdiction of the Ontario Review Board ("ORB"). On the other hand, counsel for the Centre for Addiction and Mental Health ("CAMH") and the ORB cited the *Martin* decision for the general proposition that the ORB must have express or implied jurisdiction to decide questions of law, in order to have jurisdiction over the subject matter of the proceedings. Essentially, this line of reasoning would have imported the *Martin* test for section 52 jurisdiction into the second prong of the *Mills* test.

Neither the majority nor the minority at the Court of Appeal determined the case on the basis of subject matter jurisdiction, but both rejected the submissions by CAMH and the ORB that the test set out in *Martin* for section 52 jurisdiction applied to the question of subject matter jurisdiction under section 24(1).

(c) Jurisdiction to Grant the Remedy: The Functional and Structural Approach

This was the part of the *Mills* analysis that was usually determinative of the issue.

In *Dunedin*, the Supreme Court stated that the issue of whether a tribunal has the power to grant a particular section 24(1) remedy is determined by a "functional and structural analysis". This means the function the legislature has asked the tribunal to perform and the powers and processes with which it has furnished it. Chief Justice McLachlin wrote:

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[12] *R. v. Hynes*, [2001] S.C.J. No. 80, 2001 SCC 82, [2001] 3 S.C.R. 623 (S.C.C.) [hereinafter "*Hynes*"].

[13] *R. v. Conway*, [2008] O.J. No. 1588, 2008 ONCA 326 (Ont. C.A.) [hereafter "*Conway* (C.A.)"].

> Parliament and the provincial legislatures premise legislation on the fact that courts and tribunals operate within a legal system governed by the constitutional rights and norms entrenched by the *Charter*. The "functional and structural" approach reflects this premise. It rests on the theory that where Parliament or a legislature confers on a court or tribunal a function that engages *Charter* issues, and furnishes it with procedures and processes capable of fairly and justly resolving these incidental *Charter* issues, then it must be presumed that the legislature intended the court or tribunal to exercise this power.[14]

Two sources may provide guidance in determining the function and structure of a court or tribunal: the language of the enabling legislation and the history and accepted practice of the institution.

It must be noted that the functional and structural analysis seeks to identify whether the tribunal has jurisdiction over the Charter remedy in issue, as opposed to simply the remedy in the generic sense. However, the functional and structural analysis moves beyond this question to also ask whether the legislature intended the tribunal to have the remedy at its disposal when confronted with Charter violations during the course of its proceedings.[15] For example, even if a tribunal has jurisdiction to grant damages in the ordinary course, if a complainant seeks damages as a Charter remedy, the appropriate question is whether the legislature intended the tribunal to be able to grant damages for a Charter violation.

The functional and structural analysis was applied as follows:

> The *function* of the court or tribunal is an expression of its purpose or mandate. As such, it must be assessed in relation to both the legislative scheme and the broader legal system. First, what is the court or tribunal's function within the legislative scheme? Would jurisdiction to order the remedy sought under s. 24(1) frustrate or enhance this role? How essential is the power to grant the remedy sought to the effective and efficient functioning of the court or tribunal? Second, what is the function of the court or tribunal in the broader legal system? Is it more appropriate that a different forum redress the violation of *Charter* rights?
>
> The inquiry into the *structure* of the court or tribunal relates to the compatibility of the institution and its processes with the remedy sought under s. 24. Depending on the particular remedy in issue, any or all of the following factors may be salient: whether the proceedings are judicial or quasi-judicial; the role of counsel; the applicability or

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[14] *Dunedin*, *supra*, note 11, at para. 36.

[15] *Id.*, at para. 35.

> otherwise of traditional rules of proof and evidence; whether the court or tribunal can issue subpoenas; whether evidence is offered under oath; the expertise and training of the decision-maker; and the institutional experience of the court or tribunal with the remedy in question … Other relevant considerations may include the workload of the court or tribunal, the time constraints it operates under, its ability to compile an adequate record for a reviewing court, and other such operational factors. The question, in essence, is whether the legislature or Parliament has furnished the court or tribunal with the tools necessary to fashion the remedy sought under s. 24 in a just, fair and consistent manner without impeding its ability to perform its intended function.[16]

Thus, prior to *Conway*, there were separate and relatively complex tests for section 52 and section 24 jurisdiction, with some overlap between the two tests.

III. THE NEW TEST UNDER *CONWAY*

1. Judicial History

In 1984, Paul Conway ("Conway") was found not guilty by reason of insanity on a charge of sexual assault with a weapon. Since the verdict, he had been detained in hospital. The majority of that time he spent in the maximum-secure unit of the Penetanguishene Mental Health Centre. In 2005, the ORB ordered that Conway be transferred to the medium-secure unit of CAMH.

In the summer and fall of 2006, the ORB held its annual review of Conway's detention. At that review, Conway asked the ORB to exercise its statutory powers to impose conditions on his detention at CAMH, and also applied for a section 24(1) Charter remedy as relief from alleged breaches of his rights. Specifically, Conway applied for an absolute discharge under section 24(1) of the Charter, claiming, in part, that the living and disciplinary conditions under which he was being detained infringed his rights under sections 2(b), 2(d), 7, 8, 9 and 15(1). The ORB declined to hear Conway's Charter application on the basis that it was not a "court of competent jurisdiction" to provide relief under section 24(1). In the result, the ORB ordered that Conway continue to be detained at CAMH and made suggestions in regard to the conditions of his detention.

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[16] *Id.*, at paras. 44-45 (emphasis added).

Conway appealed on two grounds: that the ORB had erred by making mere suggestions to CAMH regarding his detention, rather than imposing conditions; and that the ORB had erred in holding that it was not a "court of competent jurisdiction".

On the first ground, the Court of Appeal unanimously held that the ORB had erred by not fulfilling its obligation to impose conditions.

On the second ground, the Court of Appeal disagreed about how to decide whether the ORB had jurisdiction over the remedy sought. Justice Armstrong, writing for the majority, characterized the ORB as not a traditional judicial tribunal, and therefore found that the ORB was not a court of competent jurisdiction with respect to the remedy sought by Conway, *i.e.*, an absolute discharge. He noted specifically that:

(1) proceedings are inquisitorial rather than adjudicative;
(2) proceedings are non-adversarial;
(3) none of the parties is fixed with the burden of proof;
(4) traditional rules of evidence are relaxed;
(5) evidence is generally not presented under oath; and
(6) although the chair of the panel has legal training, the majority of panel members do not.[17]

Justice Lang, in dissent, held that the nature of the remedy sought should not be construed in an "unduly narrow manner".[18] The simple fact that the particular remedy requested is not essential for the tribunal's functioning should not prevent a court from considering whether a related remedy does meet the requirement. She concluded that the Board could order conditions or make another appropriate order to remedy a breach of a patient's Charter rights. A patient should not be compelled to make a separate application to the superior court relating to Charter breaches, when such breaches could be dealt with at a review hearing, as this would effectively deny the patient his or her rights.[19] Justice Lang also considered the function and structure of the Board, holding that it could provide an expeditious determination concerning any Charter breaches relating to Conway's treatment, and that there was no evidence that limited section 24(1) jurisdiction would impede the Board's efficiency.

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17 *Conway* (C.A.), *supra*, note 13, at para. 55, *per* Armstrong J.A.
18 *Id.*, at para. 94.
19 *Id.*, at para. 100.

Thus, the majority and minority in *Conway* differed in their application of the factors in the functional and structural analysis. Also, the majority considered only the particular remedy sought by Conway, while the minority looked as well to whether the Board might have jurisdiction over another relevant remedy. Conway appealed the decision to the Supreme Court of Canada.

2. The Supreme Court's Decision

Although the specific issue in *Conway* is the remedial jurisdiction of the ORB under section 24(1) of the Charter, the wider issue, as framed by Abella J., is the relationship between the Charter, its remedial provisions and administrative tribunals.

Before setting out the new test for determining whether an administrative tribunal can grant a Charter remedy, Abella J. conducted a thorough review of the history of jurisdiction of administrative tribunals. She described three important strands in this legal history. The first is the test in *Mills*, which has served as the grid for determining whether a court or administrative tribunal was a "court of competent jurisdiction" under section 24(1). The second strand started with *Slaight Communications*;[20] its legacy is the conclusion that any exercise of statutory discretion is subject to the Charter and Charter values. The third strand is the *Cuddy Chicks* trilogy,[21] the effect of which is that specialized tribunals with both expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates. This third strand provided the underpinning for the test in *Martin*.

After conducting this review of the evolution of the jurisprudence on the power of administrative tribunals to consider Charter issues, Abella J. set out the following test for whether an administrative tribunal can order a remedy under section 24(1) of the Charter:

(1) Does the administrative tribunal have jurisdiction, explicit or implicit, 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

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[20] *Slaight Communications v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 (S.C.C.).

[21] *Cuddy Chicks*, *supra*, note 5; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] S.C.J. No. 124, [1990] 3 S.C.R. 570 (S.C.C.); *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] S.C.J. No. 41, [1991] 2 S.C.R. 22 (S.C.C.).

competent jurisdiction and can consider and apply the Charter — and Charter remedies — when resolving the matters properly before it.[22]

(2) If the answer to the first question is affirmative, the remaining question is whether the tribunal can grant the *particular remedy* sought, given the relevant statutory scheme. At issue will be whether the remedy sought is the kind of remedy that the legislature intended to fit within the statutory framework of the tribunal. Relevant considerations will include the tribunal's statutory mandate, structure and function.[23]

This overview of the test shows that the inquiry on the first part of the test is similar to the test set out in *Martin* as to whether the administrative tribunal is a court of competent jurisdiction for the purposes of section 52 of the *Constitution Act, 1982*. The second part of the inquiry is similar to the third part of the *Mills* analysis. In the result, the Court has merged the section 52 and section 24 tests into an institutional inquiry of whether the particular tribunal has the jurisdiction to consider questions of law, including Charter issues.

3. Application of the New Test

In considering whether the ORB is a court of competent jurisdiction, Abella J. highlighted the following aspects of the ORB's structure and legislative mandate:

- The Board is a quasi-judicial body.
- It is authorized under Part XX.1 of the *Criminal Code*[24] to decide questions of law.
- It has supervisory jurisdiction over the treatment, assessment, detention and discharge of those accused who have been found not criminally responsible by reason of mental disorder.
- There is a right of appeal from the Board's disposition on any ground of appeal that raises a question of law, fact or mixed fact and law.

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22 *Conway*, *supra*, note 1, at para. 81.
23 *Id.*, at para. 82.
24 R.S.C. 1985, c. C-46.

In the second stage of the analysis, Abella J. phrased the issue as follows:

> The question for this Court to decide … is whether the particular remedies sought by Mr. Conway are the kinds of remedies that Parliament appeared to have anticipated would fit within the statutory scheme governing the Ontario Review Board. This requires us to consider the scope and nature of the Board's *statutory mandate and functions*.[25]

When considering the ORB's statutory mandate and functions, Abella J. discussed the dispositions available to the Board, the Board's broad discretion to consider a large range of evidence in order to fulfil its mandate, and the significant expertise of the Board members.

The remedies that Conway sought (an absolute discharge despite the conclusion that he remained a significant threat to public safety, or to direct CAMH to provide him with a particular treatment) were admittedly outside of the Board's statutory jurisdiction, but he asserted that section 24(1) of the Charter freed the Board from statutory limits on its jurisdiction. The Court expressly disagreed with this submission. Justice Abella held that the remedies sought by Conway would frustrate the Board's mandate to supervise the special needs of those who are found to require the treatment/assessment regime and would be in clear contradiction of Parliament's intent.

Lastly, and significantly, Abella J. indicated that tribunals can vindicate claimants' Charter rights by exercising their regular statutory powers and processes in ways that accord with Charter values. Justice Abella writes:

> Remedies granted to redress *Charter* wrongs are intended to meaningfully vindicate a claimant's rights and freedoms. ... Yet, it is not the case that effective, vindicatory remedies for harm flowing from unconstitutional conduct are available only through separate and distinct *Charter* applications. ... *Charter* rights can be effectively vindicated through the exercise of statutory powers and processes. ... In this case, it may well be that the substance of Mr. Conways' complaint about where his room is located can be fully addressed within the framework of the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values.[26]

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[25] *Conway*, *supra*, note 1, at para. 85 (emphasis added).

[26] *Id.*, at para. 103.

IV. IMPLICATIONS OF *CONWAY*

There are five notable aspects of the *Conway* decision.

1. Administrative Tribunals Should Play a Primary Role in Determining Charter Issues

First, the overarching theme in *Conway* is the Court's acceptance that administrative tribunals should play a primary role in determining Charter issues falling within their jurisdiction. The decision could be said to fall within a general trend affirming the power of administrative tribunals and respecting their decision-making (as seen in *Dunsmuir*,[27] *Khosa*,[28] and *Bell Canada*).[29]

2. The Primary Inquiry Is Whether the Tribunal Can Consider Questions of Law

Under the *Mills* analysis, the inquiry into whether the tribunal has jurisdiction to issue a remedy was driven by the specific remedy that was sought. In freeing the analysis from the anchor of the remedy and re-situating it on the institutional structure and mandate of the tribunal, the Court is implicitly condoning a more contextual approach. The most important inquiry will be whether the tribunal has the power to apply the law. The remedy sought will only be a secondary concern. The most important issue at the second stage will be whether this remedy is within the tribunal's jurisdiction and does not frustrate its legislative mandate or structure. As indicated by Abella J., section 24(1) does not bestow on a tribunal remedies that are outside its legislative jurisdiction.

3. Reliance on Charter Values in Lieu of Charter Rights

Third, the Court made clear that a tribunal can provide an effective remedy against a Charter breach through the exercise of its discretion in accordance with Charter values. In a sense, the Court may have been indicating that a complainant or applicant is not required to demonstrate

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[27] *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.).

[28] *Canada (Citizenship and Immigration) v. Khosa*, [2009] S.C.J. No. 12, [2009] 1 S.C.R. 339 (S.C.C.).

[29] *Bell Canada v. Bell Aliant Regional Communications*, [2009] S.C.J. No. 40, [2009] 2 S.C.R. 764 (S.C.C.).

a Charter breach in order to receive an appropriate remedy. The statute that the applicant is relying upon, interpreted in accordance with Charter values, may be sufficient to remedy a harm.

4. Administrative Tribunals that Are Adjudicative in Nature

Although overall the decision in *Conway* condones the power of administrative tribunals to consider Charter issues, Abella J. relies on many of the traditional juridical aspects and court-like structure of the ORB to conclude that it has the jurisdiction to apply the Charter. For example, it is important for her that an appeal lies from the ORB's determinations of questions of law, fact and mixed questions of law and fact. Thus administrative tribunals that are adjudicative in nature will continue to be regarded as better suited to address legal issues.

5. Remedies Available to Administrative Tribunals

Restricting Charter remedies to those that the tribunal would have the power to grant according to its constituting statute arguably privileges that statute over the Charter. The Court's reasoning suggests that the legislator has the power to deny Charter applicants meaningful remedies in the administrative process simply by excluding certain remedies from the tribunal's jurisdiction. This decision may play into a developing ambivalence on the Court about Charter remedies: on one hand, sometimes a simple finding of a Charter breach is a sufficient remedy (*e.g.*, *Canada (Prime Minister) v. Khadr*[30]); on the other, sometimes courts must award damages in order to vindicate Charter rights (*e.g.*, *Vancouver (City) v. Ward*[31]).

What is clear is that the Charter cannot fundamentally alter the function and structure of an administrative tribunal. The powers of an administrative tribunal are determined by its enabling statute and the Charter will not enhance these powers. The remedy sought is one that must be available to the administrative tribunal itself.

On the whole, the Court's decision in *Conway* provided much-needed clarification of a test that had become complex and difficult to apply. We turn now to a consideration of how *Conway* has been applied.

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30 [2010] S.C.J. No. 3, [2010] 1 S.C.R. 44 (S.C.C.).

31 [2010] S.C.J. No. 27, [2010] 2 S.C.R. 28 (S.C.C.).

V. APPLICATION OF *CONWAY*

1. Administrative Tribunals Jurisdiction to Consider Charter and Constitutional Issues

(a) New Courts of Competent Jurisdiction

As predicted, the test in *Conway* appears to have simplified the test for when an administrative tribunal is a court of competent jurisdiction. As is illustrated in *Sazant v. College of Physicians and Surgeons*,[32] the primary question has now become whether the tribunal has the power to consider questions of law. The functional and structural analysis no longer figures prominently in the test.

In *Sazant*, the appellant appealed to the Divisional Court from the final and interim decisions of the Discipline Committee of the College of Physicians and Surgeons of Ontario (the "Committee"). One of the appellant's arguments was that section 76(1) of the *Health Professions Procedural Code*[33] was unconstitutional and violated his section 7 and section 8 Charter rights. The appellant sought to have the Committee's decisions overturned on a number of grounds, and challenged the Committee's jurisdiction to consider the constitutional challenge.

The Divisional Court relied on *Conway* to hold that the Committee did have jurisdiction to determine Charter issues. The Court asserted that *Conway* stood for the proposition that where an administrative tribunal had the power to decide questions of law, and the tribunal's constitutional jurisdiction had not been withdrawn by statute, the tribunal could decide questions involving the Charter. The tribunal could also grant Charter remedies in relation to issues arising in the course of carrying out the tribunal's statutory mandate.[34]

The Court also stated that the "effect of *Conway* is that an administrative tribunal with the authority to apply s. 52 of the *Constitution Act, 1982* will also have the authority to grant remedies under s. 24(1) of the *Charter*. The only limit to this power is if the remedy sought is not the kind of remedy that the Legislature intended the tribunal to grant."[35]

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32 [2011] O.J. No. 192, 2011 ONSC 323 (Ont. Div. Ct.) [hereinafter "*Sazant*"].
33 Schedule 2 to the *Regulated Health Prodessions Act*, *1991*, S.C. 1991, c. 18.
34 *Sazant*, *supra*, note 32, at para. 182.
35 *Id*., at para. 184.

The Court found that the Committee's empowering statute granted it the power and duty to decide questions of law, while nothing in the statute removed the Committee's jurisdiction to decide constitutional issues. As a result, the Committee had jurisdiction to determine Charter issues. The statute in this case also explicitly granted the Committee jurisdiction to grant the remedy sought by the appellant under s. 24(1).[36]

Similarly, in *ORDER MO-2570; Port Hope (Municipality)*,[37] the Ontario Information and Privacy Commission ("IPC") held that it had jurisdiction to make a determination on the constitutional arguments. A community association appealed a decision of the Municipality of Port Hope regarding records relating to the Commissioners of the Port Hope Harbour (the "Harbour Commission"). The Privacy Commissioner cited *Conway* for the purpose of demonstrating that administrative tribunals have the power to decide questions of law and resolve constitutional questions where constitutional jurisdiction has not been clearly withdrawn.[38] The Privacy Commissioner found that the *Municipal Freedom of Information and Protection of Privacy Act*[39] ("the Act") made it "abundantly clear that the Commissioner has the power to decide questions of law on a wide range of subjects, triggering the constitutional authority referred to in the *Martin* and *Conway* cases".[40] Furthermore, there was no provision in the Act that withdrew the Commissioner's power to decide constitutional questions. The IPC found that it therefore had jurisdiction to make a determination on the constitutional arguments raised by the Harbour Commission.

(b) Section 35 of the Constitution Act, 1982

Conway is also part of a broader trend at the Supreme Court that expands the powers of administrative tribunals to consider constitutional issues. This is illustrated in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*.[41] In that case, the Supreme Court extended the test developed in *Conway* to constitutional issues more generally to hold that a commission

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[36] *Id.*, at para. 185.

[37] [2010] O.I.P.C. No. 157 (Ontario Information and Privacy Commissioner) [hereinafter "*Port Hope*"].

[38] *Id.*, at para. 12.

[39] R.S.O 1990, c. M.56.

[40] *Port Hope*, *supra*, note 37, at para. 17.

[41] [2010] S.C.J. No. 43, [2010] 2 S.C.R. 650 (S.C.C.) [hereinafter "*Rio Tinto*"].

had the power to consider whether the duty to consult under section 35 of the *Constitution Act, 1982* had been met.

The issue in *Rio Tinto* was whether the British Columbia Utilities Commission (the "Commission") was required to consider consultation with the Carrier Sekani Tribal Council First Nations to determine whether a contract for the sale of excess power was in the public interest. According to the Court, issues of consultation between the Crown and Aboriginal groups arose from section 35 of the *Constitution Act, 1982*, making the question of whether the Commission possessed the power to consider consultation a constitutional issue.[42] The Court found that the *Utilities Commission Act*[43] gave the Commission power to decide questions of law, which implied a power to decide constitutional issues properly before it, "absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power".[44] Although the *Utilities Commission Act* incorporated a section of the *Administrative Tribunals Act*[45] stating that a tribunal did not have jurisdiction over constitutional matters, the definition of "constitutional question" in the *Administrative Tribunals Act* was limited to only requiring notice for challenges to the constitutional validity or applicability of any law.[46]

The Court held that consultation issues did not fall within this definition and that there did not appear to be a clear intention on the part of the legislature to exclude from the Commission's jurisdiction the duty to consider whether the Crown had discharged its duty to consult. The consultation issues were not a challenge to the constitutional validity of a law, nor a claim for a constitutional remedy.[47] The Court concluded that the Commission had the power to consider whether adequate consultation with concerned Aboriginal peoples had taken place.

However, the Court did place limits on the Commission's jurisdiction. Chief Justice McLachlin, writing for the Court, held that the language of the *Utilities Commission Act* did not extend to empowering the Commission to engage in consultation in order to discharge the Crown's constitutional obligation to consult.[48]

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42 *Id*., at para. 68.
43 R.S.B.C. 1996, c. 473.
44 *Rio Tinto*, *supra*, note 41, at para. 69.
45 S.B.C. 2004, c. 45.
46 *Rio Tinto*, *supra*, note 41, at para. 71.
47 *Id*., at para. 72.
48 *Id.*, at para. 74.

2. Limits on the Jurisdiction of Administrative Tribunals

Although the general trend is that administrative tribunals should consider constitutional and administrative questions where appropriate, it is important to keep in mind that they remain inferior tribunals without the authority to grant general declarations of constitutional validity. This is illustrated by *Alberta (Attorney General) v. United Food and Commercial Workers Union, Local No. 401*,[49] a recent case from Alberta.

During a labour dispute, the Alberta Labour Relations Board ("ALRB") had declared that the absence of a minimum union security provision, such as a Rand provision, from the *Labour Relations Code*[50] was a violation of section 2(d) of the Charter that could "only be remedied by government action". The ALRB suspended the declaration for a period of 12 months to allow the government to address the repercussions of this decision.[51] The Attorney General of Alberta sought a judicial review of the decision.

In *United Food* the parties did not dispute that the ALRB had the jurisdiction to decide questions of law or that it was a court of competent jurisdiction in relation to the Charter. The parties also agreed that the ALRB could fashion appropriate Charter remedies affecting the parties before it. The issue was whether "as a matter of jurisdiction, an inferior tribunal … [could] determine the constitutional validity of a law for any purpose beyond the particular case and parties before it."[52]

The Court reviewed case law prior to *Conway* relating to declarations of invalidity and found that appellate jurisprudence repeatedly held that inferior tribunals do not have the jurisdiction to grant general declarations of invalidity (*Martin*, *Cuddy Chicks* trilogy).[53] The Court noted that in *Conway*, the Supreme Court had not overruled these cases. As a result, declarations of this sort could only relate to the matter directly before the tribunal and could bind the parties "only for purposes of that matter".[54] The Court ruled that the ALRB therefore did not have the jurisdiction to issue a general declaration of invalidity.

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49 [2010] A.J. No. 1417, at para. 9 (Alta. Q.B.) [hereinafter "*United Food*"].
50 R.S.A. 2000, c. L-1.
51 *United Food*, *supra*, note 49, at para. 9.
52 *Id*., at para. 12.
53 *Id*., at paras. 31-40.
54 *Id*., at para. 49.

3. *Conway* and the Ontario Review Board

In light of the Supreme Court's decision in *Conway* that the ORB can only order a remedy that is available to it under statute, it is interesting to consider the types of remedies the ORB will craft in response to Charter violations. The recent decision in *Saikaley*[55] is illustrative.

The accused, Mr. Saikaley, was under a detention order but had been living in the community. Due to a deterioration in his mental condition he was brought back to the hospital. On the third day of Mr. Saikaley's detention in the hospital, it was anticipated that his detention would be longer than seven days and thus the hospital notified the ORB that the accused had been returned to the hospital. Normally, the ORB is charged with holding a restriction of liberties hearing whenever an accused is detained in hospital for a period of longer than seven days pursuant to section 672.81 of the *Criminal Code*. However, there was a delay in convening a restriction of liberty hearing. As a result, although the patient was brought back to the hospital at the end of August, the hearing was not convened until December. Mr. Saikaley argued that the delay in holding a hearing constituted an infringement of his sections 7 and 9 rights under the Charter. The remedy that Mr. Saikaley sought was an order directing the hospital to implement an improved protocol to effectively notify the ORB that a patient's liberties had been restricted and that a restriction of liberties hearing would have to be convened as soon as practicable. One of the reasons for the delay in scheduling the restriction of liberties hearing was that from the ORB's perspective it was not clear when the hospital notified the ORB on the third day of the patient's detention, that the detention would persist for longer than seven days and that therefore a restriction of liberties hearing would need to be convened.

The ORB held that the hospital's decision to restrict the liberty of the accused was initially warranted. However, the restriction persisted in a fashion that was no longer consistent with the least onerous and least restrictive requirement. The ORB held that the accused's right to liberty and security of the person as guaranteed by section 7 of the Charter was infringed due to the delay in holding a restriction of liberty hearing in a more timely manner. In its Decision and Disposition, the ORB granted the following remedies:

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[55] *Re Saikaley*, [2011] O.R.B.D. No. 677 (O.R.B.) [hereinafter "*Saikaley*"].

> That in order to ensure that the Board receives timely and adequate notice of any significant restriction of an NCR accused's liberty in excess of seven days (as required by s. 672.56(2) of the *Criminal Code*), the Board finds that once the liberty of an NCR or unfit accused has been significantly restricted by the Hospital for in excess of seven days, the Hospital must thereafter inform the Board, in writing and as soon as is practicable, of the details of such restriction.
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> That upon receiving written notice that the liberty of an NCR or unfit accused has been significantly restarted for in excess of seven days, the Review Board will hold a hearing pursuant to s. 672.81(2.1) as soon as practicable, and generally within no more than 30 days, to review the decision to significantly increase the restrictions on the accused's liberty.

In its Reasons for Disposition, the ORB noted that "there is little precedent on the question of *Charter* remedies in the context of Review Board hearings."[56] However, the ORB looked to analogous situations that could provide guidance such as Nordheimer J.'s decision in *R. v. Brown*,[57] in which Nordheimer J. had to consider the appropriate remedy when more than 100 individuals were arrested but not taken before a justice of the peace within 24 hours. Justice Nordheimer held that despite the infringement of the liberty interests of the accused, he must balance their interest with that of the other citizens of the community and their safety. Implicitly, Nordheimer J. balanced the infringement to the accused's liberty interest with that of the public's interest in safety, and he was not prepared to order a remedy that released the accused into the community. Similarly, the ORB acknowledged that the inordinate delay in holding a restriction of liberties hearing process infringed Mr. Saikaley's Charter rights, but it was not prepared to grant his release as he continued to pose a significant risk to the safety of the public.

The remedy that the ORB ordered to remedy the infringement of Mr. Saikaley's Charter rights was to clarify the process for both the hospital and the ORB in scheduling restriction of liberties hearings. The ORB also provided an interpretation to the term "as soon as practicable" by giving a time limit of 30 days.

The decision in *Saikaley* confirms the constraints that *Conway* suggested on the jurisdiction of tribunals to order Charter remedies, namely, that the tribunal is confined to the remedies available under its statutory

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[56] *Id*., at para. 24.

[57] [2007] O.J. No. 2830 (Ont. S.C.J.).

framework. In the case of *Saikaley*, the ORB ordered the hospital to develop a plan to safely release the accused into the community within 60 days of the order, recognizing its obligation under its statutory framework to fashion dispositions that facilitate the reintegration of the accused into the community, while mitigating any risks of that release to public safety. The ORB also laid out a policy for future cases, requiring restriction of liberty hearings to take place within 30 days of the ORB's receipt of notice that such a hearing is required.

VI. CONCLUSION

As we noted at the outset, *Conway* has been a positive development in administrative law. The Supreme Court took disparate case law and developed a simpler and more coherent test for when an administrative tribunal is a court of competent jurisdiction. The application of *Conway* by the lower courts and tribunals demonstrates that the primary consideration is whether a tribunal has the jurisdiction to consider questions of law. As important, the recognition of a broad jurisdiction to consider Charter issues within administrative tribunals can be seen as an affirmation of the important role that administrative decision-making plays in the administration of justice.