



## The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 25 (2004)

Article 4

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### Citation Information

Hogg, Peter W. "Remedial Power of Administrative Tribunals." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 25. (2004).

<https://digitalcommons.osgoode.yorku.ca/sclr/vol25/iss1/4>

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# Remedial Power of Administrative Tribunals

Peter W. Hogg\*

## I. REMEDIES FOR BREACH OF THE CHARTER OF RIGHTS

The topic of this paper is the remedial power of administrative tribunals. Can an administrative tribunal refuse to apply a potentially applicable law on the ground that the law is unconstitutional? Can the tribunal do so even if the law is part of its own empowering statute? We shall see that, for most adjudicative tribunals — those with the express or implied power to decide questions of law — the answer to both these questions is yes. Can an administrative tribunal make an order other than a refusal to apply an invalid law, for example, an injunction, a declaration or an award of costs, in order to remedy a breach of the *Canadian Charter of Rights and Freedoms*?<sup>1</sup> We shall see that for many tribunals — those that are “courts of competent jurisdiction” — the answer to this question is also yes.

The *Constitution Act, 1982* provides two remedial tracks for breaches of the *Charter of Rights*. One is the supremacy clause of section 52, which automatically nullifies any law or act that is contrary to the Constitution of Canada. The other is the remedies clause of section 24, which confers on a “court of competent jurisdiction” a discretionary power to award an appropriate and just remedy for breach of the *Charter of Rights*. This article will address each of these provisions in turn,

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

considering in each case whether administrative tribunals have the power to invoke the provision.

## II. NULLIFICATION UNDER SECTION 52

Section 52(1) of the *Constitution Act, 1982* provides as follows:

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.

This provision gives to the Charter and to the rest of the Constitution of Canada overriding effect. Any law that is inconsistent with the Constitution of Canada is “of no force or effect.” The provision provides an explicit basis for judicial review of legislation in Canada. Whenever a court is faced with a conflict between the Constitution of Canada and a potentially applicable law, the court is obliged to strike down the inconsistent law. The question for this paper is whether an administrative tribunal has the same power of judicial review.

In *Douglas/Kwantlen Faculty Assn. v. Douglas College*,<sup>2</sup> the Supreme Court of Canada held that an arbitration board, which had been appointed by the parties under a collective agreement, but which was empowered by statute to decide questions of law, had the power to determine the constitutionality of a mandatory retirement provision in the collective agreement. In *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*,<sup>3</sup> the Court held that a labour relations board, which had been created and empowered by statute to decide questions of law, had the power to determine the constitutionality of a provision in the empowering statute that denied collective bargaining rights to agricultural workers. In the *Douglas College* case, La Forest J. for the Court said: “A tribunal must respect the Constitution so that if it finds invalid a law it is called upon to apply, it is bound to treat it as having no force or effect.”<sup>4</sup> This conclusion was entailed by the supremacy clause of section 52(1). A tribunal was obliged to apply all the relevant law, which

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<sup>2</sup> [1990] 3 S.C.R. 570, [1990] S.C.J. No. 124.

<sup>3</sup> [1991] 2 S.C.R. 5, [1991] S.C.J. No. 42.

<sup>4</sup> *Supra*, note 2, at 594.

included the Constitution, as well as the law contained in statutes, contracts, and common law.

In both *Douglas College* and *Cuddy Chicks*, the tribunals' empowering statutes expressly granted to the tribunals the power to decide questions of law. In two subsequent decisions, a majority of the Supreme Court of Canada held that the absence of an *express* power to decide questions of law precluded an administrative tribunal from deciding Charter issues.<sup>5</sup> These decisions were rather odd, because any statutory tribunal, whether or not it has an express power to decide questions of law, must decide all questions of law or fact that are necessary to carry out its mandate. Except for the rare case where questions of law are actually withdrawn from the jurisdiction of the tribunal by its empowering statute, a tribunal cannot fold its hands and refuse to reach a decision just because the matter before it raises a question of law. Nearly all tribunals have an *implied* power to decide all questions of law that are relevant to reaching decisions that are called for by their mandate.<sup>6</sup> Once this is accepted, it is hard to see why the terms of the Constitution should be excluded from the body of law that the tribunal may consider, especially since section 52 declares the terms of the Constitution to be "the supreme law of Canada." Indeed, one might wonder whether Parliament or a legislature, which is itself powerless to enact a law in violation of the Charter, has the power to create an administrative tribunal that must apply a law that is in violation of the Charter.<sup>7</sup>

The Supreme Court of Canada has now repudiated the two rulings that stipulated that only an express grant of power over questions of law would authorize an administrative tribunal to decide whether a potentially

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<sup>5</sup> *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, [1991] S.C.J. No. 41 (Employment Insurance Board of Referees); *Cooper v. Canada (Human Rights Commission) (sub nom. Bell v. Canada (Human Rights Commission))*, [1996] 3 S.C.R. 854, [1996] S.C.J. No. 115 (Canadian Human Rights Commission).

<sup>6</sup> *McLeod v. Egan*, [1975] 1 S.C.R. 517 (arbitrator under collective agreement bound to interpret any statute potentially applicable to the dispute).

<sup>7</sup> In *Tétreault-Gadoury*, *supra*, note 5, the Supreme Court of Canada held that the Board of Referees was obliged to exclude persons over the age of 65 from unemployment insurance benefits, and the Board's decision could not be upset on appeal or judicial review, despite the fact that the exclusion of persons over 65 was, according to the Court, contrary to the *Charter of Rights*. In *Cooper*, *supra*, note 5, the Court held, at para. 57, that the Canadian Human Rights Commission could not even consider the question whether its empowering statute violated the Charter in providing that it was not a discriminatory practice for an employer to dismiss an employee who had reached "the normal age of retirement."

applicable law offends the Charter. In *Nova Scotia (Workers' Compensation Board) v. Martin*,<sup>8</sup> the Workers' Compensation Appeals Tribunal of Nova Scotia was faced with a claim that the benefits provided by the province's workers' compensation plan for chronic pain were unconstitutional for violation of section 15 of the *Charter of Rights*. (Sufferers from work-related chronic pain were provided with a standard, temporary program for their rehabilitation but were otherwise excluded from the benefits of the workers' compensation plan.) The Supreme Court of Canada, in an opinion written by Gonthier J., held that the Tribunal had the power to rule on the Charter issue. The Tribunal had express power to determine questions of law, and so the case fell squarely within *Douglas College* and *Cuddy Chicks*, and it was not really necessary to rule on the case where the power to determine questions of law was merely implied. However, the Court took the opportunity to reappraise and restate the law.<sup>9</sup> The Court held that a tribunal with power to determine questions of law, *whether the power was express or implied*,<sup>10</sup> was presumed to have the power to determine the constitutional validity of any potentially applicable law. That presumption could be rebutted only by showing that the legislation empowering the tribunal "clearly intended to exclude *Charter* issues from the tribunal's authority over questions of law."<sup>11</sup> That clear intention would normally be evidenced by legislative provision for an alternative route for the resolution of Charter issues coming before the tribunal.<sup>12</sup>

In this case, there was nothing in the Appeal Tribunal's empowering legislation that indicated an intention to exclude Charter issues from the Tribunal's authority. It followed that the Tribunal could decide the Charter issue. (The Court went on to hold that the chronic pain provisions were contrary to the *Charter*; the Court postponed the declaration

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<sup>8</sup> [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54. The opinion of the Court was written by Gonthier J.

<sup>9</sup> *Id.*, at para. 3.

<sup>10</sup> *Id.*, at para. 41.

<sup>11</sup> *Id.*, at para. 3; see also para. 44.

<sup>12</sup> Justice Gonthier (at para. 44) expressly reserved the question of the constitutionality of "a provision that would place procedural barriers in the way of claimants seeking to assert their rights in a timely and effective manner, for instance by removing *Charter* jurisdiction from a tribunal without providing an effective alternative administrative route for *Charter* claims."

of invalidity to give the legislature time to make better provision for workers incapacitated by chronic pain.)

The constitutional question in *Martin* was whether a law was unconstitutional for breach of the *Charter of Rights*. In *Paul v. British Columbia (Forest Appeals Commission)*,<sup>13</sup> which was decided by the Supreme Court of Canada at the same time as *Martin*, the question was whether a law was unconstitutional for breach of the aboriginal rights guaranteed by section 35 of the *Constitution Act, 1982*. This question came before the Forest Appeals Commission of British Columbia, which had to determine whether Mr. Paul, a registered Indian, had violated the statutory *Forest Practices Code*<sup>14</sup> of the province. Mr. Paul had cut down three trees on Crown land, intending to use the timber to build a deck on his home. The Code prohibited the cutting of Crown timber, but Mr. Paul asserted that he had an aboriginal right to harvest logs. The Commission decided that it had the power to deal with this defence, but Mr. Paul immediately sought judicial review to stop the Commission from determining his aboriginal rights. The Supreme Court of Canada, in an opinion written by Bastarache J., held that the power of an administrative tribunal to determine whether a law was overridden by an aboriginal right was governed by the same rules as *Martin* stipulated were to be applied to Charter issues. In this case, the Commission had the power, under its empowering statute, to decide questions of law. That power was presumed to include the power to determine whether a potentially applicable law was unconstitutional in its application to an Indian by reason of section 35 of the *Constitution Act, 1982*. There was nothing in the empowering statute to indicate an intention to withdraw aboriginal rights issues from the jurisdiction of the Commission. Therefore, the Commission had the power to hear and determine Mr. Paul's defence of aboriginal rights, and the Commission should resume its proceeding in order to receive his evidence and determine the issue.

In *Paul*, it was argued that the provincial legislature could not enact a law that had the effect of empowering a tribunal to determine questions relating to aboriginal rights. That would encroach on the federal power over "Indians, and Lands reserved for the Indians" in section

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<sup>13</sup> [2003] 2 S.C.R. 585, [2003] S.C.J. No. 34. The opinion of the Court was written by Bastarache J.

<sup>14</sup> R.S.B.C. 1996, c. 159.

91(24) of the *Constitution Act, 1867*.<sup>15</sup> Aboriginal rights came within the essential core of “Indianness,” which lay outside the power of the province. The Supreme Court of Canada rejected this argument on the basis that adjudication was distinct from legislation. The power conferred by the British Columbia Legislature on its Forest Appeals Commission was solely an adjudicative one. The Commission was not granted the power to alter or extinguish aboriginal rights; it could only determine whether or not they existed. The Commission’s determinations would be binding on the parties, of course, but they would not constitute precedents that were binding on other tribunals or courts, and they would be subject to judicial review on a standard of correctness.<sup>16</sup> Justice Bastarache drew the analogy of a provincial court, which has jurisdiction to apply the entire body of law, including federal law and constitutional law, to resolve disputes properly before it. A provincial administrative tribunal with power to adjudicate questions of law must also take account of all applicable legal rules, whether provincial, federal, or constitutional.<sup>17</sup>

The effect of *Martin* and *Paul* is to take us back to where we thought we were after *Douglas* and *Cuddy Chicks*. Administrative tribunals with power to decide questions of law are presumed to also have the power to decide questions of constitutional law where the validity of a potentially applicable law is put in issue. The power to decide questions of law may be express or implied. Since the power to decide normally carries with it the implicit power to determine all questions of fact or law that are needed to reach a decision, it follows that most administrative tribunals with adjudicatory functions will be empowered to decide constitutional issues. There are some tribunals that lack the power to decide questions of law, for example, because their empowering statute remits questions of law to another body for decision. Those tribunals lack the power to decide constitutional issues. And there are some tribunals that possess the power to decide questions of law generally, but whose empowering statutes withdraw constitutional issues from their jurisdiction. In those cases, the presumption that the power to decide questions of law carries with it the power to decide constitutional

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<sup>15</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>16</sup> *Paul*, *supra*, note 13, at para. 31.

<sup>17</sup> *Id.*, at para. 21.

questions is rebutted. Those tribunals also lack the power to decide constitutional issues.

In *R. v. Seaboyer*,<sup>18</sup> the Supreme Court of Canada decided that a judge presiding at the preliminary inquiry of an indictable offence had no jurisdiction to rule on the constitutionality of a “rape-shield law” that purported to limit the accused’s right to cross-examine the victim of a sexual assault. The Court acknowledged that the preliminary inquiry judge would have the power (and the duty) to rule on the admissibility of the evidence presented at the inquiry, but the Court held that that power did not extend to determining the constitutionality of a statute that purported to prohibit the admission of evidence. This decision predates the decisions in *Martin* and *Paul*, and is inconsistent with those decisions. Clearly, the preliminary inquiry judge has an implied power to decide questions of law, since he or she has to rule on the validity of the charge and the admissibility of evidence presented at the inquiry. Under the doctrine laid down in *Martin* and *Paul*, the power to decide questions of law raises the presumption that the decision-maker also has the power to determine the constitutionality of any potentially applicable law. There seems to be no ground to rebut that presumption. Indeed, it is hard to see how the preliminary inquiry judge can decide whether the accused should stand trial if the judge must blindly follow unconstitutional legislation. Unfortunately, despite the announced intention of the Supreme Court of Canada in *Martin* and *Paul* to “reappraise and restate” the law, in neither case did the Court make any mention of *Seaboyer*. To be sure, *Martin* and *Paul* were concerned with administrative tribunals, not inferior courts, but the law could not be more restrictive for a court than for an administrative tribunal. Therefore, I think it is safe to regard *Seaboyer* as impliedly overruled. The preliminary inquiry judge has the power to decide constitutional questions that affect the validity of the charge or the admissibility of the evidence tendered in support of the charge. More generally, any statutory court with express power to decide questions of law is presumed to also have the power to decide the constitutional validity of any statute that is potentially relevant to an issue that is properly before the court.

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<sup>18</sup> [1991] 2 S.C.R. 577, [1991] S.C.J. No. 62.



### III. REMEDY UNDER SECTION 24

Section 24(1) of the *Charter of Rights* provides as follows:

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 24(2) goes on to deal explicitly with the exclusion of evidence that was obtained in breach of the *Charter of Rights*. Such evidence “shall be excluded” if its admission “would bring the administration of justice into disrepute.”

As we saw in the earlier section of this article, the primary remedy for unconstitutional action is nullification under the supremacy clause of section 52. Where it is a law that is held to be unconstitutional, nullification under section 52 will usually be the remedy sought, and often that is all that the aggrieved party seeks. But section 24 permits other remedies to be obtained, and this will be important where it is an act (as opposed to a law) that is held to be unconstitutional. For example, the aggrieved party may seek an injunction, an award of damages, or an award of costs. Section 24 is much narrower in its scope than section 52. Whereas section 52 applies to all breaches of the Constitution of Canada, section 24 applies only to breaches of the *Charter of Rights*, which is contained in sections 1-34 of the *Constitution Act, 1982*. Whereas section 52 may be applied by any court or administrative tribunal that has power to decide questions of law (as discussed in the previous section of this article), section 24 may be applied only by a “court of competent jurisdiction.” An administrative tribunal, even if it has jurisdiction to decide questions of law, will not be able to grant a remedy under section 24 unless it is a “court of competent jurisdiction.”

The Supreme Court of Canada has held that an administrative tribunal is a court of competent jurisdiction for the purpose of section 24 if its enabling statute gives it power over (1) the parties to the dispute, (2) the subject matter of the dispute, and (3) the Charter remedy that is sought. The first two of these three criteria are obvious. An administrative tribunal would not be properly seized of a case, let alone empowered to grant a remedy, if it did not have jurisdiction over the parties and subject matter. It is the third criterion that gives rise to difficulty. It requires that the tribunal have power under its enabling legislation to

grant the remedy that is sought. Applying this rule, the Court held in *Weber v. Ontario Hydro*<sup>19</sup> that a labour arbitrator was a court of competent jurisdiction which could grant a declaration and damages under section 24 for breaches of the Charter (unlawful surveillance of employees) by Ontario Hydro. Ontario's labour relations statute conferred on arbitrators the power to award declarations and damages. This supplied the necessary remedial power to make the arbitrator (who had jurisdiction over the parties and subject matter) a court of competent jurisdiction.

The opposite result occurred in *Mooring v. Canada (National Parole Board)*,<sup>20</sup> where the Court held that the National Parole Board was unable to exclude from a parole hearing evidence that had been obtained in breach of the Charter. Although the Board had jurisdiction over the parties and subject matter, its enabling statute required the Board to take into account "all available information that is relevant to a case." That requirement, the Court held, removed the exclusion of evidence from the Board's remedial powers. Therefore, the Board was not a court of competent jurisdiction for the purpose of excluding evidence under section 24.

A persistent, but ineffective, critic of the Supreme Court of Canada's jurisprudence under section 24 has argued that the Court should not have interpreted the phrase "court of competent jurisdiction" in section 24 as restricting an administrative tribunal to those remedies that it already possesses under its enabling legislation.<sup>21</sup> The argument is that, once a tribunal (or court) has jurisdiction over the parties and subject matter, it should be treated as a court of competent jurisdiction with the power under section 24 to grant "such remedy as the court considers appropriate and just in the circumstances." Under this reading, section 24 is itself the source of the power to grant an appropriate and just remedy. Not only does this seem the plainest reading of section 24, it greatly improves the capability of enforcing the Charter. If section 24 is the source of the remedial power, then a legislative body cannot prevent a tribunal (or court) from granting an appropriate and just remedy for a

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<sup>19</sup> [1995] 2 S.C.R. 929, [1995] S.C.J. No. 59.

<sup>20</sup> [1996] 1 S.C.R. 75, [1996] S.C.J. No. 10.

<sup>21</sup> Hogg, *Constitutional Law of Canada* (Carswell, 4th ed. 1997, annually supplemented), sec. 37.2(f).

Charter breach. This reading also would enable new remedies to be fashioned for Charter breaches where the existing remedial powers did not provide for a remedy that was appropriate and just.

Despite the force of these arguments, the Supreme Court of Canada in *R. v. 974649 Ontario Inc.*,<sup>22</sup> has recently explicitly reaffirmed the rule in *Weber* and *Mooring*: an administrative tribunal (or court) is a court of competent jurisdiction to grant a Charter remedy only if it has the power independently of the Charter to grant the remedy. The issue in *974649* was whether a justice of the peace, sitting in Ontario as a provincial offences court, could order costs against the Crown under section 24 for a breach of the Charter (consisting of a failure to make timely disclosure of evidence to the defence). The difficulty was that the statute empowering the court conferred only a very narrow power to award costs against the Crown; there was no power to award costs for failure to make proper disclosure to the defence, and no general power to award costs for Crown misconduct. The Supreme Court of Canada recognized that the award of costs was an appropriate and just remedy in this case, but refused to go to section 24 as the source of the court's power to grant the remedy. The remedial power had to be derived "from a source other than [s. 24 of] the *Charter*," which in the case of a statutory court meant "its enabling legislation."<sup>23</sup> However, the Court said, a remedial power may be implied as well as express. Although the enabling legislation withheld any general power to award costs, the Court held that the "function and structure"<sup>24</sup> of the provincial offences court was suitable for the award of costs for Charter breaches, and for that reason the legislation should be interpreted as conferring by implication the power to award costs for Charter breaches. Therefore, the provincial offences court was a court of competent jurisdiction with the power to make an award of costs against the Crown.

The result in *974649* was that an appropriate and just remedy was awarded for a Charter breach. But the Supreme Court of Canada's imputation of an implied power in the provincial offences court's enabling legislation seems a contrived and convoluted path to that result. The same result would have been achieved more directly by acknowledging

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<sup>22</sup> [2001] 3 S.C.R. 575, [2001] S.C.J. No. 79.

<sup>23</sup> *Id.*, at para. 26.

<sup>24</sup> *Id.*, at para. 43.

that section 24 itself grants the necessary remedial power to a court that has jurisdiction over the parties and the subject matter. Obviously, the Court is now settled in its determination not to interpret section 24 in this fashion. However, the Court seems anxious to achieve much the same result by the roundabout route of implying remedial powers into the enabling legislation. If the Court continues to be imaginative in its implications from the function and structure of each court or tribunal that is faced with a breach of the Charter, we need not fear that Charter breaches will go unremedied.

#### IV. JUDICIAL REVIEW

When an administrative tribunal decides a constitutional question, even if its decision is not subject to appeal, it is subject to judicial review by a superior court. Indeed, an attempt by Parliament or the legislature to enact a privative clause to bar judicial review of a constitutional determination would be unconstitutional.<sup>25</sup> On judicial review of a constitutional determination by an administrative tribunal, the Supreme Court of Canada has consistently insisted that the standard of review is correctness.<sup>26</sup> Constitutional determinations by administrative tribunals receive no curial deference. Even if the tribunal has reached a reasonable interpretation of the Charter, the reviewing court will still decide the constitutional question in the way it believes to be correct. Nevertheless, the tribunal's initial determination of the constitutional question will normally make a useful contribution to the ultimate resolution of the issue. The tribunal's knowledge of the regulated field — the context in which the question is to be decided — is likely to produce a well-informed assessment of the constitutional arguments, which will assist the reviewing court in reaching its “correct” decision.

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<sup>25</sup> Hogg, *supra*, note 21, sec. 7.3(f).

<sup>26</sup> *Douglas/Kwantlen Faculty Assn. v. Douglas College*, *supra*, note 2, at 605; *Cuddy Chicks v. Ontario*, *supra*, note 3, at 18; *Nova Scotia (Workers' Compensation Board) v. Martin*, *supra*, note 8, at para. 31; *Paul v. British Columbia (Forest Appeals Commission)*, *supra*, note 13, at paras. 31, 32.

## V. DECLARATION OF INVALIDITY

There is another limitation on the power of administrative tribunals to decide Charter issues. The Supreme Court of Canada has consistently insisted that the tribunal that makes a finding of invalidity has no power to make a *declaration* of invalidity.<sup>27</sup> What the Court seems to mean by this is that a decision by a tribunal that a law is unconstitutional is no more than a decision that the law is inapplicable to the particular case. It is not a binding precedent. It has no effect outside the particular case: it “is not binding on future decision makers, within or outside the tribunal’s administrative scheme.”<sup>28</sup> According to the Court, only “superior courts” have the power to issue binding declarations of invalidity that will invalidate a law with general effect.<sup>29</sup>

## VI. PRACTICE OF TRIBUNALS

Despite the arguments of constitutional principle that support the power of administrative tribunals to decide constitutional questions, it is undoubtedly the case that some administrative tribunals are not well-placed to decide constitutional issues, whether because of the lack of expertise of their members or because of the volume of cases they have to decide. As a matter of institutional design, it probably does make sense to expressly remove the power to decide constitutional issues from some tribunals, as has been done in some enabling statutes.<sup>30</sup> Of course, this is not a practical solution for the tribunal whose enabling statute has not addressed the issue.

A tribunal that is faced with a constitutional issue that it must decide will often have to make some changes to its normal procedures.

If the constitutionality of a statutory provision is the issue, then there is a statutory requirement in all provinces and territories that notice of the constitutional question be served on the relevant Attorney General and often on two Attorneys General (provincial and federal). A similar requirement applies to federal tribunals, except that all 11

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<sup>27</sup> *Cuddy Chicks, id.*, at 17; *Martin, id.*, at para. 31; *Paul, id.*, at para. 31.

<sup>28</sup> *Martin, supra*, note 8, at para. 31.

<sup>29</sup> *Cuddy Chicks, supra*, note 3, at 17.

<sup>30</sup> For example, *Ministry of Health Appeal and Review Boards Act, 1998*, S.O. 1998, c. 18, Sch. H, s. 6(3); *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sch. A, s. 67(2).

Attorneys General must be served. If no notice has been served, then the tribunal is debarred from considering the constitutional question.<sup>31</sup> If a notice has been served, the Attorney General will be entitled to intervene in the proceedings and may well do so, which will bring an extra counsel to the hearings and perhaps additional evidence and argumentation.

Apart from the Attorney General, private parties or public interest groups may also seek to intervene in the proceedings. The tribunal will have to decide whether its rules permit interventions and, if so, whether they should be permitted in the particular case, and, if so, whether the intervenors should be permitted to lead evidence and generally behave like a party. Evidence may be more extensive than in a normal proceeding, and the tribunal will have to decide whether it needs to adopt more elaborate practices akin to discovery so that the evidence is fairly adduced and each side has opportunities to counter evidence offered by the other side. A full record will have to be compiled. All this may involve a very different kind of proceeding than the tribunal regularly conducts.

## VII. CONCLUSIONS

The end result of these developments is that nearly all administrative tribunals (those with power to decide questions of law) have power to determine the constitutionality of laws that are potentially relevant to the cases before them, and have the power under section 52 to refuse to apply those laws that are found to be unconstitutional. And nearly all administrative tribunals (those that have jurisdiction over the parties, the subject matter and — if only by implication — the remedy) have power to determine breaches of the Charter by the executive, and have the power under section 24 to award an appropriate and just remedy. This seems to be the right result as a matter of constitutional principle. It seems obvious to me that individuals should be able to invoke the Charter in the earliest and most convenient forum; that administrative tribunals in applying the law should apply the whole body of law, including the Charter; and that the Crown should not be effectively liberated from its Charter duties when it appears before an administrative tribunal. That

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<sup>31</sup> Notice requirements are discussed in Hogg, *supra*, note 21, sec. 56.6(a).

said, there are certainly tribunals that are not suitable for the decision of constitutional issues. Where the knowledge and expertise of the members, the volume of cases, or other considerations, make a tribunal unsuitable for the decision of constitutional issues, the only remedy is to amend the enabling statute to withdraw the function from the tribunal.