

2003 CONFERENCE OF BOARDS AND AGENCIES

UPDATE ON ADMINISTRATIVE LAW

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I. Introduction

There have been a number of decisions in the last year that have considered some of the fundamental principles and concepts that lie at the heart of administrative law. The purpose of this paper is to provide an update on administrative law through a review of these decisions, and to reconcile the recent decisions with existing jurisprudence. Specifically, the paper will address the issues of:

- a) Standard of review;
- b) Judicial independence;
- c) Procedural fairness; and
- d) Charter jurisdiction of administrative tribunals.

II. Standard of Review

The Supreme Court of Canada has considered the standard of review in several decisions over the last year. These decisions have helped to clarify and refine the view of the court on this central administrative law issue.

The standard of review, as a component of judicial deference, has evolved from predominantly jurisdiction-based considerations to a pragmatic and functional analysis. Simply put, the pragmatic and functional analysis considers which decision maker, the administrative tribunal or the court, should rule on an issue, and also what that decision maker should consider in arriving at a decision.

The evolution of the 'pragmatic and functional approach' by the Supreme Court of Canada can be traced from its origins in *Bibeault*¹ through *Pezim*² to *Pushpanathan*^{3 4}. This

¹ *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1040

² *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557

approach weighs four contextual factors to determine the level of deference that a reviewing court must show to the administrative decision maker. These factors are: (i) the presence or absence of a privative clause or statutory right of appeal; (ii) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (iii) the purposes of the legislation in question and the particular provision in issue; and (iv) the nature of the question – law, fact, or mixed law and fact.

The application of the factors to the issue in question will determine the appropriate standard of review. The Supreme Court of Canada has identified three standards of review which can be arrived at after implementing the pragmatic and functional approach. The three standards of review are (i) correctness; (ii) reasonableness *simpliciter*; and (iii) patent unreasonableness.

The two most significant decisions of the Supreme Court of Canada within the last years are *Q. v. College of Physicians and Surgeons of British Columbia*⁵, and *Ryan v. Law Society of New Brunswick*⁶. These two decisions have clarified the standard of review in Canadian jurisprudence.

Extending the Pragmatic and Functional Approach

In *Q.*, the Supreme Court of Canada considered whether or not the pragmatic and functional analysis would be applied in decisions coming before a court by a statutory right of appeal. *Q.* involved a doctor who was brought before an Inquiry Committee of the College of Physicians and Surgeons. The Inquiry Committee found the doctor guilty of infamous conduct

³ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982

⁴ Cowan, "The Standard of Review: The Common Sense Evolution?", O.B.A. Administrative Law Section Meeting, January 21, 2003.

⁵ *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] SCC 19.

⁶ *Ryan v. Law Society of New Brunswick*, [2003] SCC 20.

as a result of his taking physical and emotional advantage of a patient. The Inquiry Committee made findings of credibility in reaching this conclusion. The Committee's decision under the *Medical Practitioners Act* provided a right of appeal to the British Columbia Supreme Court. That Court did not follow the pragmatic and functional approach to determine the standard of review. Instead, the Court determined the standard of review based on the language of the appeal right in the *Medical Practitioners Act*. The Court adopted a standard akin to correctness, and re-weighed the evidence that was before the Inquiry Committee in intricate detail. The Court disagreed with the Committee's findings and set aside the finding of infamous conduct. The College appealed the decision to the British Columbia Court of Appeal.

The Court of Appeal upheld the decision of the Supreme Court, finding that the standard of review to be applied to the trial judge's decision was whether the Court was "clearly wrong". The Court of Appeal concluded that the lower court was not "clearly wrong" in its decision, and upheld the ruling. That decision was then appealed to the Supreme Court of Canada.

The Supreme Court of Canada unanimously rejected the approaches taken by both lower courts. The Supreme Court of Canada concluded that the pragmatic and functional approach must be used to determine the standard of review in all cases, including statutory appeals. McLachlin C.J. stated that:

"[in] every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach."⁷

Despite this broad declaration, the Court noted that an appellate review of a judicial decision will differ from a judicial review of an administrative decision. In this regard, McLachlin C.J. stated:

"In appellate review of judicial decisions, the nature of the question is almost entirely determinative of the standard of review... But the conceptual foundation of review of

⁷ *Supra* note 5 at para 21.

administrative decisions is fundamentally different than that of appeals from judicial decisions. Consequently, in the context of judicial review of administrative action, the nature of the question is just one of four factors to consider when determining standard of review."⁸

The Supreme Court of Canada also considered the limits of the pragmatic and functional approach in *Chamberlain v. Surrey School District No. 36*⁹. In *Chamberlain*, a school board refused to allow the use of three books containing references to families with same-sex parents to be used in its schools. The administrative law issue that arose in this case was whether the school board trustees had exceeded their jurisdiction by refusing to permit the use of the books in question.

The majority of the Supreme Court of Canada in *Chamberlain* held that the pragmatic and functional approach applied to the review of discretionary decisions of elected administrative decision-makers. In this regard, McLachlin C.J. stated, with reference to elected bodies:

"In my view, the usual manner of review under the pragmatic and functional approach is necessary. It is now settled that all judicial review of administrative decisions should be premised on a standard of review arrived at through consideration of the factors stipulated by the functional and pragmatic approach. This is essential to ensure that the reviewing court accords the proper degree of deference to the decision-making body."¹⁰

Standard of Review Along a Spectrum

In *Ryan*, the Supreme Court of Canada considered whether or not there could be more than three standards of review, and whether the reasonableness standard could be considered to move along a spectrum. *Ryan* involved a statutory appeal from a finding of misconduct by the Law Society of New Brunswick.

The Supreme Court of Canada rejected the suggestion that there are more than three standards of review. Writing for a unanimous court, Iacobucci J. stated:

⁸ *Supra* note 5 at para 33.

⁹ *Chamberlain v. Surrey School District No. 36*, [2002] SCC 86.

¹⁰ *Ibid* at para 4.

"I find it difficult, if not impracticable, to conceive more than three standards of review. In any case, additional standards should not be developed unless there are questions of judicial review to which the three existing standards are obviously unsuited ... I am not convinced that the increase in complexity generated by adding a fourth standard would lead to greater precision in achieving the objectives of judicial review of administrative action. A pragmatic and functional approach should not be unworkable or highly technical."¹¹

Specifically, Iacobucci J. focused on the middle standard of reasonableness *simpliciter*.

The decision in *Ryan* suggests that the reasonableness standard does not move toward correctness or patent unreasonableness according to the circumstances. Rather, it is a fixed standard that involves asking, "after a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?"¹². The addition of a fourth standard could make an already complicated analysis even more complex.

Iacobucci J. also rejected the notion of a spectrum of reasonableness:

"It is true that the Court has resorted to the metaphor of a spectrum in order to explain the relative ordering of the three recognized standards of review. The idea is that the standards could be arranged from least deferential to most deferential with reasonableness as the intermediate standard of review. The metaphor suggests standards arranged along a gradient of deference but it was never meant to suggest an infinite number of possible standards."¹³

A spectrum of reasonableness could lead to an infinite number of standards of review, a concept that the court had rejected specifically in the *Ryan* decision. The result appears to be that while there may be a spectrum of deference with comparing each of the three standards of review, there is not a spectrum of standards that extends between each of the standards.

III. Judicial Independence

The Supreme Court of Canada has had occasion recently to consider how judicial independence relates to administrative tribunals. The decisions in *Bell Canada v. Canadian*

¹¹ *Supra* note 6 at para 24.

¹² *Ibid* at para 47.

¹³ *Ibid* at para 45.

*Telephone Employees Association*¹⁴, *Ell v. Alberta*¹⁵, and *C.U.P.E. v. Ontario (Minister of Labour)*¹⁶ all considered the issue of the independence of tribunals from a post *Ocean Port* perspective.

Independence is separate and distinct from bias and lack of impartiality.¹⁷ However, the basic question to be asked is: Is there a reasonable apprehension that the tribunal lacks the capacity to adjudicate in an independent manner? There are three key elements of independence. They are: (1) security of tenure; (2) financial security; and (3) independence in administrative matters. The consideration of independence in an administrative law context follows these principles, but not to the same degree. In *Canadian Pacific Limited v. Matsqui Indian Band*¹⁸, Lamer C.J. stated that while administrative tribunals were subject to the principles of judicial independence, one must consider other factors specific to the particular tribunal:

"Therefore, while administrative tribunals are subject to the Valente principles, the test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue. The requisite level of institutional independence (i.e. security of tenure, financial security and administrative control) will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office."

The distinction between administrative decision makers and judges was considered by the Supreme Court of Canada in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*¹⁹. In *Ocean Port*, the Supreme Court of Canada modified the effect of its decision in *Matsqui*, and found that the constitutionally protected guarantee of judicial independence did not extend to administrative tribunals and government officials who exercise court-like functions. The Supreme Court reasoned that it was the legislature or

¹⁴ *Bell Canada v. Canadian Telephone Employees Association*, [2003] SCC 36.

¹⁵ *Ell v. Alberta*, [2003] SCC 35.

¹⁶ *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] SCC 29.

¹⁷ *R. v. Valente*, [1985] 2 S.C.R. 673 at p. 685.

¹⁸ *Canadian Pacific Limited v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at p.51.

¹⁹ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781.

parliament that determined the degree of independence required by a tribunal, and that the statute must be construed as a whole to determine the degree of independence the legislature intended.²⁰

As noted above, three recent decisions of the Supreme Court of Canada have considered the effect of the *Ocean Port* decision on the independence of administrative tribunals. In *Bell Canada*, the Supreme Court considered whether the Canadian Human Rights Tribunal lacked independence in dealing with a pay equity complaint. *Bell Canada* involved a complaint by the union that Bell paid its female employees lower wages than their male counterparts who were performing work of equal value. Bell argued that guidelines applicable to the complaint that were issued by the Canadian Human Rights Commission and by statute, were binding on the Canadian Human Rights Tribunal, raised issues of independence and impartiality.

In addressing the independence and impartiality arguments, the Supreme Court of Canada noted that different tribunals will have varying requirements of independence:

"Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence."²¹

The Supreme Court concluded that the Canadian Human Rights Tribunal had a high degree of independence from the executive branch (i.e. the Canadian Human Rights Commission). In coming to this conclusion, the court noted:

"The fact that the tribunal functions in much the same way as a court suggests that it is appropriate for its members to have a high degree of independence from the executive branch. A high degree of independence is also appropriate given the interests that are affected by proceedings before the Tribunal – such as the dignity interests of the complainant, the interest of the public in eradicating discrimination, and the reputation of the party that is alleged to have engaged in discriminatory practices. There is no indication in the Act that the legislature intended anything less than a high degree of independence of Tribunal members."²²

²⁰ *Ibid* at para 20.

²¹ *Supra* note 14 at para 21.

²² *Ibid*, at para 24.

Bell argued that the Tribunal was not impartial since it was bound by the guidelines issued by the Commission. However, the Supreme Court held that, in this case, the power of the Commission to issue guidelines binding on the tribunal "[may] have been Parliament's way of ensuring that the Act would be interpreted in a manner that was sensitive to the needs of the public and to developments across the country, and hence, that it would be interpreted by the Tribunal in the manner that best furthered the aims of the Act as a whole."²³ Therefore, even though the Tribunal was entitled to a high degree of independence, the guidelines did not lead to a reasonable apprehension of bias, and the independence of Tribunal was not compromised.

In *Ell*, the Supreme Court of Canada considered a challenge to legislation which revised the qualifications of justices of the peace to require membership in the Law Society of Alberta and experience requirements. The respondents were justices of the peace that were appointed before the legislative amendments, but did not meet the new criteria. These justices of the peace were removed from office and given other positions. The respondents took the position that these amendments jeopardized the security of tenure of the justices.

The Supreme Court concluded that the constitutional guarantee of judicial independence did extend to justices of the peace that were in the criminal justice system:

"Accordingly, the judiciary's role as arbiter of disputes and guardian of the Constitution require that it be independent from all other bodies. A separate, but related, basis for independence is the need to uphold public confidence in the administration of justice. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry ... In light of these bases of judicial independence – impartiality in adjudication, preservation of our constitutional order, and public confidence in the administration of justice – it is clear that the principle extends its protection to the judicial office held by the respondents."²⁴

Despite this conclusion, the court found that in this case, the removal of the justices from office would not negatively effect the public's perception of the independence of the judiciary.

²³ *Ibid*, at para 41.

²⁴ *Supra* note 15 at para 23-24.

In doing so, the Supreme Court acknowledged that the absence of security of tenure is not fatal to establishing independence.

In *C.U.P.E.*, the Supreme Court of Canada considered whether arbitration boards under the Hospital Labour Disputes Arbitration Act were tainted by the appointment of four retired judges to chair arbitration boards. C.U.P.E. argued that indicators of independence such as security of tenure, financial security, and administrative independence were not present. Binnie J., writing for the majority, noted:

"[T]he court cannot substitute a different tribunal for the one designed by the legislature. An ad hoc tribunal is by definition constituted on a case-by-case basis. Security of tenure does not survive the termination of the arbitration, and financial security is similarly circumscribed. Administrative independence has little formal protection. Professional labour arbitrators (including those on the s.49(10) list) function successfully in such a structure even though there may be no guarantee of continuing work from any particular employer or union. In addition to HLDAA's statutory command, the Court's assessment of structural independence should take into account the success with which ad hoc tribunals have long operated in labour relations in general.."²⁵

The Supreme Court of Canada concluded that this was not a case where institutional independence was infringed upon.

IV. Procedural Fairness

Unlike many of the other topics, there has not been a recent Supreme Court of Canada decision that has modified or clarified the doctrine of procedural fairness. The 1999 decision of the Supreme Court of Canada in *Baker* continues to be the leading authority on procedural fairness. However, there have been a number of trial and appellate court decisions over the past year that have canvassed *Baker* in their consideration of procedural fairness.

Both the Ontario Court of Appeal and the British Columbia Court of Appeal have recently considered the doctrine of procedural fairness in the context of extradition hearings. In

²⁵ *Supra* note 16, at para 190.

*United States of America v. Johnson*²⁶, the Ontario Court of Appeal held that the Minister of Justice owed a duty of procedural fairness in an extradition hearing. In *Johnson*, an extradition request was made by the government of the United States regarding the appellant. The United States sought to deport the appellant to Nigeria. The appellant challenged extradition on the basis of humanitarian and compassionate grounds, and the fact that he had sought refugee status in Canada. The Minister concluded that the appellant's circumstances were not of such a nature that he should refuse to order surrender, but did not issue written reasons regarding this conclusion.

Gilless J.A., writing for the Ontario Court of Appeal, noted that:

"In my view, the Minister must give reasons for his decision. The holding of L'Heureux-Dube J. in *Baker v. Canada* ... a case arising in the context of deportation, applies equally to the decision to surrender under the Extradition Act. In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required."²⁷

The Court of Appeal granted the application for judicial review, set aside the decision of the Minister of Justice, and referred the matter back to the Minister for determination.

The British Columbia Court of Appeal was faced with a similar fact situation in *United States of America v. Taylor*²⁸. In *Taylor*, an extradition request was made by the government of the United States regarding the appellant. The United States sought to extradite the appellant to the United States to face charges of grand theft. The appellant resisted extradition on the basis that his wife required medical treatment for a schizophrenic condition and that she was dependent on him for day-to-day care. The appellant also raised as issues his failing health, and the fact that the alleged offences were of a non-violent nature. The Minister concluded that the

²⁶ *United States of America v. Johnson*, [2002] O.J. No. 4759 (Ont. C.A.).

²⁷ *Ibid* at para 46.

²⁸ *United States of America v. Taylor*, [2003] B.C.J. No. 1018 (B.C.C.A.).

appellant's circumstances were not of such a nature that he should refuse to order surrender. The Minister did provide written reasons for the decision.

The British Columbia Court of Appeal considered whether the Minister gave adequate reasons for his decision. Smith J.A. stated:

"[P]rocedural fairness requires the Minister to explain why he has rejected a submission based on s. 44(1)(a) of the Act that to surrender a fugitive will be unjust or oppressive. Second, the effect of extradition on members of the fugitive's family may be a relevant consideration for the Minister. ... In my view, the Minister's reasons in this case were not responsive to the applicant's submissions. More particularly, while he stated that he had given the matter full consideration, his reasons are conclusory and do not demonstrate that he performed his mandatory duty under s. 44 (1)(a) to have regard to 'all the relevant circumstances'. The Minister did not say whether he considered that the hardship to Mrs. Taylor was relevant to the question before him. If he did consider that it was relevant, he failed to state why he concluded that this hardship would not make the surrender 'unjust or oppressive' under s.44 (1)(a), alone or in combination with the circumstances relating to the applicant personally."²⁹

In *Taylor*, the Court set aside the Minister's decision to surrender the applicant, and referred the question of surrender back to the Minister for determination.

The Federal Court of Appeal has also had occasion to consider the doctrine of procedural fairness in two recent cases involving appeals by the Minister of Human Resources Development. In *Canada (Minister of Human Resources Development) v. Angheloni*³⁰, the Minister sought judicial review of a decision of the Pension Appeals Board that granted disability benefits to Angheloni. Similarly, in *Canada (Minister of Human Resources Development) v. Quesnelle*³¹, the Minister sought judicial review of a decision of the Pension Appeals Board that granted a disability pension to Quesnelle. In both of these cases, it was the Minister, not the individual, trying to establish that the decision maker had not provided adequate reasons for its decision. Evans J.A., writing for the court in *Quesnelle*, stated:

"While the importance of the interests at stake, and the seriousness of the adverse effect on a party of a negative decision, may be relevant to determining the content of the duty of fairness and the adequacy of a tribunal's reasons, this does not justify applying a double standard to the adequacy of a tribunal's reasons depending on which way it decides a dispute. In this case, the Minister

²⁹ *Ibid* at para 18

³⁰ *Canada (Minister of Human Resources Development) v. Angheloni*, [2003] F.C.J. No. 473.

³¹ *Canada (Minister of Human Resources Development) v. Quesnelle*, [2003] F.C.J. No. 267.

represents the public interest in the financial integrity of the Canada Pension Plan and its due administration according to law, and there is a public interest in ensuring that claimants are not paid benefits to which they are not entitled. Both parties are entitled to a fair hearing before the Board and, without reasons that adequately explain the basis of a decision, neither party can be assured that, when a decision goes against it, its submissions and evidence have been properly considered. Moreover, without adequate reasons, the losing party may be effectively deprived of the right to apply for judicial review."³²

In each case, the application for judicial review was allowed and the matter sent back to the Board for determination.

The Ontario Superior Court of Justice recently addressed the issue of the sufficiency of written reasons, and their requirement despite the increased work load on the decision maker. In *Daneshvar v. National Dental Examining Board of Canada*³³, the applicant received a failing grade in one of her clinical examinations that she was required to pass for admission to the practice of dentistry in Canada. The applicant appealed the failing grade to the Appeals Committee which dismissed her appeal. She subsequently appealed that decision. In its reasons, the Court comments on the requirement of written reasons for decision. Lane J. notes:

"We acknowledge that there will be an increased work load for the Committee, but the lack of reasons is a serious flaw in the present system. ... The reference to 'extensive reasons' is gratuitous: no one expects reasons like those given by courts or more formal boards or tribunals. A brief answer to the major complaints made by the applicant may be appropriate. The Baker court referred to the acceptability of 'various types of written explanations', a formula that may require some working out, but clearly not a direction to deplete the forests of Canada. The heart of the matter is that it is an explanation."³⁴

Turning away from the requirement of written reasons in procedural fairness considerations, the Ontario Court of Appeal recently considered in *Pritchard v. Ontario Human Rights Commission*³⁵ whether a legal opinion prepared by the Ontario Human Rights Commission's in-house counsel is protected by solicitor-client privilege. As part of its consideration of this privilege, the Court concluded that:

³² *Supra* note 30 at para 11.

³³ *Daneshvar v. National Dental Examining Board of Canada*, [2002] O.J. No. 2487.

³⁴ *Ibid* at para 18.

³⁵ *Pritchard v. Ontario Human Rights Commission*, [2003] O.J. No. 215, leave to appeal to S.C.C. granted [2003] S.C.C.A. No. 125.

"procedural fairness can be achieved without the production of such legal opinions. The ultimate question on any judicial review of the Commission's decision should not be whether the legal opinion it received was correct or not, but whether the decision of the Commission can be upheld. The legal opinion is therefore irrelevant."³⁶

The *Pritchard* decision does not discuss the procedural fairness argument in any detail. However, the decision suggests that while written reasons may be required as a matter of procedural fairness, the information that the written decision is based on may not be required to be disclosed.

V. Power of Administrative Bodies to Apply the Charter

The power of administrative bodies to apply the *Charter of Rights and Freedoms* was reviewed very recently by the Supreme Court of Canada in two appeals that were heard together. In *Martin v. Nova Scotia (Workers' Compensation Board)* and *Laseur v. Nova Scotia (Workers' Compensation Board)*³⁷, the Supreme Court of Canada set out specific guidelines for determining when an administrative tribunal may apply the *Charter*.

Before the decision in *Martin*, the ability of an administrative tribunal to consider *Charter* issues was addressed in a series of 1991 cases known as the 'trilogy',³⁸ and the 1996 decision in *Cooper v. Canada (Human Rights Commission)*.³⁹ The Supreme Court of Canada in *Cooper* held that as a matter of constitutional law, tribunals that have been explicitly or implicitly granted the power to determine questions of law by their enabling statute could address constitutional issues, including the constitutional validity of their enabling statute. However, in the recent *Martin* decision, the Supreme Court of Canada reversed its opinion

³⁶ *Ibid* at para 54.

³⁷ *Martin v. Nova Scotia (Worker's Compensation Board)* and *Laseur v. Nova Scotia (Worker's Compensation Board)*, [2003] SCC 54.

³⁸ These cases are: *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; and *Tetreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.

³⁹ *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854.

regarding administrative tribunals engaging in *Charter* determinations. Gonthier J., writing for a unanimous court, stated:

"I am of the view that it is now time to reappraise the case law and to provide a single set of rules concerning the jurisdiction of administrative tribunals to consider *Charter* challenges to a legislative provision."⁴⁰

The Supreme Court of Canada set out the 'new' rules for administrative tribunals considering *Charter* challenges. In each case, the first question to be addressed is whether the administrative tribunal has the express or implied jurisdiction to decide *any* question of law arising under the challenged provision of the Act, not whether Parliament or the legislature intended that the tribunal apply the *Charter*.⁴¹ If the tribunal does have that jurisdiction, then it is presumed to have the jurisdiction to interpret the *Charter* unless the legislature has removed that right from the tribunal.⁴² Implied jurisdiction must be discerned by looking at the statute as a whole. The relevant factors include⁴³:

- the statutory mandate of the tribunal and whether deciding questions of law is necessary to fulfil the mandate,
- the interaction of the tribunal with other elements of the administrative system,
- whether the tribunal is adjudicative in nature,
- practical considerations such as the tribunal's capacity to consider questions of law

Once the presumption has been raised, the second question is whether it has been rebutted. The burden of establishing the presumption lies on the party who alleges that the administrative body lacks the jurisdiction to apply the *Charter*. The presumption may only be rebutted by an explicit or clearly implicit withdrawal of authority.⁴⁴ Such an implication should generally arise from the statute itself as opposed to external considerations.

⁴⁰ *Supra* note 37 at para 34.

⁴¹ *Supra* note 37 at para 35.

⁴² *Supra* note 37 at para 36.

⁴³ *Supra* note 37 at para 41.

⁴⁴ *Supra* note 37 at para 42.

The Supreme Court of Canada in *Martin* also notes that the distinction between 'general' and 'limited' questions of law as relied on in *Cooper*, should no longer be relied upon.⁴⁵

In *Martin*, the Supreme Court of Canada found that the Worker's Compensation Appeal Tribunal had the jurisdiction to decide questions of law and, consequently, the jurisdiction to determine the constitutionality of the provision.

The effect of *Martin* will be far reaching. All administrative tribunals that have the power by statute to determine questions of law will have the jurisdiction to determine the constitutional validity of a provision before it.

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⁴⁵ *Supra* note 37 at para 45