

General Questions of Law

Express of Implied

Express - “All” or “any” matters, ex. “all” questions of law . . .

Implied - Court looks at:

- A. Scheme of the Act – what Questions of Law is the Tribunal Required by its statute to consider – Note list in *Cooper*.**

Shopping List Approach???
(When is List Long enough)

Questions of Law akin to Court
(Private and Public law)

- B. Legal Expertise of the Tribunal**

Lawyer Appointees

Access to legal advice??

- C. Non-Legal (Policy) expertise of the Tribunal**

Tripartite Status (Connection to Policy Issues)

Cuddy Chicks: “the ability of the decision - maker to analyze competing policy concerns is critical. Therefore, while board members need not have formal legal training, it remains that they have a very meaningful role to play in the resolution of constitutional issues”.

Cooper – No special expertise on issue of discrimination

Deference in Administrative Law

D. Adjudicative Nature of Proceedings

Admissibility of Hearsay Evidence

**Availability of Rules of Procedure
(required in statute)**

**Purpose of Tribunal's Proceedings, ex.,
timely and efficient (ex., benefit
entitlement)
or deliberative "debated in the fullness it
requires"**

**E. "One Stop Shopping" Accessibility by
Complainants to Have Issue Determined at
First Instance**

Yes – Cuddy Chicks

**No – Cooper – surface attraction but
inevitability of Judicial Review Anyway**

**F. Ability to Consider Division of Powers issues
Yes, in Douglas College (La Forest)**

**No, in Cooper (La Forest) – there is a
"conceptual difference"**

Unresolved Questions

**Ability of Appeal Court to consider s. 52 (1) if Tribunal Cannot
- May Depend on Scope of Appeal Power**

**Ability of Court on Judicial Review to consider s. 52(1) if Tribunal
Cannot – Arguably Yes, Cooper para 65**

“GENERAL” QUESTIONS OF LAW

Notwithstanding the general scheme of the Act, there are specific provisions, notably ss. 27, 40 and 41, that both the appellants and the Commission fastened upon as indicating an intent by Parliament to have the Commission determine questions of law. *However, these sections amount to no more than that the Commission has power to interpret and apply its enabling statute. It does not follow that it then has a jurisdiction to address general questions of law.* Every administrative body, to one degree or another, must have the power to interpret and apply its own enabling statute. If this were not the case, it would be at the mercy of the parties before it and would never be the master of its own proceedings. *The power to refuse to accept a complaint, or to turn down an application, or to refuse to do one of the countless duties that administrative bodies are charged with, does not amount to a power to determine questions of law as envisaged in Douglas/Kwantlen, Cuddy Chicks and Tétreault-Gadoury.* To decide otherwise would be to accept that all administrative bodies *and tribunals* are competent to question the constitutional validity of their enabling statutes, a position this Court has consistently rejected.

Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854 at 891-892

65 I would add a practical note of caution with respect to a tribunal's jurisdiction to consider *Charter* arguments. First, as already noted, a tribunal does not have any special expertise except in the area of factual determinations in the human rights context. Second, any efficiencies that are *prima facie* gained by avoiding the court system will be lost when the inevitable judicial review proceeding is brought in the Federal Court. Third, the unfettered ability of a tribunal to accept any evidence it sees fit is well suited to a human rights complaint determination but is inappropriate when addressing the constitutionality of a legislative provision. Finally, and perhaps most decisively, the added complexity, cost, and time that would be involved when a tribunal is to hear a constitutional question would erode to a large degree the primary goal sought in creating the tribunals, i.e., the efficient and timely adjudication of human rights complaints.

Regina v. 974649 Ontario Inc. c.o.b. as Dunedin Construction (1992) et al. (1999), 42 O.R. (3d) 354 (Ont. C.A.)

The requirement in Mills that a court has "the authority to make the order sought" is not a requirement that it have authority to make the order for a Charter breach. That authority flows from s. 24(1). Rather, the requirement is that the court have the authority to make **the type of order** sought within the jurisdiction it exercises, independently of the Charter. If it were otherwise there would be no need for s. 24(1). . . .

When Parliament or a legislature has conferred a remedial authority to be exercised in some, albeit limited circumstances, that jurisdiction is part of the existing statutorily created jurisdictional scheme. Section 24(1) does not create a new jurisdiction **but rather it enlarges the grounds** upon which the existing jurisdiction may be exercised. . . .

For the purpose of s. 24(1) there does not seem to be any reason to distinguish an existing inherent jurisdiction from an **existing statutory jurisdiction**.

Blencoe v. B.C. Human Rights Commission, 2000 SCC 44

Para 53: Professor Hogg also addresses the deliberate omission of "property" from "life, liberty and security of the person" in s. 7, and states, at p. 44-12:

It also requires . . . that those terms [liberty and security of the person] be interpreted as excluding economic liberty and economic security; otherwise, property, having been shut out of the front door, would enter by the back.

Para 96: I do not doubt that parties in human rights sex discrimination proceedings experience some level of stress and disruption of their lives as a consequence of allegations of complainants. Even accepting that the stress and anxiety experienced by the respondent in this case was linked to delays in the proceedings, I cannot conclude that the scope of his security of the person protected by s. 7 of the *Charter* covers such emotional effects nor that they can be equated with the kind of stigma contemplated in *Mills* (1986), *supra*, of an overlong and vexatious pending criminal trial or in *G. (J.)*, *supra*, where the state sought to remove a child from his or her parents. **If the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private rights, some amount of stress and stigma attached to the proceedings must be accepted. This will also be the case when dealing with the regulation of a business, profession, or other activity.** A civil suit involving fraud, defamation or the tort of sexual battery will also be "stigmatizing". The Commission's investigations are not public, the respondent is asked to provide his version of events, and communication goes back and forth. While the respondent may be vilified by the press, there is no "stigmatizing" state pronouncement as to his "fitness" that would carry with it serious consequences such as those in *G. (J.)*. There is thus no constitutional right or freedom against such stigma protected by the s. 7 rights to "liberty" or "security of the person".

R. v. Hynes (1999), 26 C.R. (5th) 1 (Nfld. C.A.)

Per Gushue J.

[para22] However, and in any event, by not recognizing the extension of the admissibility power to exclusions based on a Charter breach, there appears to be an anomaly in that, by way of obvious example, a statement may be excluded if not voluntary, but may not be excluded if obtained in breach of the right to counsel. Thus, even though a statement may be obtained in breach of s. 10(b) of the Charter, the preliminary inquiry justice would have to commit for trial although without that statement there would be no case to answer.

Per Green J., (Dissent)

[para42] Mills stresses that the Charter did not confer jurisdiction on any particular body to grant a Charter remedy. Accordingly, the body in question, in this case a preliminary inquiry justice, must be found to have an independent source of jurisdiction to grant such a remedy, in this case, the exclusion of evidence. That would normally be found in the statutory regime creating and regulating the operation of the body in question. Obviously, **inasmuch as the statute may have been enacted prior to the Charter and would not have purported expressly to confer Charter jurisdiction, the examination will of necessity have to involve an inquiry as to whether, generically, the statutory regime contemplates the granting of remedies of the type that would flow**

from the kind of Charter breach in question. In the context of a preliminary inquiry, this would involve asking, not whether the justice is specifically authorized to exclude evidence obtained in breach of the Charter, but whether the justice is authorized to perform a general evidence-excluding function.

Per Marshall J.A.

[para72] MARSHALL J.A.:-- This opinion is advanced in full awareness of my colleagues' respective positions as to the proper outcome of this appeal. While siding with Gushue J.A.'s conclusion that the appeal should be dismissed because the current law, as articulated by the Supreme Court of Canada, precludes exclusion of evidence under s. 24(2) of the Charter, that concurrence does not extend to the view that the current legal position in that regard appears to be an incongruous one. To the contrary, this opinion argues the law's current position precluding exclusion of evidence under the Charter at preliminary inquiries is a congruent one, compatible not only with the Criminal Code, but with the Charter.

Appendix A: Chart of Post-Cooper Decisions

Case	Tribunal	Challenge To:	Jurisd. Ruling	Court Ruling	Cite	Date
<i>Nova Scotia (Workers' Compensation Board) v. O'Quinn</i>	Human Rights Board of Inquiry	Workers' Compensation Act provision disentitling beneficiary from widow's pension should she remarry	Followed <i>Cooper</i> , Board of Inquiry did not have power to rule on constitutionality of legislation other than its own, i.e., the <i>Workers' Compensation Act</i> .	N.S.C.A.	(1997), 143 D.L.R. (4th) 259 at 271-272	97/01/23
<i>Shubenacadie Indian Band v. Canadian Human Rights Commisison et al.</i>	Canada Human Rights Board of Inquiry	Finding by Board of Inquiry that actions of Indian Band Council refusing to provide social assistance to non-Indian spouses of Indian resident on reserve.	While Board of Inquiry may not have the power, following <i>Cooper</i> , to determine whether its own order would be contrary to <i>Charter</i> s. 25, the Court on Judicial Review could do so.	F.C.T.D.	(1997), 138 F.T.R. 275 at 288 et seq.	97/10/30
<i>Krznaric v. Chevette</i>	Ont. H.R.T.	Failure of Police Services Board to accommodate disability	has no s. 52 jurisdiction	Ont.Ct.(Gen.D iv.)	(1997) 154 D.L.R.(4th) 527 at pp. 541 - 545	97/11/13
<i>Canada v. Reynolds</i>	Immigration Appeal Division	<i>Immigration Act</i> , s. 70(5)	Some s. 52 jurisdiction but not re: limiting provisions of own Act	F.C.T.D.	(1997) 139 F.T.R. 315 at paras. 13 - 15	97/12/15

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<i>Newfoundland v. NAPE</i>	three person <i>ad hoc</i> labour arbitration board appointed pursuant to collective agreement	<i>Public Sector Restraint Act</i> , s. 9, precluding pay equity adjustments for years prior to 1992	No s. 52 jurisdiction	Newf. S.C.	(1998), 500 A.P.R. 1 at paras 18 - 39	98/3/20
<i>Bell Canada v. CTEA</i>	CHRC Tribunal	Independence of Tribunal	s. 52 jurisdiction re: Acts other than <i>CHRC</i>	F.C.T.D.	[1998] 3 F.C. 244 at paras. 131, 132, appeal adjourned <i>sine die</i> (1999) 246 N.R. 368 (F.C..A.)	98/3/23
<i>Bd. Of Ed. (Saskatoon) v. HRC</i>	Sask. HR Bd. Of Inquiry	Reference re: s. 52 jurisdiction	Distinguished jurisdiction over enabling statute from jurisdiction over a party's actions but declines to rule	Sask.Q.B.	(1998) 167 Sask.R. 184 at paras. 10,11	98/5/8
<i>Gwala v. Canada</i>	Immigration S.I.O.	<i>Immigration Act</i> , s. 46.4	no s. 52 jurisdiction	F.C.T.D.	[1998] 4 F.C. 43 at para. 22, aff'd on this pt. [1999] 3 F.C. 404 at para. 3 (F.C.A.)	98/5/25
<i>Ayangma v. P.E.I.</i>	P.E.I. H.R.C.	s. 24 jurisdiction	Has no s. 24 jurisdiction	P.E.I.S.C.	(1998) 29 C.P.C.(4 th) at paras. 29. 30 and 46	98/10/21
<i>Canada v. Perera</i>	Appeal Board	<i>Public Service Employment Regulations</i> , s. 27	no s. 52 jurisdiction	F.C.T.D.	(1998), 161 F.T.R. 71 at para. 12, (appealed below)	98/12/17
<i>N.W.T.(W.C.B.) v. Nolan</i>	W.C.A.T.	<i>Worker's Compensatoin Act</i> , s. 29	has s. 52 jurisdiction	N.W.T.S.C.	(1999), 45 C.C.E.L.(2d) 215	99/1/26

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<i>Paul v. British Columbia (Forest Appeals Commission)</i>	<i>Forest Appeals Commission</i>	Whether Appeals Commission could consider aboriginal rights in determining violations of the <i>Forest Practices Code</i>	Authority was implicit, inferred from authority to convene a hearing, receive evidence, hear witnesses, and practical reasons, such as avoiding separate proceedings.	B.C.S.C.	(2000), 179 D.L.R. (4th) 351 at 363 et seq., leave to appeal to B.C.C.A. granted.	99/09/23
<i>Emereskin Cree Nation v. Canada</i>	CHRC Tribunal	Application of CHRC to Aboriginals	Distinguished no Tribunal jurisdiction re: <i>Charter</i> from question of jurisdiction re: federalism in granting stay	Alta. Q.B.	[1999] A.J. No. 1209 at paras. 18 - 23	99/10/27
<i>Barletta v. Canada</i>	Immigration Appeal Division	<i>Immigration Act</i> , s. 70(5)	Some s. 52 jurisdiction but not re: limiting provisions of own Act (follows <i>Reynolds</i>)	F.C.T.D.	[1999] F.C.J. No. 1897 at para. 38	99/11/2
<i>Collins v. Abrams</i>	B.C.H.R.T.	B.C. <i>Human Rights Code</i> , s. 7(1)(b)	s. 52 jurisdiction b/c given power to decide questions of law (unclear how); also distinguished <i>Cooper</i> badly	B.C.S.C.	[1999] B.C.J. No. 2859 at paras 14, 15	99/12/2

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<i>Canada (Attorney General) v. Perera</i>	public service Appeal Board	s. 27 of <i>Public Service Employment Regulations</i> which precludes appeals from public service competitions to the executive group where the appointment was already in the executive group	Appeal Board does not have jurisdiction under s. 52 (1)	F.C.A.	(2000) 256 N.R. 57 at paras 42 and 59	2000/06/08