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Recent Cases from the Supreme Court

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***R. v. Conway* [2010] 1 S.C.R. 765**

Three Waves into One: “Surf’s Up?”

- Mental health detainee alleged that *Charter* rights were breached, and sought absolute discharge, or access to psychotherapy and move from location adjacent to construction site as remedies before ORB
- Absolute discharge available where no “significant threat” to public safety, which ORB had found to the contrary.

- ORB: found no *Charter* jurisdiction for absolute discharge
- ONCA: agreed, but unreasonable not to address treatment issues of his continued detention
- SCC: dismissed appeal
- Restates and consolidates *Mills* based s.24(1) test of jurisdiction over the person, the subject matter, and remedy sought, as evolved through *Slaight* (exercise of statutory discretion is subject to *Charter* and its values) and the *Douglas College*, *Cuddy Chicks Ltd.*, *Tétrault Gadoury s.52(1)* trilogy (tribunals with expertise and authority to decide questions of law are best positioned to determine initially the constitutionality of their statutory provision).

- Now, with rare exceptions, tribunals with authority to apply the law have *Charter* s.24(1) jurisdiction on issues that are within the proper exercise of their functions.
- Result is consistent with tribunal accessibility and avoidance of bifurcation in decision making on constitutional questions the essential factual character of which falls within the tribunal's specialized jurisdiction.
- Rather than requiring litigants to test, remedy by remedy, whether tribunal is a court of competent jurisdiction, the initial inquiry is whether it has express or implied jurisdiction to decide questions of law. If it does, and no clear legislative intent to withdraw *Charter* jurisdiction, then it is a s.24(1) court of competent jurisdiction.

- The remaining issue is whether the remedy is one legislatively intended to fit within the statutory mandate, structure, and functions of the tribunal.
- ORB characterized as a quasi-judicial, specialized statutory tribunal with ongoing supervisory jurisdiction, with appeals based on question of law or mixed fact and law. Thus court of competent jurisdiction.

- However, statutory mandate meant no *Charter* jurisdiction to grant absolute discharge on the facts, or to impose treatment order (expressly prohibited by *Criminal Code*).
- Same wine in a new bottle? Or is there a genie within with new powers, just waiting to be called forth? Public safety mandate, factual findings and express statutory provisions in this case lead to conclusion that time will tell, as litigants and courts determine what *Charter* remedies are consistent or compatible with statutory remedial jurisdiction of the tribunal, and specifically its legislative intent.

***R. v. 974649* [2001] 3 S.C.R. 575 (Dunedin)**

- Provincial offences court's quasi-criminal Court role favoured expansive remedial jurisdiction to award costs for *Charter* beaches where legislation disclosed no contrary intention and gave the court functions that attracted *Charter* issues and remedies.

Blencoe v. B.C. [2000] 2 S.C.R. 307

- Although *Charter* applied generally to B.C. Human Rights Commission, *Askov Charter* analysis and remedy rejected where common law fairness analysis did not warrant a stay for delay as it did not offend community sense of decency and fairness. Only in exceptional cases where state interferes with a right to make decisions that affect a person's fundamental being engage the *Charter* s.7 analysis, as dignity, reputation or freedom from stigma are not free standing rights. Does *Conway* change this?
- Although *Dunsmuir* merged three standards of review into two for ease of threshold analysis, the debate continues, particularly as to the application of the reasonableness standard. Will *Conway's* progeny continue to engage a similar fact based uncertainty on *Charter* remedies?

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43

The Role of Tribunals in Aboriginal Consultation

- The duty of a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal.
- SCC rejects argument that tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has taken place and, if not, to itself fulfill the requirement regardless of whether its constituent statute so provides. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law.
- Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise.

- The tribunal seeking to engage in consultation itself must possess remedial powers necessary to do what it is asked to do in connection with the consultation. The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent.
- An ongoing right to consultation on future changes capable of adversely impacting aboriginal rights did not undermine the validity of the tribunal's decision on the narrow issue before it: whether approval of an Energy Purchase Agreement could have an adverse impact on claims or rights of the First Nations. The tribunal correctly identified the main issue before it as whether the EPA had the potential to adversely affect the claims and rights of the First Nations.

- It then examined the evidence on this question. It looked at the organizational implications of the EPA and at the physical changes it might bring about. It concluded that these did not have the potential to adversely impact the claims or rights of the First Nations. The Commission did not act unreasonably in arriving at these conclusions.

Ontario (Public Safety and Security) v. Criminal Lawyers Association [2010] 1 S.C.R. 815

- Omission of s.14 (law enforcement) and s.19 (solicitor-client privilege) exemptions from s.23 (public interest override) in F.I.P.P.A. did not violate *Charter* s.2(b) (freedom of expression).
- Trial judge ordered murder trial stay based on state misconduct. OPP investigation exonerated police of misconduct without reasons. Lengthy report and legal advice relating to same not disclosed. IPC and Divisional Court agree. ONCA determined exemption scheme violated *Charter*.

- SCC reverses. CLA did not demonstrate that meaningful public discussion of investigation and prosecution cannot take place within the exemption scheme, let alone address the recognized derogation from *Charter* protection of privilege and proper government function. Sections 14 and 19 also incorporate considerations of the public interest.
- Matter remitted to IPC to determine if s.14 was properly claimed, as IPC had not reviewed Minister's exercise of discretion to not disclose any part of voluminous record without reasons.

- Decision on s.19 privilege claim upheld. ONCA in *L.C.B.O. v. Magnotta Winery* [2010] ONCA 681 reverses IPC order to disclose mediation briefs and settlement details, relying on s.19(2) exemption records prepared by or for Crown counsel for use in litigation. Leaves open if there is class or fact based settlement privilege under s.19(1) or based on common law.
- Contrast “public interest” in disclosure by government with “public interest” in disclosure of journalists’ confidential sources: *Globe & Mail v. Canada (A.G.)* [2010] SCC 41