TAB 14

Citation: R. v. Conway, 2010 SCC 22
Date: June 11, 2010
Docket: 32662
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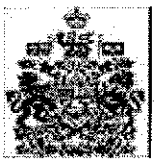

SUPREME COURT OF CANADA

CITATION: R. *v.* Conway, 2010 SCC 22

DATE: 20100611
DOCKET: 32662

BETWEEN:

Paul Conway
Appellant
and
Her Majesty The Queen and Person in charge of the Centre for Addiction and Mental Health
Respondents
– and –
Attorney General of Canada, Ontario Review Board, Mental Health Legal Committee and Mental Health Legal Advocacy Coalition, British Columbia Review Board, Criminal Lawyers' Association and David Asper Centre for Constitutional Rights, and Community Legal Assistance Society
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 104) Abella J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ. concurring)

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R. *v.* CONWAY

Paul Conway *Appellant*

v.

Her Majesty The Queen and Person in charge of the Centre for Addiction and Mental Health *Respondents*

and

Attorney General of Canada, Ontario Review Board, Mental Health Legal Committee and Mental Health Legal Advocacy Coalition, British Columbia Review Board, Criminal Lawyers' Association and David Asper Centre for Constitutional Rights, and Community Legal Assistance Society *Interveners*

Indexed as: R. *v.* Conway

2010 SCC 22

File No.: 32662.

2009: October 22; 2010: June 11.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Remedies — Accused not criminally responsible by reason of mental disorder detained in mental health facility — Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms — Accused also seeking as remedy order directing mental health facility to provide him with particular treatment — Whether Review Board has jurisdiction to grant remedies under s. 24(1) of Charter — If so, whether accused entitled to remedies sought — Criminal Code, R.S.C. 1985, c. C-46, ss. 672.54, 672.55.

Constitutional law — Charter of Rights — Remedies — Court of competent jurisdiction — Remedial jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms — New approach.

Criminal law — Mental disorder — Review Board — Remedial jurisdiction under Canadian Charter of Rights and Freedoms — Accused not criminally responsible by reason of mental disorder detained in mental health facility — Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms at his disposition hearing before Review Board — Board concluding accused was a threat to public safety and not entitled to absolute discharge under Criminal Code — Whether Review Board has jurisdiction to grant absolute discharge as remedy under s. 24(1) of Charter — If so, whether accused entitled to remedy sought — Criminal Code, R.S.C. 1985, c. C-46, s. 672.54.

Administrative law — Boards and tribunals — Jurisdiction — Remedial jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms — New approach.

In 1984, C was found not guilty by reason of insanity on a charge of sexual assault with a weapon. Since the verdict, he has been detained in mental health facilities and diagnosed with several mental disorders. Prior to his annual review hearing before the Ontario Review Board in 2006, C alleged that the mental health centre where he was being detained had breached his rights under the *Canadian Charter of Rights and Freedoms*. He sought an absolute discharge as a remedy under s. 24(1) of the *Charter*. The Board unanimously concluded that C was a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute discharge under s. 672.54(*a*) of the *Criminal Code*, which provides that an absolute discharge is unavailable to any patient who is a "significant threat to the safety of the public". The Board therefore ordered that C remain in the mental heath centre. The Board further concluded that it had no jurisdiction to consider C's *Charter* claims. A majority in the Court of Appeal upheld the Board's conclusion that it was not a court of competent jurisdiction for the purpose of granting an absolute discharge under s. 24(1) of the *Charter*. However, the Court of Appeal unanimously concluded that it was unreasonable for the Board not to address the treatment impasse plaguing C's detention. This issue was remitted back to the Board.

Before this Court, the issue is whether the Ontario Review Board has jurisdiction to grant remedies under s. 24(1) of the *Charter*. C has requested, in addition to an absolute discharge, remedies dealing with his conditions of detention: an order directing the mental health centre to provide him with access to psychotherapy and an order prohibiting the centre from housing him near a construction site.

Held: The appeal should be dismissed.

When the *Charter* was proclaimed, its relationship with administrative tribunals was a blank slate. However, various dimensions of the relationship quickly found their way to this Court. The first wave of relevant cases started in 1986 with *Mills v. The Queen*, [1986] 1 S.C.R. 863. The *Mills* cases established that a court or administrative tribunal was a "court of competent jurisdiction" under s. 24(1) of the *Charter* if it had jurisdiction over the person, the subject matter, and the remedy sought. The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. The *Slaight* cases established that any exercise of statutory discretion is subject to the *Charter* and its values. The third and final wave started in 1990 with *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570, followed in 1991 by *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. The cases flowing from this trilogy, which deal with s. 52(1) of the *Constitution Act, 1982*, established that specialized tribunals with both the expertise and the authority to decide questions of law are in the best position to hear and decide the constitutionality of their statutory provisions.

This evolution of the case law over the last 25 years has cemented the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. It confirms that we do not have one *Charter* for the courts and another for administrative tribunals and that, with rare exceptions, administrative tribunals with the authority to apply the law, have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions. The evolution also confirms that expert tribunals should play a primary role in determining *Charter* issues that fall within their specialized jurisdiction and that in exercising their statutory functions, administrative tribunals must act consistently with the *Charter* and its values.

Moreover, the jurisprudential evolution affirms the practical advantages and the constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals. Any scheme favouring bifurcation is, in fact, inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction.

A merger of the three distinct constitutional streams flowing from this Court's administrative law jurisprudence calls for a new approach that consolidates this Court's gradual expansion of the scope of the *Charter* and its relationship with administrative tribunals. When a *Charter* remedy is sought from an administrative tribunal, the initial inquiry should be whether the tribunal can grant *Charter* remedies generally. The answer to this question flows from whether the administrative tribunal has the jurisdiction, explicit or implied, to decide questions of law. If it does, and unless the legislature has clearly demonstrated its intent to withdraw the *Charter* from the tribunal's authority, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate. The tribunal is, in other words, a court of competent jurisdiction under s. 24(1) of the *Charter*. This approach has the benefit of attributing *Charter* jurisdiction to a tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether the tribunal is a court of competent jurisdiction.

Once the initial inquiry has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought given its statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent, namely, whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations include the tribunal's statutory mandate and function.

In this case, C seeks certain *Charter* remedies from the Board. The first inquiry, therefore, is whether the Board is a court of competent jurisdiction under s. 24(1). The answer to this question depends on whether the Board is authorized to decide questions of law. The Board is a quasi-judicial body with significant authority over a vulnerable population. It operates under Part XX.1 of the *Criminal Code* as a specialized statutory tribunal with ongoing supervisory jurisdiction over the treatment, assessment, detention and discharge of NCR patients: accused who have been found not criminally responsible by reason of mental disorder. Part XX.1 of the *Criminal Code* provides that any party to a review board hearing may appeal the board's disposition on a question of law, fact or mixed fact and law. The *Code* also authorizes appellate courts to overturn a review board's disposition if it was based on a wrong decision on a question of law. This statutory language is indicative of the Board's authority to decide questions of law. Given this conclusion, and since Parliament has not excluded the *Charter* from the Board's mandate, it follows that the Board is a court of competent jurisdiction for the purpose of granting remedies under s. 24(1) of the *Charter*.

The next question is whether the remedies sought are the kinds of remedies which would fit within the Board's statutory scheme. This requires consideration of the scope and nature of the Board's statutory mandate and functions. The review board regime is intended to reconcile the "twin goals" of protecting the public from dangerous offenders and treating NCR patients fairly and appropriately. Based on the Board's duty to protect public safety, its statutory authority to grant absolute discharges only to non-dangerous NCR patients, and its mandate to assess and treat NCR patients with a view to reintegration rather than recidivism, it is clear that Parliament intended that dangerous NCR patients have no access to absolute discharges. C cannot, therefore, obtain an absolute discharge from the Board. The same is true of C's request for a treatment order. Allowing the Board to prescribe or impose treatment is expressly prohibited by s. 672.55 of the *Criminal Code*. Finally, neither the validity of C's complaint about the location of his room nor, obviously, the propriety of his request for an order prohibiting the mental health centre from housing him near a construction site, have been considered by the Board. It may well be that the substance of C's complaint can be fully addressed within the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values. If so, resort to s. 24(1) of the *Charter* may not add to the Board's capacity to either address the substance of C's complaint or provide appropriate redress.

Cases Cited

Considered: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*,

[1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625;*Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Carter v. The Queen*, [1986] 1 S.C.R. 981; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185; *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146; **referred to:** *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *United States v. Allard*, [1987] 1 S.C.R. 564; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Smith*, [1989] 2 S.C.R. 1120; *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *R. v. Menard*, 2008 BCCA 521, 240 C.C.C. (3d) 1; *British Columbia (Director of Child, Family and Community Service) v. L. (T.)*, 2009 BCPC 293, 73 R.F.L. (6th) 455, aff'd 2010 BCSC 105 (CanLII); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *R. v. Swain*, [1991] 1 S.C.R. 933; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 2(*b*), (*d*), 7, 8, 9, 12, 15(1), 24.

Constitution Act, 1982, s. 52(1).

Criminal Code, R.S.C. 1985, c. C-46, Part XX.1, ss. 672.4(1), 672.38(1), 672.39, 672.54, 672.55, 672.72(1), 672.78(1 672.81(1), 672.83(1).

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Lokan, Andrew K., and Christopher M. Dassios. *Constitutional Litigation in Canada*. Toronto: Thomson/Carswe 2006.

APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Armstrong and Lang JJ.A.), 2008 ONCA 326, 90 O.R. (3d) 335, 293 D.L.R. (4th) 729, 235 O.A.C. 341, 231 C.C.C. (3d) 429, 169 C.R.R. (2d) 314, [2008] O.J. No. 1588 (QL), 2008 CarswellOnt 2352, allowing in part an appeal from a decision of the Ontario Review Board. Appeal dismissed.

Marlys A. Edwardh, *Delmar Doucette*, *Jessica Orkin* and *Michael Davies*, for the appellant.

Hart M. Schwartz and *Amanda Rubaszek*, for the respondent Her Majesty the Queen.

Janice E. Blackburn and *Ioana Bala*, for the respondent the Person in charge of the Centre for Addiction and Mental Health.

Simon Fothergill, for the intervener the Attorney General of Canada.

Stephen J. Moreau and *Elichai Shaffir*, for the intervener the Ontario Review Board.

Paul Burstein and *Anita Szigeti*, for the interveners the Mental Health Legal Committee and the Mental Health Legal Advocacy Coalition.

Joseph J. Arvay, Q.C., *Mark G. Underhill* and *Alison Latimer*, for the intervener the British Columbia Review Board.

Cheryl Milne, for the interveners the Criminal Lawyers' Association and the David Asper Centre for Constitutional Rights.

David W. Mossop, Q.C., and *Diane Nielsen*, for the intervener the Community Legal Assistance Society.

The judgment of the Court was delivered by

ABELLA J. —

[1] The specific issue in this appeal is the remedial jurisdiction of the Ontario Review Board under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. The wider issue is the relationship between the *Charter*, its remedial provisions and administrative tribunals generally.

[2] There are two provisions in the *Charter* dealing with remedies: s. 24(1) and s. 24(2). Section 24(1) states that anyone whose *Charter* rights or freedoms have been infringed or denied may apply to a "court of competent jurisdiction" to obtain a remedy that is "appropriate and just in the circumstances". Section 24(2) states that in those proceedings, a court can exclude evidence obtained in violation of the *Charter* if its admission would bring the administration of justice into disrepute. A constitutional remedy is also available under s. 52(1) of the *Constitution Act, 1982*, which states that the Constitution is the supreme law of Canada, and that any law inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.

[3] When the *Charter* was proclaimed in 1982, its relationship with administrative tribunals was a *tabula rasa*. It was not long, however, before various dimensions of the relationship found their way to this Court.

[4] The first relevant wave of cases started in 1986 with *Mills v. The Queen*, [1986] 1 S.C.R. 863. The philosophical legacy of *Mills* was in its conclusion that for the purposes of s. 24(1) of the *Charter*, a "court of competent jurisdiction" was a "court" with jurisdiction over the person, the subject matter, and the remedy sought. For the next 25 years, this three-part test served as the grid for determining whether a court or administrative tribunal was a "court of competent jurisdiction" under s. 24(1) of the *Charter* (*Carter v. The Queen*, [1986] 1 S.C.R. 981; *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *United States v. Allard*, [1987] 1 S.C.R.

564; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Smith*, [1989] 2 S.C.R. 1120; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 ("*Dunedin*"); *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *R. v. Menard*, 2008 BCCA 521, 240 C.C.C. (3d) 1; *British Columbia (Director of Child, Family and Community Service) v. L. (T.)*, 2009 BCPC 293, 73 R.F.L. (6th) 455, aff'd 2010 BCSC 105 (CanLII)).

[5] The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. Although *Slaight* did not — and does not — offer any direct guidance on what constitutes a "court of competent jurisdiction", its legacy was in its conclusion that any exercise of statutory discretion is subject to the *Charter* and its values (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 875; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 53-56; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paras. 38-40; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 22; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383, at paras. 20-24).

[6] The third and final wave started in 1990 with *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, followed in 1991 by *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. The legacy of these cases — the *Cuddy Chicks* trilogy — is in their conclusion that specialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates (*Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223; *Okwuobi v. Lester B. Pearson School Board;* 2005 SCC 16, [2005] 1 S.C.R. 257).

[7] The impact of these three jurisprudential waves has been to confine constitutional issues for administrative tribunals to three discrete universes. It seems to me that after 25 years of parallel evolution, it is time to consider whether the universes can appropriately be merged.

Background

[8] Paul Conway is 56 years old. As a child, he was physically and sexually abused by close relatives. During his twenties, Mr. Conway was twice convicted of assault.

[9] In September 1983, at the age of 29, Mr. Conway threatened his aunt at knife point and forced her to have sexual intercourse with him repeatedly over the course of a few hours. On February 27, 1984, Mr. Conway was found not guilty by reason of insanity on a charge of sexual assault with a weapon.

[10] Since the verdict, Mr. Conway has been detained in mental health facilities across Ontario, primarily the Penetanguishene Mental Health Centre's maximum security unit. He has been diagnosed with an unspecified psychotic disorder, a mixed personality disorder with paranoid, borderline and narcissistic features, potential post traumatic stress disorder and potential paraphilia.

[11] In 2005, following Mr. Conway's mandatory annual review hearing before the Ontario Review Board, the Board transferred Mr. Conway from Penetanguishene to Toronto's Centre for Addiction and Mental Health ("CAMH"), a medium security facility. The Board observed that although Mr. Conway was "unconvinced that he suffers from a mental illness" and was "uncured", his treatment required that he have hope of eventually being integrated into the community.

[12] Prior to his annual review hearing in 2006, Mr. Conway sent a Notice of Constitutional Question to the Board, CAMH, and the Attorneys General of Ontario and Canada, alleging breaches of ss. 2(*b*), 2(*d*), 7, 8, 9, 12 and 15(1) of the *Charter*. He listed the following grounds as the basis of the claim that his constitutional rights had been violated and that he was therefore entitled to an absolute discharge under s. 24(1):

> Mr. Conway states that there is little regard for the living conditions under which he is detained a these factors have a negative impact on his mental and physical health. These conditions include:
>
> a. Construction noise, fumes and dust associated with the renovation of the unit directly below him w peace, tranquillity and convalescence;
> b. Failure to respect his rights, individuality, and expressions of same;
> c. Interruptions by staff of his telephone calls and unnecessary and improper implementation of c including when he is speaking with legal counsel;
> d. Unfair treatment by staff which manifests in differential treatment towards him compared wi accused individuals detained on the unit; and
> e. Failure to provide for his needs and advocacy for his expressed needs;
>
> . . .
>
> Mr. Conway is currently incarcerated and is subject to infringements on his liberty, safety, dign security of his person without due process of the law, including:
>
> a) environmental pollution;
> b) noise pollution;
> c) arbitrary actions by staff;
> d) threats of attack and attacks by inpatients;
> e) hostility by staff against him;
> f) threats of the use of chemical and mechanical restraints;
> g) failure to provide emotional counselling for the abuse suffered by Mr. Conway as a child (including physical, sexual and domestic abuse) which is the real source of Mr. Conway's mental health pr emotional distress;
> h) failure to provide an environment which allows him to feel safe on a daily basis;
> i) failure to provide an environment where the Rule of Law prevails;
> j) failure to provide an environment where Mr. Conway is afforded procedural fairness in resp restriction of his liberties;
> k) failure to provide an environment which is free of racism;
> l) failure to provide [an] environment which is cross-culturally sensitive; and
> m) such other and further infringements and violations as counsel may advise and the Board may perm
>
> These violations on Mr. Conway's rights have affected Mr. Conway such that he no longer can therapeutically from the environment.

[13] After an eight-day hearing, the five-member panel of the Ontario Review Board unanimously concluded that Mr. Conway was "an egocentric, impulsive bully with a poor to absent ability to control his own behaviour", had continued paranoid and delusional ideation, and had a persistent habit of threatening and intimidating others, high actuarial scores for violent recidivism and an untreated clinical condition.

[14] He was consequently found to be a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute discharge under the statute, which states that an absolute discharge is unavailable to any patient who is a "significant threat to the safety of the public" (*Criminal Code*, R.S.C. 1985, c. C-46, s. 672.54). Accordingly, Mr. Conway was ordered to remain at CAMH. The Board suggested, but did not formally order, that CAMH establish a "renewed

treating team" for Mr. Conway, enrol him in anger management and sexual assault prevention programs, and investigate whether he had sustained brain damage in a car accident more than 30 years ago.

[15] As for Mr. Conway's application for a remedy under s. 24(1) of the *Charter*, the Board concluded that it had no *Charter* jurisdiction in light of its statutory structure and function, its own past rulings, and those of other Canadian review boards denying s. 24(1) jurisdiction. It therefore had no jurisdiction to consider Mr. Conway's *Charter* claims.

[16] Mr. Conway appealed to the Ontario Court of Appeal, which unanimously found that an absolute discharge was not an available remedy for Mr. Conway under s. 24(1) (2008 ONCA 326, 90 O.R. (3d) 335). Armstrong J.A. for the majority concluded that the Board lacked jurisdiction to grant an absolute discharge as a *Charter* remedy because granting such a remedy to a patient who, like Mr. Conway, was a significant threat to the public, would frustrate Parliamentary intent. The Board was therefore not a court of competent jurisdiction pursuant to the test set out in *Mills* since it lacked jurisdiction over the particular remedy sought. Lang J.A. agreed that an absolute discharge was unavailable to Mr. Conway, but she was of the view that the Board was competent to make other orders that would be appropriate remedies for a breach of a patient's *Charter* rights.

[17] Notably, the Court of Appeal also unanimously concluded that it was unreasonable for the Board not to make a formal order setting out conditions addressing the treatment impasse plaguing Mr. Conway's detention. This issue was remitted back to the Board.

[18] This Court, in order to decide whether Mr. Conway is entitled to the *Charter* remedies he is seeking, must first determine whether the Ontario Review Board is a court of competent jurisdiction which can grant *Charter* remedies under s. 24(1). In accordance with the new approach developed in these reasons, I am of the view that it is. On the other hand, I am not persuaded that Mr. Conway is entitled to the particular *Charter* remedies he seeks and would therefore dismiss the appeal.

Analysis

[19] Section 24(1) states:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may a a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just circumstances.

[20] We do not have one *Charter* for the courts and another for administrative tribunals (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, *per* McLachlin J. (in dissent), at para. 70; *Dunedin*; *Douglas College*; *Martin*). This truism is reflected in this Court's recognition that the principles governing remedial jurisdiction under the *Charter* apply to both courts *and* administrative tribunals. It is also reflected in the jurisprudence flowing from *Mills* and the *Cuddy Chicks* trilogy according to which, with rare exceptions, administrative tribunals with the authority to apply the law have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions.

[21] The jurisprudential evolution has resulted in this Court's acceptance not only of the proposition that expert tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction, but also that in exercising their statutory discretion, they must comply with the *Charter*.

[22] All of these developments serve to cement the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. In light of this evolution, it seems to me to be no longer helpful to limit the inquiry to whether a court or tribunal is a court of competent jurisdiction only for the purposes of a particular remedy. The question instead should be institutional: does this particular tribunal have the jurisdiction to grant *Charter* remedies generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If it does, and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate (*Cuddy Chicks* trilogy; *Martin*). A tribunal which has the jurisdiction to grant *Charter* remedies is a court of competent jurisdiction. The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought based on its statutory mandate. The answer to this question will depend on legislative intent, as discerned from the tribunal's statutory mandate (the *Mills* cases).

[23] This approach has the benefit of attributing *Charter* jurisdiction to the tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether it is a court of competent jurisdiction. It is also an approach which emerges from a review of the three distinct constitutional streams flowing from this Court's jurisprudence. As the following review shows, this Court has gradually expanded the approach to the scope of the *Charter* and its relationship with administrative tribunals. These reasons are an attempt to consolidate the results of that expansion.

The Mills Cases

[24] In *Mills*, it was decided that relief is available under s. 24(1) of the *Charter* if the "court" from which relief is sought has jurisdiction over the parties, the subject matter and the remedy sought. Since 1986, the *Mills* test has been consistently applied to determine whether courts and tribunals acting under specific statutory schemes are courts of competent jurisdiction to grant particular remedies under s. 24(1).

[25] The early cases considered the remedial jurisdiction of statutory and superior courts. In *Mills* and *Carter*, this Court held that a provincial court judge sitting as a preliminary inquiry court was not a court of competent jurisdiction for the purpose of ordering a stay of proceedings for an alleged s. 11(*b*) violation. The following year, this Court concluded that extradition judges had the same institutional features as preliminary inquiry judges, and could therefore not order a stay in the event of a *Charter* breach (*Mellino*; *Allard*). Further, in *Mellino*, the Court observed that since extradition proceedings were reviewable by superior courts by way of *habeas corpus*, those superior courts were the courts of competent jurisdiction to grant a stay under s. 24(1), not the extradition judge.

[26] In 1988, in *Gamble*, the Court held that a superior court in the province where an individual is in custody is a court of competent jurisdiction to hear an application for *habeas corpus*, stating:

> Where the courts of Ontario have jurisdiction over the subject matter and the person, it seems to me th may, under the broad provisions of s. 24(1) of the *Charter*, grant such relief as it is within their jurisdic grant and as they consider appropriate and just in the circumstances. [p. 631]

[27] In 1995, in *Weber*, the Court expanded the scope of the *Mills* inquiry to cover administrative tribunals. The issue was whether a labour arbitrator appointed under the *Labour Relations Act*, R.S.O. 1990, c. L.2, was a court of competent jurisdiction for the purpose of granting damages and a declaration under s. 24(1) in relation to disputes which in their essential character arose out of the collective agreement between the parties. Weber had sought relief for what he alleged were breaches of ss. 7 and 8 of the *Charter* committed by his employer, Ontario Hydro, who had gathered surveillance evidence about him during his extended sick leave. The Court had to determine whether Weber was required to raise his *Charter* claims before a labour arbitrator or before the superior court.

[28] For the majority, McLachlin J. rejected an approach that would bifurcate the proceedings between the arbitrator and the courts. In her view, the "essential character" of Weber's claim was unfair treatment by the employer. The collective agreement expressly stated that the grievance procedure applied to "[a]ny allegation that an employee has been subjected to unfair treatment". Weber's *Charter* claims were therefore found to be within the arbitrator's exclusive jurisdiction:

> [W]hile the informal processes of such tribunals might not be entirely suited to dealing with constitutional clear advantages to the practice exist. Citizens are permitted to assert their *Charter* rights in a p inexpensive, informal way. The parties are not required to duplicate submissions on the case in two d fora, for determination of two different legal issues. A specialized tribunal can quickly sift the facts and c a record for the reviewing court. And the specialized competence of the tribunal may provide assistance reviewing court.
>
> . . .
>
> . . . it is not the name of the tribunal that determines the matter, but its powers. . . . The practical import of *Charter* remedies into the existing system of tribunals, as McIntyre J. notes, [*in Mills*] is that litigant "direct" access to *Charter* remedies in the tribunal charged with deciding their case. [paras. 60 and 65]

[29] Foreshadowing the debate that is before us in this case, Iacobucci J. in dissent, expressed the view that the arbitrator was neither a "court" nor of "competent jurisdiction" for the purpose of granting *Charter* remedies under s. 24(1). In his view, Weber was entitled to seek labour remedies from the arbitrator, but not those under the *Charter*.

[30] The *Weber* "exclusive jurisdiction model" enunciated by McLachlin J., which directed that an administrative tribunal should decide *all* matters whose essential character falls within the tribunal's specialized statutory jurisdiction, is now a well-established principle of administrative law (*Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Québec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185; *Québec (Human Rights Tribunal)*; *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146; *Okwuobi*; Andrew K. Lokan and Christopher M. Dassios, *Constitutional Litigation in Canada* (2006), at p. 4-15).

[31] The next year, this Court decided *Mooring*. The issue was whether the National Parole Board was a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the *Charter*. Sopinka J., writing for the majority, considered only the third step of the *Mills* test since he found it to be determinative. In his view, it followed from the Parole Board's structure and function, as well as the language of its enabling statute, that the Board could not exclude evidence under s. 24(2) of the *Charter*. Pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, the Board was not bound by the traditional rules of evidence and was obliged to consider all available, relevant information when rendering its decisions. The ability to exclude evidence would have been, in Sopinka J.'s view, inconsistent with the intent and specific provisions of the Parole Board's statutory scheme. Since the *Mills* test was ultimately a means of discerning Parliamentary intent, this inconsistency precluded the Board from being a court of competent jurisdiction for the purpose of granting the particular remedy sought. Sopinka J. concluded instead that the Parole Board's "duty of fairness" obligations offered sufficient protection to those appearing before the Board.

[32] Major J. (McLachlin J. concurring), in a vigorous dissent, criticized the majority's implicit resurrection of the idea, rejected in *Weber*, that only courts could be "courts of competent jurisdiction" for the purpose of s. 24(1). Major J. was of the view that the policy considerations animating the Court's reasoning under s. 52 in the *Cuddy Chicks* trilogy applied equally in cases arising under s. 24(1). He felt that "[o]f primary

importance is the ability of the citizen to rely upon and assert *Charter* rights in a direct manner in the normal procedural context in which the issue arises" (para. 61). As he explained:

> There is no reason in principle why any of the practical advantages enunciated by La Forest J. in the should apply with any less force to a tribunal granting a remedy under s. 24 than to a tribunal declining to a constitutionally invalid statutory provision. If anything, tailoring a specific *Charter* remedy for a s applicant before a tribunal is more suited to a tribunal's special role in determining rights on a case by cas in the tribunal's area of expertise. It has less serious ramifications than determining that a statutory provisi not be applied on *Charter* grounds. [para. 64]

[33] Turning to the *Mills* test, Major J. concluded that the only real question before the Court was whether the Parole Board was a court of competent jurisdiction for the purpose of awarding the specific remedy sought by the applicant, namely the exclusion of evidence. While the Parole Board was not bound by formal rules of evidence, it was nonetheless obliged to exclude information that was irrelevant, unreliable or inaccurate. Accordingly, the Board had the jurisdiction to exclude evidence and it therefore met the third *Mills* criterion. Major J. expressly disagreed with Sopinka J.'s conclusion that the doctrine of procedural fairness provided sufficient protection of constitutional rights in the context of the Board's proceedings.

[34] More recently, the Court has had two further opportunities to consider the *Mills* test. In *Dunedin*, the issue was whether a provincial court judge with jurisdiction under Ontario's *Provincial Offences Act*, R.S.O. 1990, c. P.33, was a court of competent jurisdiction for the purpose of ordering costs against the Crown for failure to comply with the *Charter*. McLachlin C.J., writing for a unanimous Court, again confirmed that applying the *Mills* test is, first and foremost, a matter of discerning legislative intent. The question in each case is whether the legislature intended to give the court or tribunal the power to apply the *Charter*:

> [W]here a legislature confers on a court or tribunal a function that involves the determination of matters *Charter* rights may be affected, and furnishes it with processes and powers capable of fairly and justly re those incidental *Charter* issues, then it must be inferred, in the absence of a contrary intention, that the leg intended to empower the tribunal to apply the *Charter*. [para. 75]

[35] This approach "promotes direct and early access to *Charter* remedies in forums competent to issue such relief" (para. 75). Applying it to the issue before her, McLachlin C.J. concluded that both the structure and function of the provincial offences court supported the view that it could and should apply the *Charter*. Looking first to function, McLachlin C.J. concluded that the provincial offences court's role as a quasi-criminal court of first instance weighed strongly in favour of expansive remedial jurisdiction under s. 24 of the *Charter*. Such jurisdiction would promote the resolution of *Charter* issues in the forum best situated to resolve them:

> Provincial offences courts, like other criminal trial courts, are the preferred forum for issuing *Charter* reme the cases originating before them, where they will have the 'fullest account of the facts available'. . . .Tl commends a full complement of criminal law remedies at the disposal of provincial offences courts. Thi remedial jurisdiction is necessary to prevent frequent resort to superior courts to fill gaps in statutory juris and to ensure that the remedy that ultimately flows is in fact both appropriate and just. [para. 79]

[36] McLachlin C.J. also sought, as she had in *Weber*, to avoid the unnecessary bifurcation of avenues of relief:

> [F]racturing the availability of *Charter* remedies between provincial offences courts and superior courts c some circumstances, effectively deny the accused access to a remedy and a court of competent jurisdict may be unrealistic to expect criminal accused, who often rely on legal aid to mount a defence against the s

> bring a separate action in the provincial superior court to recover the costs arising from the breach c *Charter* rights. This option, while available in theory, may far too often prove illusory in practice. [para. 8

[37] McLachlin C.J. then considered the structure of the provincial offences court. She concluded that since criminal and quasi-criminal proceedings are structurally indistinguishable, the criminal courts' jurisdiction to grant costs in the event of a *Charter* breach extends to the quasi-criminal courts. The *Provincial Offences Act* disclosed no contrary intention. McLachlin C.J. ultimately concluded that since the legislature gave the provincial offences court functions destined to attract *Charter* issues and *Charter* remedies, the legislature must have intended that it be able to deal with related *Charter* issues.

[38] In the companion case of *Hynes*, the issue was whether a preliminary inquiry court was a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the *Charter*. Again, only the third step of the *Mills* test was considered, and again the tension on display in *Weber* and *Mooring* was exhibited. McLachlin C.J., for the majority, reiterated the principles set out in *Dunedin* and explained that in all cases the question is

> whether Parliament or the legislature intended to empower the court or tribunal to make rulings on (violations that arise incidentally to their proceedings, and to grant the remedy sought as a remedy fc violations. [para. 26]

She went on to conclude that a preliminary inquiry court was not a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2). A preliminary inquiry's primary function was, in her view, to determine whether the Crown has sufficient evidence to warrant committing the accused to trial. Empowering a preliminary inquiry judge to exclude evidence under the *Charter* would jeopardize the inquiry's expeditious nature. The criminal trial courts were better suited to the task of determining whether to exclude evidence.

[39] Major J., writing in dissent for four judges, agreed that only the third step of the *Mills* test was at issue but disagreed with the majority as to the result. He noted that preliminary inquiry judges were authorized to exclude evidence under the common law confessions rule. It was not, therefore, supportable by "logic or efficiency to permit a preliminary inquiry justice to determine the admissibility of statements for common law purposes, but not for *Charter* purposes, when it is recognized that preliminary inquiry justices are armed with all the facts. Parliament could not have intended such waste" (para. 96). Accordingly, in his view, a preliminary inquiry judge was competent to exclude evidence under s. 24(2).

[40] This review of *Mills*' progeny gives rise to three observations. First, this Court has accepted that the *Mills* test applies to courts as well as to administrative tribunals. Second, although *Mills* set out a three-pronged definition of "court of competent jurisdiction", the first two steps have almost never been relied on. Twenty-five years later, "jurisdiction over the parties" and "jurisdiction over the subject matter" remain undefined for the purposes of the test. The inquiry has almost always turned on whether the court or tribunal had jurisdiction to award the *particular* remedy sought under s. 24(1). In other words, the inquiry is less into whether the adjudicative body is institutionally a court of competent jurisdiction, and more into whether it is a court of competent jurisdiction *for the purposes of granting a particular remedy*. Third, while there appears to be agreement that s. 24(1) jurisdiction is a function of legislative intent, the authoritative comments of the majorities in *Weber* and *Dunedin* eschewing bifurcated proceedings and heralding early and accessible adjudication of *Charter* applications, may have been slightly unmoored by the majority in *Mooring*.

The Slaight cases

[41] The cases flowing from *Slaight*, while of no direct assistance on what constitutes a court of competent jurisdiction, are of interest as they too show how the Court increasingly came to expand the

application of the *Charter* in the administrative sphere. In 1989, *Slaight* established that any exercise of statutory discretion must comply with the *Charter* and its values. The issue was whether an adjudicator appointed under the *Canada Labour Code*, R.S.C. 1970, c. L-1, had the authority to order an employer to write a content-restricted reference letter for an employee and to limit the employer's response to any inquiries about the employee to the comments in the letter. The employer argued that such an order violated s. 2(*b*) of the *Charter*. This Court agreed that the employer's s. 2(*b*) rights were violated, but a majority concluded that the arbitrator's order was justified under s. 1 of the *Charter*.

[42] Lamer J. explained that it was "not . . . open to question" that the adjudicator's orders were subject to the *Charter*:

> The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsiste its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret leg conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is ex conferred or necessarily implied. . . . Legislation conferring an imprecise discretion must therefore be inte as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powe not have the power to make an order that would result in an infringement of the *Charter*, and he exce jurisdiction if he does so. [Emphasis in original; pp. 1077-78.]

[43] *Slaight* was applied in 1994 in *Dagenais*, where Lamer C.J. (for the majority on this issue) said that a judge's discretion to order a publication ban was subject to the *Slaight* principle. He concluded that the judge's discretion could not be open-ended or exercised arbitrarily, and had to be "exercised within the boundaries set by the principles of the *Charter*" (p. 875). Exceeding those boundaries would result in a reversible error of law (see also *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, and *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188).

[44] In the 1997 case of *Eaton*, the Ontario Special Education Tribunal, acting pursuant to the *Education Act*, R.S.O. 1990, c. E.2, had ordered that Emily Eaton, a child with cerebral palsy, be placed in a special classroom for students with disabilities. The Eatons alleged discrimination, arguing that their daughter's education should take place in the mainstream schools. Lamer C.J. wrote brief reasons to clarify what he had said in *Slaight*:

> [S]tatutory silences should be read down to not authorize breaches of the *Charter*, unless this cannot b because such an authorization arises by necessary implication. I developed this principle in the con administrative tribunals which operate pursuant to broad grants of statutory powers, and which can pot violate *Charter* rights. Whatever section of the Act or of Regulation 305, R.R.O. 1990, grants the authorit Tribunal to place students like Emily Eaton . . . *Slaight Communications* would require that any open language in that provision (if there were any) be interpreted so as to not authorize breaches of the *Charter* 3]

[45] In the 1997 case of *Eldridge*, the Court was asked to assess the constitutionality of certain aspects of British Columbia's health care delivery scheme. The issue was whether the *Charter* applied to the Medical Services Commission's decision not to provide sign language interpreters for the deaf as part of a publicly funded scheme for the provision of medical care. La Forest J., writing for a unanimous Court, said that the basic principle derived from *Slaight* was that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so (para. 35). The provincial government had delegated to the Medical Services Commission the power to decide whether a service was a "benefit" under the *Medical and Health Care Services Act*, S.B.C. 1992, c. 76, and to define what constitutes a "medically required" service for the purpose of the provincial health insurance program. When exercising this discretion, the Commission was acting in a governmental capacity and was therefore subject to the *Charter*.

[46] In 1999, the Court decided *Baker*, a judicial review of the exercise of statutory discretion by an immigration officer pursuant to the *Immigration Act*, R.S.C. 1985, c. I-2. L'Heureux-Dubé J., relying on *Slaight* and *Roncarelli v. Duplessis*, [1959] S.C.R. 121 among others, concluded that statutory discretion must be exercised in accordance with the boundaries imposed by the statute, the principles of the rule of law and of administrative law, the fundamental values of Canadian society, and the principles of the *Charter* (paras. 53 and 56).

[47] The following year, in *Blencoe*, the Court was asked to determine whether the provincial Human Rights Commission was subject to the *Charter*. Bastarache J., writing for the majority, explained that *Slaight* guaranteed that statutory bodies like the Commission are bound by the *Charter* even if they are independent of the government and/or exercising adjudicatory functions:

> The facts in *Slaight* and the case at bar share at least one salient feature: the labour arbitrator (in *Slaig* the Commission (in the case at bar) each exercise governmental powers conferred upon them by a leg body. The ultimate source of authority in each of these cases is government. All of the Commission's are derived from the statute. The Commission is carrying out the legislative scheme of the *Human Rights* It is putting into place a government program or a specific statutory scheme established by governn implement government policy. . . . The Commission must act within the limits of its enabling statute. T clearly a "governmental quality" to the functions of a human rights commission which is created by gove to promote equality in society generally.
>
> Thus, notwithstanding that the Commission may have adjudicatory characteristics, it is a statutory c and its actions fall under the authority of the *Human Rights Code*. The state has instituted an admini: structure, through a legislative scheme, to effectuate a governmental program to provide redress discrimination. It is the administration of a governmental program that calls for *Charter* scrutiny. (complaint is brought before the Commission, the subsequent administrative proceedings must comply w *Charter*. These entities are subject to *Charter* scrutiny in the performance of their functions just as gove would be in like circumstances. To hold otherwise would allow the legislative branch to circumvent the (by establishing statutory bodies that are immune to *Charter* scrutiny. The above analysis leads inexorably conclusion that the *Charter* applies to the actions of the Commission. [paras. 39-40]

The majority ultimately concluded that Blencoe's *Charter* rights had not been infringed.

[48] Finally, in 2006, in *Multani*, the Court considered whether a decision of a school board's council of commissioners prohibiting one of its students from wearing a kirpan at school infringed the student's freedom of religion. Charron J., writing for the majority and relying on *Slaight*, explained:

> The council is a creature of statute and derives all its powers from statute. Since the legislature ca statute that infringes the *Canadian Charter*, it cannot, through enabling legislation, do the sam delegating a power to act to an administrative decision maker. [para. 22]

The Cuddy Chicks Trilogy

[49] While the courts and tribunals were preoccupied with the proper application of the principles in *Mills* and *Slaight*, another line of authority regarding the constitutional jurisdiction of statutory tribunals was emerging. These cases dealt with whether administrative tribunals could decide the constitutionality of the provisions of their own statutory schemes and decline to apply them because they are "of no force or effect" under s. 52(1) of the *Constitution Act, 1982*. The first case was *Douglas College*, in which two Douglas College employees challenged the mandatory retirement provision in their collective agreement, claiming that it was contrary to s. 15(1) of the *Charter*. The primary issue was whether a labour arbitrator, governed by the *Industrial Relations Act*, R.S.B.C. 1979, c. 212, and appointed under the parties' collective agreement, had the jurisdiction to determine the collective agreement's constitutionality.

[50] La Forest J., writing for the Court on this issue, concluded that the jurisdiction lay with the arbitrator. Under the *Industrial Relations Act*, the arbitrator had express authority to "provide a final and conclusive settlement of a dispute". To fulfill this mandate, arbitrators acting under the Act could interpret and apply any statute that regulated employment. This included the *Charter*. La Forest J. noted that arbitrators were bound by the same Constitution as the courts. Accordingly, if a collective agreement was illegal or unconstitutional, an arbitrator must decline to apply it just as a court would.

[51] La Forest J. rejected the College's argument that the informal arbitration process was unsuited to litigating a *Charter* issue, concluding that any disadvantages of allowing administrative tribunals to decide constitutional questions were outweighed by the "clear advantages" of granting them this jurisdiction. In his view, such jurisdiction promotes respect for the Constitution because "[t]he citizen, when appearing before decision-making bodies set up to determine his or her rights and duties, should be entitled to assert the rights and freedoms guaranteed by the Constitution" (p. 604). Constitutional issues should be raised at an early stage in the context in which they arise, without the claimant having to first resort to an application in superior court, which is more expensive and time-consuming than the administrative process. In addition, a "specialized competence can be of invaluable assistance in constitutional interpretation" (p. 605). Specialized arbitrators and agencies can sift through the facts and quickly compile a record for the benefit of a reviewing court. In this way, the parties (and the reviewing courts) benefit from the arbitrators' expertise. This practice also allows for all related aspects of a matter to be dealt with by the most appropriate decision maker. As La Forest J. pointed out, "it would be anomalous if tribunals responsible for interpreting the law on the issue were unable to deal with the issue in its entirety, subject to judicial review" (p. 599).

[52] In 1991, *Cuddy Chicks* established that the Ontario Labour Relations Board could determine the constitutionality of a provision which excluded agricultural workers from the protections of Ontario's *Labour Relations Act*, R.S.O. 1980, c. 228. The issue arose out of an application by the union for the certification of Cuddy Chicks' hatchery employees. The union challenged the constitutional validity of this exclusion, arguing that it violated ss. 2(*d*) and 15 of the *Charter*, and sought to have it declared to be of no force and effect pursuant to s. 52(1).

[53] In rejecting the employer's argument that the superior court, not the Labour Board, should deal with the constitutional question, and drawing on his reasons in *Douglas College*, La Forest J.'s "overarching consideration" was that where administrative bodies like the Labour Board have specialized expertise, that expertise makes them the appropriate forum for assessing *Charter* compliance:

> It is apparent, then, that an expert tribunal of the calibre of the Board can bring its specialized expe bear in a very functional and productive way in the determination of *Charter* issues which make demands c expertise. In the present case, the experience of the Board is highly relevant to the *Charter* challeng enabling statute, particularly at the s. 1 stage where policy concerns prevail. At the end of the day, th process will be better served where the Board makes an initial determination of the jurisdictional issue from a constitutional challenge. In such circumstances, the Board not only has the authority but a c ascertain the constitutional validity of s. 2(*b*) of the *Labour Relations Act*. [Emphasis added; p. 18.]

[54] After citing a number of cases in which labour boards were found to have the jurisdiction to consider constitutional questions relating to their own jurisdiction, such as *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, La Forest J. observed:

> What these cases speak to is not only the fundamental nature of the Constitution, but also th competence of labour boards and the value of their expertise at the initial stages of complex constit deliberations. These practical considerations have compelled the courts to recognize a power, albeit a ca

limited one, in labour tribunals to deal with constitutional issues involving their own jurisdiction. considerations are as compelling in the case of *Charter* challenges to a tribunal's enabling statute. There extend this "limited but important role" of labour boards to the realm of the *Charter* is simply a progression of a well established principle. [Emphasis added; p.19.]

[55] La Forest J. ultimately concluded that it was within the Board's jurisdiction to consider the constitutionality of its enabling statute since it had the express authority to consider questions of law under the statute.

[56] In *Tétreault-Gadoury*, Ms. Tétreault-Gadoury lost her job shortly after her 65th birthday and applied for unemployment insurance benefits. The Employment and Immigration Commission denied her application because, under s. 31 of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, a person over 65 was only entitled to a lump sum retirement benefit. Ms. Tétreault-Gadoury appealed the Commission's decision to a Board of Referees, arguing that s. 31 of the Act offended s. 15(1) of the *Charter*. The Board declined to rule on the constitutional question. Rather than appeal to an umpire as directed by the Act, Ms. Tétreault-Gadoury appealed to the Federal Court of Appeal, which concluded that s. 31 of the *Unemployment Insurance Act, 1971* was contrary to s. 15 of the *Charter*.

[57] On appeal, La Forest J., again writing for the Court on the jurisdictional issue, reiterated the principle that an administrative tribunal with the authority to interpret or apply the law is entitled to determine whether a particular statutory provision is unconstitutional. The *Unemployment Insurance Act, 1971* expressly conferred the jurisdiction to consider questions of law on the umpires, not the Board of Referees. This meant that under the legislative scheme, umpires, not the Referees, were authorized to resolve constitutional issues .

[58] In 1996, the constitutional jurisdiction of another statutory body — the Canadian Human Rights Commission — came under scrutiny in *Cooper*. Two airline pilots filed a human rights complaint with the Commission alleging that the mandatory retirement provision in their collective agreement was discriminatory. Section 15(*c*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, permitted the imposition of mandatory retirement if the age set was the "normal age of retirement for employees . . . in [similar] positions". The complainants challenged the constitutionality of s. 15(*c*). The issue before the Court was whether the Commission and, in turn, a tribunal appointed by the Commission to hear a complaint, had the power to assess the constitutionality of a provision of the *Canadian Human Rights Act*.

[59] *Cooper*, decided in the same year as *Mooring*, highlighted the conceptual debate in this Court as to the constitutional jurisdiction of administrative tribunals. La Forest J., writing for the majority, again confirmed that if a tribunal has the power to consider questions of law, then it "must be able to address constitutional issues" (para. 46). The Commission, however, lacked statutory authority to decide questions of law. While it was entitled to interpret and apply its enabling statute, this limited legal jurisdiction was insufficient to establish that the Commission could consider general questions of law.

[60] La Forest J. reached the same conclusion with respect to a human rights tribunal. While a tribunal could consider general legal and constitutional questions, "logic" demanded that it lacked the ability to assess the constitutionality of the *Canadian Human Rights Act* (para. 66). The tribunals lacked expertise; any gain in efficiency would be lost through the inevitable judicial review of a tribunal's constitutional determinations; the tribunals' loose evidentiary rules were unsuited to constitutional litigation; and constitutional matters would bog down the human rights system, which was intended to provide for efficient and timely adjudication of complaints.

[61] Lamer C.J. concurred with La Forest J., but wrote separate reasons urging the Court to abandon the principles set out in the *Cuddy Chicks* trilogy. In his view, the principles enunciated in those cases were contrary to the separation of powers and Parliamentary democracy, two fundamental principles of the Canadian Constitution.

[62] In dissent, McLachlin J. (L'Heureux-Dubé J. concurring) concluded that both the Human Rights Commission and a human rights tribunal were empowered to assess the constitutionality of the *Canadian Human Rights Act*. This result, according to McLachlin J., "best achieves the economical and effective resolution of human rights disputes and best serves the values entrenched in the *Canadian Human Rights Act* and the *Charter*" (para. 73). Like La Forest J., McLachlin J. reinforced the view expressed in the trilogy that "administrative tribunals empowered to decide questions of law may consider *Charter* questions" (para. 81), and once again confirmed that in light of the doctrine of constitutional supremacy,

> [c]itizens have the same right to expect that [the *Charter*] will be followed and applied by the administrati of government as by legislators, bureaucrats and the police. If the state sets up an institution to exercise over people, then the people may properly expect that that institution will apply the *Charter*. [para. 78]

In her view, both the Commission and the tribunals could consider whether the *Charter* renders invalid the "'normal age of retirement' defence", since both bodies were empowered to decide questions of law.

[63] In *Martin*, in 2003, the Court sought to resolve the debate over the *Charter* jurisdiction of tribunals. The issue was whether s. 10B of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, and the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96, which precluded individuals suffering from chronic pain from receiving workers' compensation benefits, were contrary to s. 15(1) of the *Charter*. As a threshold issue, it was necessary to decide whether the Nova Scotia Workers' Compensation Appeals Tribunal had the jurisdiction to consider whether the benefits provisions of its enabling statute were constitutional.

[64] Gonthier J., writing for a unanimous Court, expressly rejected the 1996 *ratio* in *Cooper*, particularly insofar as it distinguished between limited and general questions of law and insofar as it suggested that an adjudicative function was a prerequisite for a tribunal's constitutional jurisdiction. He also expressly rejected Lamer C.J.'s contention that the *Cuddy Chicks* trilogy was inconsistent with the separation of powers and Parliamentary democracy.

[65] Instead, Gonthier J. affirmed and synthesized the main principles emerging from the trilogy. The first was the principle of constitutional supremacy, which provides that any law that is inconsistent with the Constitution is, to the extent of the inconsistency, of no force and effect. No government actor can apply an unconstitutional law, he observed, and, subject to an express contrary intention, a government agency given statutory authority to consider questions of law is presumed to have the jurisdiction to assess related constitutional questions.

[66] As a further corollary, Gonthier J. echoed the views expressed over the years by McLachlin J., Major J., La Forest J., and McIntyre J. confirming that "Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts". Explaining that this "accessibility concern" was "particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling legislation", Gonthier J. concluded that "forcing litigants to refer *Charter* issues to the courts would result in costly and time-consuming bifurcation of proceedings" (para. 29).

[67] In his view, a tribunal's factual findings and the record it compiles when considering a constitutional question are of invaluable assistance in constitutional determinations. The tribunal provides the reviewing court with the most well-informed, expert view of the issues at stake:

> It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminati constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ab the decision maker to analyze competing policy concerns is critical. . . .The informed view of the Bo manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of inv assistance. [para. 30, citing *Cuddy Chicks*, at pp. 16-17]

[68] Based on these principles, Gonthier J. concluded that the following determines whether it is within an administrative tribunal's jurisdiction to subject a legislative provision to *Charter* scrutiny:

> · Under the tribunal's enabling statute, does the administrative tribunal have jurisdiction, explicit or imp decide questions of law arising under a legislative provision? If so, the tribunal is presumed to ha jurisdiction to determine the constitutional validity of that provision under the *Charter*.
> · Does the tribunal's enabling statute clearly demonstrate that the legislature intended to exclude the (from the tribunal's jurisdiction? If so, the presumption in favour of *Charter* jurisdiction is rebutted.

[69] Applying this approach, Gonthier J. noted that the Workers' Compensation Appeals Tribunal was explicitly authorized to "determine all questions of fact and law". Further, the Tribunal's decisions could be appealed "on any question of law". This confirmed that the Tribunal was entitled to decide legal questions which triggered the presumption that the Tribunal was authorized to decide *Charter* questions.

[70] The adjudicative nature of the Tribunal was also relevant. It was independent of the Workers' Compensation Board, could establish its own procedural rules, consider all relevant evidence, record any oral evidence for future reference, exercise powers under the *Public Inquiries Act*, R.S.N.S. 1989, c. 372, and extend time limits for decisions when necessary. In addition, its members had been called to the bar and the Attorney General could intervene in proceedings involving constitutional questions. In his view, therefore, even if the Tribunal had lacked express authority to decide questions of law, an implied grant of authority would have been found. The legislature clearly intended to create a comprehensive scheme for resolving workers' compensation disputes. Nothing in the *Workers' Compensation Act* rebutted the presumption.

[71] Moreover, allowing the Tribunal to apply the *Charter* furthered the policy objectives of allowing courts to "benefit from a full record established by a specialized tribunal fully apprised of the policy and practical issues relevant to the *Charter* claim". It also permitted workers to "have their *Charter* rights recognized within the relatively fast and inexpensive adjudicative scheme created by the Act" rather than having to pursue separate proceedings in the courts in addition to a compensation claim before the administrative tribunal (para. 56).

[72] Gonthier J. concluded that the Workers' Compensation Board too, like the Appeals Tribunal, had the jurisdiction to review the constitutional validity of its enabling statute, since both statutory bodies had the same authority to decide questions of law.

[73] *Martin* was released with *Paul v. British Columbia (Forest Appeals Commission)*. Paul was charged with a breach of s. 96 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, which was a general prohibition against cutting Crown timber. Paul conceded that he cut the prohibited timber, but asserted that as an aboriginal person, he had a right to do so under s. 35 of the *Constitution Act, 1982*. The issue on appeal was whether the provincial Forest Appeals Commission had the authority to entertain Paul's constitutional argument.

[74] Bastarache J., writing for the Court, applied the methodology in *Martin* to determine whether the Commission was authorized to consider and apply s. 35 of the *Constitution Act, 1982*. The issue therefore was whether the enabling statute either expressly or by implication granted the Commission the jurisdiction to interpret or decide questions of law.

[75] The *Forest Practices Code* stated that any party to a proceeding before the Commission could make submissions as to fact, law and jurisdiction and could appeal a Commission's decision on a question of law or jurisdiction. These provisions made it impossible to conclude that the Commission's mandate was limited to purely factual matters, and the Court accordingly concluded that the Forest Appeals Commission was empowered to decide questions of law, including whether s. 35 of the *Constitution Act, 1982* applied.

[76] In the case of *Okwuobi*, the issue was the jurisdiction of the Administrative Tribunal of Québec to hear rights claims for minority language education under the *Charter of the French Language*, R.S.Q., c. C-41, and the *Canadian Charter*. Based on *Martin* and *Paul*, the Court concluded:

> As will become clear, the fact that the ATQ is vested with the ability to decide questions of law is ‹ and is determinative of its jurisdiction to apply the *Canadian Charter* in this appeal. The quasi-judicial st of the ATQ, discussed briefly above, may be indicative of a legislative intention that constitutional quest considered and decided by the ATQ, but the structure of the ATQ is not determinative. This is evidenced recent decisions of this Court in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.I 2003 SCC 54, and *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 S [para. 28]

In *Okwuobi*, the Administrative Tribunal of Québec was found to have the jurisdiction to decide questions of law. The presumption in favour of constitutional jurisdiction was therefore triggered and was not rebutted.

[77] These cases confirm that administrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority — and duty — to consider and apply the Constitution, including the *Charter*, when answering those legal questions. As McLachlin J. observed in *Cooper*:

> [E]very tribunal charged with the duty of deciding issues of law has the concomitant power to do so. T that the question of law concerns the effect of the *Charter* does not change the matter. The *Charter* is nc holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the peop law and law-makers that touch the people must conform to it. Tribunals and commissions charged with d legal issues are no exception. Many more citizens have their rights determined by these tribunals than courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decis these tribunals. [para. 70]

The Merger

[78] The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly, they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a *Charter* remedy is sought to an inquiry asking whether it is "competent" to grant a particular remedy within the meaning of s. 24(1).

[79] Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals (*Douglas College*, at pp. 603-604; *Weber*, at para. 60; *Cooper*, at para. 70; *Martin*, at para. 29). The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in *Mills*, at p. 891. And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction (*Weber*; *Regina Police Assn.*; *Québec (Commission des droits de la personne et des droits de la jeunesse)*; *Québec (Human Rights Tribunal)*; *Vaughan*; *Okwuobi*. See also *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 49).

[80] If, as in the *Cuddy Chicks* trilogy, expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when a remedy is sought under s. 52 of the *Constitution Act, 1982*, there is no reason why such tribunals are not also in the best position to assess constitutional questions when a remedy is sought under s. 24(1) of the *Charter*. As McLachlin J. said in *Weber*, "[i]f an arbitrator can find a law violative of the *Charter*, it would seem he or she can determine whether conduct in the administration of the collective agreement violates the *Charter* and likewise grant remedies" (para. 61). I agree with the submission of both the Ontario Review Board and the British Columbia Review Board that in both types of cases, the analysis is the same.

[81] Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, 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 competent jurisdiction and can consider and apply the *Charter* — and *Charter* remedies — when resolving the matters properly before it .

[82] Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin*).

Application to this Case

[83] The question before the Court is whether the Ontario Review Board is authorized to provide certain remedies to Mr. Conway under s. 24(1) of the *Charter*. Before the Board, Mr. Conway sought an absolute discharge. At the hearing before this Court, and for the first time, he requested additional remedies dealing with his conditions of detention: an order directing CAMH to provide him with access to psychotherapy, and an order prohibiting CAMH from housing him near a construction site.

[84] The first inquiry is whether the Board is a court of competent jurisdiction. In my view, it is. The Board is a quasi-judicial body with significant authority over a vulnerable population. It is unquestionably authorized to decide questions of law. It was established by, and operates under, Part XX.1 of the *Criminal Code* as a specialized statutory tribunal with ongoing supervisory jurisdiction over the treatment, assessment, detention and discharge of those accused who have been found not criminally responsible by reason of mental disorder ("NCR patient"). Section 672.72(1) provides that any party may appeal a board's disposition on any

ground of appeal that raises a question of law, fact or mixed fact and law. Further, s. 672.78(1) authorizes an appellate court to allow an appeal against a review board's disposition where the court is of the opinion that the board's disposition was based on a wrong decision on a question of law. I agree with the conclusion of Lang J.A. and the submission of the British Columbia Review Board that, as in *Martin* and *Paul*, this language is indicative of the Board's power to decide legal questions. And there is nothing in Part XX.1 of the *Criminal Code* — the Board's statutory scheme — which permits us to conclude that Parliament intended to withdraw *Charter* jurisdiction from the scope of the Board's mandate. It follows that the Board is entitled to decide constitutional questions, including *Charter* questions, that arise in the course of its proceedings.

[85] The question for the Court to decide therefore 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.

[86] Part XX.1 of the *Criminal Code* was enacted after this Court struck down the traditional regime for dealing with mentally ill offenders as contrary to s. 7 of the *Charter* in *R. v. Swain*, [1991] 1 S.C.R. 933. The traditional system subjected offenders with mental illness to automatic and indefinite detention at the pleasure of the Lieutenant Governor in Council (*Criminal Code*, s. 614(2) (formerly s. 542.2(2)) (repealed S.C. 1991, c. 43, s. 3); *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625). Part XX.1 was designed to address the concerns raised in *Swain* and was intended to highlight that offenders with a mental illness must be "treated with the utmost dignity and afforded the utmost liberty compatible with [their] situation" (*Winko,* at para. 42; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498, at para. 22).

[87] Part XX.1 introduced a new verdict — "not criminally responsible on account of mental disorder" — into the traditional guilt/innocence dichotomy. This verdict is neither an acquittal nor a conviction; rather, it diverts offenders to a special stream that provides individualized assessment and treatment for those found to be a significant danger to the public (*Winko*, at para. 21; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 90; *Penetanguishene*, at para. 21). Those NCR patients who are not a significant danger to the public must be unconditionally released.

[88] The Ontario Board manages and supervises the assessment and treatment of each NCR patient in Ontario by holding annual hearings and making dispositions for each patient (ss. 672.38(1), 672.54, 672.81 (1) and 672.83(1); *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326, at para. 29). It is well established that the review board regime is intended to reconcile the "twin goals" of protecting the public from dangerous offenders, and treating NCR patients fairly and appropriately (*Winko*, at para. 20; House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, No. 7, 3rd Sess., 34th Parl., October 9, 1991, at p. 6). While public safety is the paramount concern, an NCR patient's liberty interest has been held to be the Board's "major preoccupation" within the fence posts staked by public safety (*Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528, at para. 19). The Board fulfills its "primary purpose" therefore by protecting the public while minimizing incursions on patients' liberty and treating patients fairly (*Mazzei*, at para. 32; *Winko*, at paras. 64-71; *Penetanguishene*, at para. 51).

[89] Section 672.54 of the *Criminal Code* sets out the remedial jurisdiction of review boards, stating:

> Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or (
> it shall, taking into consideration the need to protect the public from dangerous persons, the mental condi
> the accused, the reintegration of the accused into society and the other needs of the accused, make one
> following dispositions that is the least onerous and least restrictive to the accused:

(*a*) where a verdict of not criminally responsible on account of mental disorder has been rendered in res accused and, in the opinion of the court or Review Board, the accused is not a significant threat to tl the public, by order, direct that the accused be discharged absolutely;

(*b*) by order, direct that the accused be discharged subject to such conditions as the court or Review Boar appropriate; or

(*c*) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as t Review Board considers appropriate.

Accordingly, at a disposition hearing regarding an NCR patient, the Ontario Review Board is authorized to make one of three dispositions: an absolute discharge, a conditional discharge or a detention order. When making its disposition, the Board must consider the four statutory criteria: the need to protect the public from dangerous persons, the patient's mental condition, the reintegration of the patient into society and the patient's other needs.

[90] The Board has a "necessarily broad" discretion to consider a large range of evidence in order to fulfill this mandate (*Winko*, at para. 61). The Board's assessment of the evidence must "take place in an environment respectful of the NCR accused's constitutional rights, free from the negative stereotypes that have too often in the past prejudiced the mentally ill who come into contact with the justice system" (*Winko*, at para. 61). Upon considering the evidence, if the Board is not of the opinion that the patient is a significant threat to public safety, it must direct that the patient be discharged absolutely (s. 672.54(*a*); *Winko*, at para. 62). On the other hand, if the Board finds that the patient is, as in Mr. Conway's case, a significant threat to public safety, an absolute discharge is not statutorily available as a disposition (s. 672.54; *Winko*, at para. 62).

[91] A patient is not a significant threat to public safety unless he or she is a "real risk of physical or psychological harm to members of the public that is serious in the sense of going beyond the merely trivial or annoying" (*Winko*, at para. 62). The conduct giving rise to the harm must be criminal in nature (*Winko*, at paras. 57 and 62).

[92] Once a patient is absolutely discharged, he or she is no longer subject to the criminal justice system or to the Board's jurisdiction (*Mazzei*, at para. 34). However, pending an absolute discharge, NCR patients are subject to a detention or conditional discharge order. The Board is entitled to include appropriate conditions in its orders (s. 672.54(*b*) and (*c*)). The appropriateness of conditions is tied, at least in part, to the framework for making the least onerous and least restrictive disposition consistent with public safety, the patient's mental condition and other needs, and the patient's reintegration into the community (s. 672.54(*b*), (*c*); *Penetanguishene*, at paras. 51 and 56).

[93] The Board is not entitled to include any conditions that prescribe or impose treatment on an NCR patient (s. 672.55; *Mazzei*) and any conditions must withstand *Charter* scrutiny (*Slaight*). In addition, disposition orders, including any conditions, are subject to appeal. The Court of Appeal is entitled to allow an appeal against a disposition if it is unreasonable, cannot be supported by the evidence, is based on a wrong decision on a question of law, or gives rise to a miscarriage of justice (s. 672.78(1); *Owen*).

[94] Subject to these limits, the content of the conditions included in a disposition is at the Board's discretion. In this way, the Board has the statutory tools to supervise the treatment and detention of dangerous NCR patients in a responsive, *Charter*-compliant fashion and has a broad power to attach flexible, individualized, creative conditions to the discharge and detention orders it devises for dangerous NCR patients.

[95] The Board's task calls for "significant expertise" (*Owen*, at paras. 29-30) and the Board's membership, which sits in five-member panels comprised of the chairperson (a judge or a person qualified for or retired from appointment to the bench), a second legal member, a psychiatrist, a second psychiatrist or psychologist and one public member (ss. 672.39 and 672.4(1)), guarantees that the requisite experts perform the Board's challenging task (*Owen*, at para. 29; s. 672.39). Further, as almost one-quarter of NCR patients and accused found unfit to stand trial spend at least 10 years in the review board system, with some, like Mr. Conway, spending significantly longer (Jeff Latimer and Austin Lawrence, *Research Report — The Review Board Systems in Canada: Overview of Results from the Mentally Disordered Accused Data Collection Study* (Department of Justice Canada, January 2006, at p. v), review boards become intimately familiar with the patients under their supervision. In light of this expertise, the appellate courts are "not to be too quick to overturn" a review board's "expert opinion" on how best to manage a patient's risk to the public (*Owen*, at para. 69; *Winko*, at para. 61).

[96] Mr. Conway submits that, pursuant to s. 24(1) of the *Charter*, and notwithstanding the Board's finding that he is a significant threat to public safety, he is entitled to an absolute discharge or, in the absence of a discharge, an order directing CAMH to provide him with alternative treatment and/or an order directing CAMH to ensure that he can access psychotherapy. Mr. Conway admits that these remedies are outside the Board's statutory jurisdiction, but asserts that s. 24(1) of the *Charter* frees the Board from statutory limits on its jurisdiction.

[97] I disagree. Part XX.1 of the *Code* provides the Board with "wide latitude" in the exercise of its powers (*Winko*, at para. 27; *Mazzei*, at para. 43). However, Parliament did not imbue the Board with free remedial rein, and in fact withdrew certain remedies from the Board's statutory arsenal. As noted above, Part XX.1 of the *Code* precludes the Board from granting either an absolute discharge to an NCR patient found to be dangerous or an order directing that a hospital authority provide an NCR patient with particular treatment (ss. 672.54(*a*) and 672.55; *Winko*; *Mazzei*). Parliament was entitled to withdraw these powers from the Board and, barring a constitutional challenge to the legislation, no judicial fiat can overrule Parliament's clear expression of intent.

[98] Granting the Board the jurisdiction to unconditionally release a dangerous patient without the requisite treatment to resolve the dangerousness would frustrate the Board's mandate to supervise the special needs of those who are found to require the treatment/assessment regime (*Winko*, at paras. 39-42). It would also undermine the balance required by s. 672.54: it not only threatens public safety, it jeopardizes the interests of the NCR patient by failing to adequately prepare him or her for reintegration and, as a result, creating a substantial risk of re-offending and re-entry into the Part XX.1 regime (*Winko*, at paras. 39-41). As McLachlin J. wrote in *Winko*, at paras. 39-41:

> Treatment . . . is necessary to stabilize the mental condition of a dangerous NCR accused and reduce the tl public safety created by that condition. . . .
>
> Part XX.1 protects society. If society is to be protected on a long-term basis, it must address the caus offending behaviour — the mental illness. . . .
>
> Part XX.1 also protects the NCR offender. The assessment-treatment model introduced by Part XX.1 *Criminal Code* is fairer to the NCR offender than the traditional common law model. The NCR offende criminally responsible, but ill. Providing opportunities to receive treatment, not imposing punishment, is and appropriate response.

[99] The Board's duty to protect public safety, its statutory authority to grant absolute discharges only to non-dangerous NCR patients, and its mandate to assess and treat NCR patients with a view to reintegration rather than recidivism, all point to Parliament's intent not to permit NCR patients who are dangerous to have access to absolute discharges as a remedy. These factors are determinative in this case and

lead to the conclusion that it would not be appropriate and just in Mr. Conway's current circumstances for the Board to grant him an absolute discharge.

[100] The same is true of Mr. Conway's request for a treatment order. Allowing the Board to prescribe or impose treatment is not only expressly prohibited by the *Criminal Code* (s. 672.55); it is also inconsistent with the constitutional division of powers (*Mazzei*). The authority to make treatment decisions lies exclusively within the mandate of provincial health authorities in charge of the hospital where an NCR patient is detained, pursuant to various provincial laws governing the provision of medical services. "It would be an inappropriate interference with provincial legislative authority (and with hospitals' treatment plans and practices) for Review Boards to require hospital authorities to administer particular courses of medical treatment for the benefit of an NCR accused" (*Mazzei*, at para. 31).

[101] A finding that the Board is entitled to grant Mr. Conway an absolute discharge despite its conclusion that he is a significant threat to public safety, or to direct CAMH to provide him with a particular treatment, would be a clear contradiction of Parliament's intent. Given the statutory scheme and the constitutional considerations, the Board cannot grant these remedies to Mr. Conway.

[102] Finally, Mr. Conway complains about where his room is located and seeks an order under s. 24(1) prohibiting CAMH from housing him near a construction site. Neither the validity of this complaint, nor, obviously, the propriety of any redress, has yet been determined by the Board.

[103] Remedies granted to redress *Charter* wrongs are intended to meaningfully vindicate a claimant's rights and freedoms (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 55; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 30). 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 (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 2). *Charter* rights can be effectively vindicated through the exercise of statutory powers and processes (*Nasogaluak*; *Dagenais*; *Okwuobi*). In this case, it may well be that the substance of Mr. Conway's 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. If that is what the Board ultimately concludes to be the case, resort to s. 24(1) of the *Charter* may not add either to the Board's capacity to address the substance of the complaint or to provide appropriate redress.

[104] I would dismiss the appeal. In accordance with the request of the parties, there will be no order for costs.

Appeal dismissed.

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Solicitor for the respondent Her Majesty the Queen: Attorney General of Ontario, Toronto.

Solicitors for the respondent the Person in charge of the Centre for Addiction and Mental Health: Bersenas Jacobsen Chouest Thomson Blackburn, Toronto.

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TAB 15

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

(The Constitution Act, 1982)

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) 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.

TAB 16

Environmental Assessment Act

R.S.O. 1990, CHAPTER E.18

1. (1) In this Act,

"*Director*" means a person appointed under section 31.1 to act as a Director; ("directeur")

"***environment***" means,

(a) air, land or water,

(b) plant and animal life, **including human life,**

(c) the social, economic and cultural conditions that influence the life of humans or a community,

(d) any building, structure, machine or other device or thing made by humans,

(e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or

(f) any part or combination of the foregoing and the interrelationships between any two or more of them,

in or of Ontario; ("environnement")

"***land*" includes enclosed land, land covered by water and subsoil**; ("terrain")

"***person***" includes a municipality, Her Majesty in right of Ontario, a Crown agency within the meaning of the *Crown Agency Act*, **a public body**, a partnership, an unincorporated joint venture and an unincorporated association; ("personne")

"*prescribed*" means prescribed by the regulations; ("prescrit")

"*proceed*" includes "carry on"; ("exploiter", "poursuivre")

"***proponent***" means a person who,

(a) carries out or proposes to carry out an undertaking, or

(b) is the owner or person having charge, management or control of an undertaking; ("promoteur")

"***public body***" means a body other than a municipality that is defined as a public body by the regulations; ("organisme public")

"*regulations*" means the regulations made under this Act; ("règlements")

"***Tribunal***" means the Environmental Review Tribunal; ("Tribunal")

"***undertaking***" means,

(a) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity by or on behalf of Her Majesty in right of Ontario, by a public body or public bodies or by a municipality or municipalities,

(b) a major commercial or business enterprise or activity or a proposal, plan or program in respect of a major commercial or business enterprise or activity of a person or persons other than a person or persons referred to in clause (a) that is designated by the regulations, or

(c) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity of a person or persons, other than a person or persons referred to in clause (a), if an agreement is entered into under section 3.0.1 in respect of the enterprise, activity, proposal, plan or program; ("entreprise")

Purpose of Act

2. The purpose of this Act is the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management I n Ontario of the environment. R.S.O. 1990, c. E.18, s. 2.

Application of Act

3. This Act applies to,

(a) enterprises or activities or proposals, plans or programs in respect of enterprises or activities by or on behalf of Her Majesty in right of Ontario or by a public body or public bodies or by a municipality or municipalities;

(b) major commercial or business enterprises or activities or proposals, plans or programs in respect of major commercial or business enterprises or activities of a person or persons, other than a person referred to in clause (a), designated by the regulations

Harmonization

3.1 (1) This section applies,

(a) if another jurisdiction imposes requirements with respect to an undertaking to which this Act applies; and

(b) if the Minister considers the requirements imposed by the other jurisdiction to be

equivalent to the requirements imposed under this Act. 1996, c. 27, s. 2.

Notice and comment

(4) When the Minister proposes to make an order under this section, the Minister shall give adequate public notice of the proposed order and shall ensure that members of the public have an opportunity to comment on it. 1996, c. 27, s. 2

PART II
ENVIRONMENTAL ASSESSMENTS

Application For Approval

Approval for undertaking

5. (1) Every proponent who wishes to proceed with an undertaking shall apply to the Minister for approval to do so. 1996, c. 27, s. 3.

Application

(2) The application consists of the proposed terms of reference submitted under subsection 6 (1) and the environmental assessment subsequently submitted under subsection 6.2 (1). 1996, c. 27, s. 3.

Prohibition

(3) No person shall proceed with an undertaking unless the Minister gives his or her approval to proceed under section 9 or the Tribunal gives its approval under section 9.1. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Same

(4) No person shall proceed with an undertaking in a manner inconsistent with a condition imposed by the Minister or the Tribunal for proceeding with it. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Public inspection of Ministry review

7.2 (1) Any person may inspect the Ministry review in the places and at the times set out in the public notice. 1996, c. 27, s. 3.

Comments

(2) Any person may comment in writing on the undertaking, the environmental assessment and the review to the Ministry and, if the person wishes the comments to be considered when the

Minister decides the proponent's application, shall submit the comments by the prescribed deadline. 1996, c. 27, s. 3.

Request for hearing

(3) Any person may request that the Minister refer the proponent's application or a matter that relates to it to the Tribunal for hearing and decision. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Decision by Minister

9. (1) The Minister may decide an application and, with the approval of the Lieutenant Governor in Council or of such ministers of the Crown as the Lieutenant Governor in Council may designate, the Minister may,

(a) give approval to proceed with the undertaking;

(b) give approval to proceed with the undertaking subject to such conditions as the Minister considers necessary to carry out the purpose of this Act and in particular requiring or specifying,

(i) the methods and phasing of the carrying out of the undertaking,

(ii) the works or actions to prevent, mitigate or remedy effects of the undertaking on the environment,

(iii) such research, investigations, studies and monitoring programs related to the undertaking, and reports thereof, as the Minister considers necessary,

(iv) such changes in the undertaking as the Minister considers necessary,

(v) that the proponent enter into one or more agreements related to the undertaking with any person with respect to such matters as the Minister considers necessary,

(vi) that the proponent comply with all or any of the provisions of the environmental assessment that may be incorporated by reference in the approval,

(vii) the period of time during which the undertaking or any part thereof shall be commenced or carried out; or

(c) refuse to give approval to proceed with the undertaking. 1996, c. 27, s. 3.

Basis for decision

(2) The Minister shall consider the following matters when deciding an application:

1. The purpose of the Act.
2. The approved terms of reference for the environmental assessment.
3. The environmental assessment.
4. The Ministry review of the environmental assessment.
5. The comments submitted under subsections 6.4 (2) and 7.2 (2).
6. The mediators' report, if any, given to the Minister under section 8.
7. Such other matters as the Minister considers relevant to the application. 1996, c. 27, s. 3.

Notice to proponent

(3) The Minister shall notify the proponent of his or her decision and shall give the proponent written reasons for it. 1996, c. 27, s. 3.

Notice to others

(4) The Minister shall notify every person who submitted comments to the Ministry under subsection 7.2 (2) of his or her decision. 1996, c. 27, s. 3.

Referral to Tribunal

9.1 (1)The Minister may refer an application to the Tribunal for a decision. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Powers of the Tribunal

(2) The Tribunal may make any decision the Minister is permitted to make under subsection 9 (1). 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Basis for decision

(3) The Tribunal shall consider the following things when deciding an application:

1. The purpose of the Act.
2. The approved terms of reference for the environmental assessment.
3. The environmental assessment.
4. The Ministry review of the environmental assessment.
5 The comments submitted under subsections 6.4 (2) and 7.2 (2).

(4) The decision of the Tribunal must be consistent with the approved terms of reference for the environmental assessment. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Referral to Tribunal of part of a decision

9.2 (1) The Minister may refer to the Tribunal for hearing and decision a matter that relates to an application. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Restrictions

(2) The Minister may give such directions or impose such conditions on the referral as the Minister considers appropriate and may amend the referral. 1996, c. 27, s. 3.

Proposed decision

(3) The Minister shall inform the Tribunal of decisions that the Minister proposes to make on matters not referred to the Tribunal in connection with the application. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Request for referral to Tribunal

9.3 (1)This section applies if under subsection 7.2 (3) a person requests the Minister to refer an application or a matter that relates to one to the Tribunal for hearing and decision. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Referral of application

(2) If referral of the application is requested, the Minister shall refer the application to the Tribunal under section 9.1 unless in his or her absolute discretion,

(a) the Minister considers the request to be frivolous or vexatious;

(b) the Minister considers a hearing to be unnecessary; or

(c) the Minister considers that a hearing may cause undue delay in determining the application. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Same, related matter

(3) If referral of a matter that relates to the application is requested, the Minister shall refer the matter to the Tribunal under section 9.2 except in the circumstances described in subsection (2). 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Referral in part

(4) Despite subsection (2) or (3), if referral of an application or of matters relating to the application is requested but the Minister considers a hearing to be appropriate in respect of only some matters, the Minister shall refer those matters to the Tribunal under section 9.2. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

Referral to other tribunal, entity

11. (1)The Minister may refer to a tribunal (other than the Environmental Review Tribunal) or an entity for decision a matter that relates to an application if he or she considers it appropriate in the circumstances. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (3).

(6) A decision of the tribunal or entity under this section shall be deemed to be a decision of the Minister. 1996, c. 27, s. 3.

Referral by Tribunal

(7) The Tribunal may refer to another tribunal or entity for decision a matter that relates to an application and subsections (1) to (6) apply with necessary modifications with respect to the referral. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (4).

EB-2010-0023

IN THE MATTER OF the *Ontario Energy Board Act* 1998, S.O. 1998, c. 15, (Schedule B);, (the Act)

AND IN THE MATTER OF section 99 of the Act;

AND IN THE MATTER OF an application by Hydro One Networks Inc. for authority to expropriate interest in certain lands for the purpose of constructing and operating a new 500 kilovolt double circuit transmission line known as the Bruce to Milton Transmission Reinforcement Project

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