

CASE LAW UPDATE

Catherine Powell

R. v. Conway

2010 SCC 22, released 11 June 2010

Administrative Law – Charter – Remedies – Jurisdiction of Administrative Tribunals

Mr. Conway, a patient at CAMH, brought an application before the Ontario Review Board (the “ORB”) for, among other things, an absolute discharge pursuant to s. 24(1) of the Charter. The ORB concluded that it had no jurisdiction to consider Mr. Conway’s Charter claim. On appeal, the Ontario Court of Appeal confirmed that the ORB was not a court of competent jurisdiction for the purpose of granting an absolute discharge under s. 24(1) of the Charter. The question for the Supreme Court, therefore, was whether the ORB possessed the necessary jurisdiction to grant remedies pursuant to s. 24(1) of the Charter.

Writing for a unanimous Court, Justice Abella answered the question before the Court in the positive, but ultimately dismissed Mr. Conway’s appeal.

Existing case law establishes that expert administrative tribunals should play a primary role in determining Charter issues that fall within their specialized jurisdiction while exercising their statutory functions. Such tribunals, in fact, have the authority – and the duty – to consider and apply the Constitution.

Accordingly, it was appropriate and consistent with the Court’s gradual expansion of the relationship between administrative tribunals and the Charter to adopt a merger of the three distinct constitutional streams flowing from the *Mills*, *Slaight*, and *Cuddy Chicks* cases.

When a remedy under s. 24(1) of the Charter is sought from an administrative tribunal, the tribunal must first determine whether it has the jurisdiction, explicit or implied, to decide questions of law. If it does, and there is no clear evidence that the legislature intended to exclude the Charter from the tribunal’s jurisdiction, the tribunal can consider and apply the Charter and Charter remedies. Once this preliminary inquiry has been resolved in the affirmative, the remaining question is whether, in light of the relevant statutory scheme, the tribunal can grant the particular remedy sought. This is a question of legislative intent, and “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”, keeping in mind the tribunal’s statutory mandate, structure, and function. While the ORB was a court of competent jurisdiction for the purpose of awarding Charter remedies, Parliament had specifically removed from it the jurisdiction to grant an absolute discharge in circumstances like those at hand.