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***OMB JURISDICTION***

## planning instruments and the Charter

The case of *Advocacy Centre for Tenants Ontario v. Waterloo*, currently before the Ontario Municipal Board (the "Board"), will test the limits of tribunals' jurisdiction to grant remedies for violations of the *Canadian Charter of Rights and Freedoms* (the Charter") and provincial human rights Codes. The case arises in the context of an appeal from municipal zoning by-law and Official Plan amendments prohibiting further group home and other social service establishments in an area of the City of Kitchener. It is the Board's first opportunity to consider the remedial jurisdiction it has as a "court of competent jurisdiction" under section 24(1) of the Charter, under the Supreme Court of Canada's expanded approach in *Tranchemontagne v. Ontario (Director, Disability Support Program)*. Kim Mullin and Tiffany Tsun review the applicable legal principles in detail, and argue that there are still jurisdictional limits on the remedies the Board can provide, based upon its statutory mandate. While recognizing the important nexus between land use planning and human rights, the authors suggest the Board's expertise and jurisdiction is firmly anchored on the side of land use planning. The authors also caution that the Board must be careful not to overstep that role and jurisdiction. 666

***DUTY TO CONSULT***

## the duty to consult Aboriginal parties

In two recent decisions, the Supreme Court of Canada has addressed the duty to consult Aboriginal parties affected by administrative decisions, and particularly the role of tribunals in that context. These two cases confirm that the purpose of the *Haida* consultation obligation, although a fundamental duty which the Crown must always scrupulously observe, is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed. In doing so, the Court confirmed the utility of administrative law principles. Chris Sanderson and Michelle Jones provide an analysis of these decisions, and throw some helpful light on this contentious area. The authors suggest that the Court has now made it clear that fundamental principles of administrative law are not altered, but should be applied normally in this context. Interpretation of the tribunal's statutory mandate will still determine whether it has any role to play, either in conducting such consultations, or in assessing the adequacy of consultations by other Crown agencies. The authors also discuss how principles of procedural fairness, in an administrative law sense, can inform the content of the duty to consult, and the adequacy of consultations, in particular context. 674

OMB JURISDICTION

# The Role of the Ontario Municipal Board in Human Rights Issues

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## Introduction

This article examines the role and jurisdiction of the Ontario Municipal Board (the "Board") with respect to human rights issues emerging from the land use planning process in light of the reasons of the Board in *Advocacy Centre for Tenants Ontario v. Waterloo*.[1] The Interim Decision dealt with appeals of the City of Kitchener's Official Plan Amendment No. 58 and Zoning By-law Amendment 2005-91, which sought to reduce a perceived over-concentration of residential care facilities, lodging houses, and supportive and assisted housing in a downtown neighbourhood called Cedar Hill. Non-profit organizations challenged these instruments on the basis that they had a discriminatory effect on certain disadvantaged populations.

The Board issued its Interim Decision on January 14, 2010, describing the appeals as an "'unprecedented' case at the nexus between land-use controls and human rights."[2] The decision is a case study of the ways in which the Ontario Human Rights Code[3] and the human rights guarantees established by the *Canadian Charter of Rights and Freedoms*[4] can affect land use planning decisions. It also provides insight into the Board's own views on its evolving role and jurisdiction in human rights issues.

This article suggests that while the Board has jurisdiction to consider human rights issues, it plays a limited role in providing remedies for Charter and Code violations. This is because neither the Charter nor the Code provides the Board with any independent source of jurisdiction to grant remedies and the Board does not have freestanding jurisdiction to declare by-laws or official plans to be invalid solely because of conflict with the Charter or the Code.

## Background

A full review of the factual background to the Interim Decision is beyond the scope of this article. A brief summary of the context is set out below.

The Cedar Hill neighbourhood is a predominantly residential neighbourhood adjacent to the Kitchener downtown. The land use policies of the 1960s to 1980s left a legacy of absentee landlord-owned multiple dwellings, assisted and supportive housing, and residential care facilities in Cedar Hill.

The vulnerable populations associated with these land uses fell prey to drug dealers and other predators, leading to a significant number of crack houses and a problem with prostitution within the neighbourhood. By 2003, a perception had developed that Cedar Hill had reached a saturation point.

In May 2003, Kitchener City Council passed an interim control by-law which prohibited the use of any lands within Cedar Hill for the purpose of a residential care facility,[5] a group home,[6] a lodging house,[7] a

[1] (2010), 69 MPLR (4th) 119 (OMB) ["Interim Decision"].
[2] Ibid. at paragraph 1.
[3] R.S.O. 1990, c. H19 ["Code"].
[4] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ["Charter"].

[5] Defined in the Zoning By-law as a "dwelling or part thereof occupied by three or more persons, exclusive of staff, who by reason of their emotional, physical or social condition or legal status, are cared for on a temporary or permanent basis in a supervised group setting."
[6] Defined in the Zoning By-law as a "residence licensed or funded under a federal or provincial statute for the accommodation of three to ten persons, exclusive of staff, living under supervision in a single housekeeping unit and who, by reason of their emotional, mental, social or physical condition or legal status, require a group living arrangement for their well-being."
[7] Defined in the Zoning By-law as a "dwelling or part thereof containing one or more lodging units designed to accommodate four or more residents." A group home or residential care facility is not a lodging house.

multiple dwelling or a social service establishment. Council also directed that a comprehensive study of the neighbourhood be undertaken.[8]

The study was completed and presented to the City Council in 2005. The study reached a number of key conclusions. First, the study concluded that Cedar Hill had a lesser degree of community well-being compared to other neighbourhoods as measured by various census variables, and that Cedar Hill risked becoming "a ghetto for small, low-income households." Second, it concluded that Cedar Hill had the highest percentage of absentee landlords of any downtown community. Third, it concluded that Cedar Hill had an over-concentration of residential care facilities and supportive housing.

### The Planning Instruments

In response to the study, City Council adopted Official Plan Amendment No. 58 ("OPA 58") and Zoning By-law Amendment No. 2005-91 (the "By-law"). Both instruments were area-specific and applied only to the Cedar Hill community.

OPA 58 prohibited the establishment of new lodging houses, new social service establishments and new residential care facilities. It also required new individual dwelling units to be generally at least 85 square metres in floor area and to contain no more than two bedrooms, and encouraged residential properties to be occupied by the property owner.

The By-law was intended to implement the policies set out in OPA 58. OPA 58 and the By-law had no effect on existing facilities which, by operation of section 34(9) of the *Planning Act*,[9] became legal non-conforming uses.

The Advocacy Centre for Tenants Ontario ("ACTO"), among others, appealed the instruments to the Board. ACTO alleged that the instruments were not good planning and that they violated the Charter and the Code. The City took the position that the instruments were a legitimate planning response to the problems faced by Cedar Hill; that the Board had no jurisdiction to invalidate the instruments on the basis of the Code or the Charter; and that ACTO had not demonstrated that they had a discriminatory effect on a group protected by either the Code or the Charter.

## The Board's Decision

In its Interim Decision, the Board effectively drew a distinction between the City's objectives and the means it chose to implement those objectives. The Board accepted that the City's stated goals of de-concentration and dispersal were valid planning objectives and were supported by Official Plan policies.

While the Board accepted the City's conclusion that there was an over-concentration of certain uses that should be dispersed, it declined to uphold the instruments that the City had adopted to implement the objectives embodied by those conclusions. Instead, the Board directed that a second phase of the hearing take place no later than 15 months from its decision (i.e., by April 2011) to consider OPA 58 and the By-law.

The Board was critical of the City's process in adopting the planning instruments in a number of respects. Most importantly for the purposes of this article, the Board was concerned that the City had not given sufficient consideration to whether the instruments discriminated against disadvantaged groups contrary to the Code and Charter. The Board specifically directed that the second phase of the hearing be supported by analysis of the instruments' conformity with, among other things, the Code and the Charter.

### The Board's View on Its Jurisdiction and Role in Human Rights Process

The Interim Decision provides a glimpse of the Board's view of its own jurisdiction to apply the Code and the Charter. The Board elaborated on the applicability of its 2004 decision in *Toronto (City) Zoning By-law*

[8] The terms of reference set out a number of research questions for the study. Those questions were aimed at determining whether Cedar Hill had a disproportionate share of uses such as residential care facilities and a lesser degree of community well-being, and whether community well-being and the state of the social environment was linked to the results of the quantitative analysis. The study questions were the outcome of City staff's dialogue with the community during the first year of the interim control by-law.

[9] R.S.O. 1990, c. P13, s. 34(9).

*No. 138-2003 (Re)*[10] (often cited as "*Deveau*") in light of the Supreme Court of Canada's decision in *Tranchemontagne v. Ontario (Director, Disability Support Program)*.[11]

In *Deveau*, a by-law limiting the location of homeless shelters was appealed by ACTO on a number of grounds including breaching the Charter. The Board in that case declined to remove the impugned sections to make the by-law consistent with the Charter. It reasoned that its jurisdiction in such matters was limited to making constitutional determinations that were necessarily incidental to its own jurisdiction and that, therefore, it could not make freestanding declarations of invalidity, which was the purview of the courts.[12]

The Board in *Deveau* was of the view that administrative tribunals were limited in the remedies they may employ and that the courts would be the final arbiters of legislative legitimacy under the Charter and the Constitution.[13] While the Board had clear jurisdiction to amend by-laws on planning grounds, the Board held that to amend the by-laws to make them consistent with the Charter would contradict the jurisprudence. Accordingly, it held that it had "no jurisdiction to consider the Charter issues raised before it, nor to accede to the remedy requested."[14]

In *Tranchemontagne*, which was released after *Deveau*, a majority of the Supreme Court concluded that the Social Benefits Tribunal could, and should, consider and apply the Code in matters arising before it, given its power to decide questions of law and its subject-matter jurisdiction over the dispute.[15]

In the Interim Decision, the Board concluded that the reasoning in *Deveau* was no longer persuasive in light of *Tranchemontagne*:

> On the jurisdictional question, *Deveau* has been superseded. The Code would appear to prohibit a by-law or planning instrument that had a discriminatory effect, subject to the statutory defence of "reasonableness and *bona fide* under the circumstances", notably undue hardship. A municipality which sought to justify the imposition of a discriminatory standard/requirement/policy might be expected to establish that it made real and meaningful efforts to accommodate the needs of persons adversely affected by the standard/requirement/policy, or sought less discriminatory approaches to achieving the objective. It might also be expected to establish, on a substantive level, that it is not possible to accommodate, short of undue hardship.
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> For its part, the Board is as bound by the Code as municipalities are, and must conduct itself accordingly.[16]

The Board further criticized the *Deveau* approach in which litigants would have to bifurcate proceedings in order to address both the planning and human rights issues. It commented as follows:

> [The Supreme Court in *Tranchemontagne*] appears unequivocal, concerning the expectation that a tribunal – including this Board – would "consider the whole law" of any human rights aspect in a case "properly before it". There is no reference whatever, as in *Deveau*, to "leaving it to any person to apply to the Court for relief"; and there are clear admonitions about declining jurisdiction.[17]

The Interim Decision suggests that the Board now views itself as a one-stop forum for addressing planning and human rights issues in land use matters, and that it could not approve any instrument which violated the Code and Charter.

More importantly, by holding that the reasoning in *Deveau* has been superseded by *Tranchemontagne*, the Board left open the proposition that it has jurisdiction not only to consider Code and Charter issues, but that it also has the power to grant Charter remedies, including declaring by-laws or official plans to be invalid.

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[10] [2004] OMBD No 280 ["*Deveau*"].
[11] [2006] 1 S.C.R. 513 ["*Tranchemontagne*"].
[12] *Deveau*, supra note 10 at paragraph 166.
[13] Ibid. at paragraphs 145-146.
[14] Ibid. at paragraph 167.
[15] Existing jurisprudence has established that an administrative tribunal with jurisdiction to consider questions of law can consider the constitutionality of its own enabling legislation. See *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504 ["*Martin*"].
[16] Interim Decision, supra note 1 at paragraph 144.
[17] Ibid. at paragraph 143.

## The Board's Role and Jurisdiction in Human Rights Issues

In light of the Board's comments in the Interim Decision, it is worth considering whether the Board could invalidate a municipal by-law or other planning instruments for breach of the Code or Charter alone. While the Board may have jurisdiction to grant Charter remedies, the Board's remedial power is nonetheless confined by the governing statutory framework. In particular, the authors suggest that the Board lacks the jurisdiction to make freestanding determinations of the validity of planning instruments. In other words, the Board's power to assess legality in relation to the planning merits of an impugned by-law does not give the Board the power to invalidate by-laws on other grounds, such as for breach of the Code or Charter.

### Analysis for Determining the Board's Jurisdiction to Grant Charter Remedies

Recently, the Supreme Court of Canada reaffirmed that an administrative tribunal can be a "court of competent jurisdiction" with the authority to grant Charter remedies. In June 2010, the Supreme Court in *R. v. Conway*[18] set out the analysis for determining whether a particular tribunal has the jurisdiction to grant relief to remedy breaches of the Charter.

Under section 24(1) of the Charter, anyone whose Charter rights or freedoms have been violated may apply to a "court of competent jurisdiction" seeking remedies that the court considers appropriate and just. Earlier jurisprudence had suggested that the inquiry should, on a case-by-case basis, determine whether the particular tribunal is a "court of competent jurisdiction" to grant the requested remedy.

In *Conway,* the Court concluded that the inquiry should focus instead on determining whether the tribunal, as an institution, has jurisdiction to grant Charter remedies. As stated by Justice Abella writing for a unanimous Court:

> [I]t 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).
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> 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 ….[19]

In *Conway*, at issue was whether the Ontario Review Board had jurisdiction to grant Mr. Conway, among other requested remedies, an absolute discharge from the mental health facility. The tribunal and the Ontario Court of Appeal concluded that the tribunal lacked jurisdiction as it was not a "court of competent jurisdiction" for the purpose of granting an absolute discharge under section 24(1) of the Charter. The Supreme Court arrived at a different conclusion on the jurisdiction issue but nonetheless ruled against the applicant. It ruled that while the Ontario Review Board has jurisdiction to grant remedies pursuant to section 24(1) of the Charter, the particular relief requested by Mr. Conway fell outside the tribunal's statutory scheme.

*Conway* establishes a framework for ascertaining an administrative tribunal's authority to grant Charter remedies. The first step of the inquiry focuses on whether the administrative tribunal has jurisdiction, express or implied, to decide questions of law, and if so, whether the Legislature has clearly

[18] 2010 SCC 22, [2010] 1 S.C.R. 765 ["*Conway*"].

[19] Ibid. at paragraphs 22-23.

demonstrated an intent to exclude the Charter from the tribunal's jurisdiction.[20] Once a tribunal is found to be a "court of competent jurisdiction," it may consider and apply the Charter "when resolving the matters properly before it."[21]

The remaining question is "whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal."[22] Relevant factors for determining legislative intent include "those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function."[23] In *Conway*, the Supreme Court held that while the Ontario Review Board in general is a "court of competent jurisdiction" able to grant Charter remedies, the Criminal Code clearly excludes the requested remedies from the tribunal's jurisdiction.[24]

The *Conway* decision confirms that "effective, vindicatory remedies from harm flowing from unconstitutional conduct" can be available at administrative tribunals without the need for separate and distinct Charter applications.[25] At the same time, however, the available remedies at the administrative tribunal must be remedies within the bounds of the tribunal's exercise of statutory powers and processes.

As emphasized by Justice Abella, "… resort to s. 24(1) of the Charter may not add to the [tribunal's] capacity to address the substance of the complaint or to provide appropriate redress." In other words, section 24(1) of the Charter does not free a tribunal from statutory limits on its jurisdiction.[26]

**No Freestanding Jurisdiction to Determine Validity of By-law**

Applying the *Conway* analysis, it is clear that the Ontario Municipal Board as an institution is a "court of competent jurisdiction" able to apply the Charter and grant Charter remedies. What is less clear is whether the Board has the jurisdiction to invalidate a planning instrument on the basis of the Charter.

Under the first stage of the *Conway* analysis, the Board is a "court of competent jurisdiction" as it derives its jurisdiction to hear Code and Charter issues by virtue of section 35 of the *Ontario Municipal Board Act*.[27] Section 35 confers on the Board the power to hear and determine all questions of law or of fact "as to all matters within its jurisdiction under this Act."[28] Section 34 of the OMB Act further provides that the Board has all the powers of a court of record for the purposes of that Act.[29] The Divisional Court in *Grushman v. Ottawa (City)*[30] held that these provisions indicate the Legislature's intent to confer on the Board the power to consider questions of law and to address constitutional issues by extension through section 52(1) of the *Constitution Act, 1982*.[31]

The second stage of the *Conway* inquiry focuses on whether a particular remedy is one that would fit within the tribunal's statutory framework. It is at this stage that the problem arises. Although the Board has jurisdiction to determine questions of law, that jurisdiction is subject to judicially determined limits. As affirmed by the Ontario Court of Appeal in *Toronto (City) v. Goldlist Properties Inc.*,[32] "the Board does not have a free-standing jurisdiction, as a court does, to determine that a by-law is invalid."[33] Rather, the Board's power is limited to making those decisions that are necessarily incidental to the exercise of its responsibilities under the *Planning Act*.

The Legislature has created a statutory framework in which the Board remains the expert forum for assessing the planning merits of Council-created subordinate legislation such as zoning by-laws, while the Court

[20] Ibid. at paragraph 81.
[21] Ibid.
[22] Ibid. at paragraph 82.
[23] Ibid.
[24] Ibid. at paragraphs 97 and 101.
[25] Ibid. at paragraph 103.
[26] Ibid. at paragraphs 96-97.
[27] R.S.O. 1990, c. O28 ["OMB Act"].
[28] Ibid., s. 35.
[29] Ibid., s. 34.
[30] [2000] O.J. No. 4444, 15 MPLR (3d) 167 (Div. Ct.) ["*Grushman*"].
[31] Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ["*Constitution Act, 1982*"], s. 52, which states that any law inconsistent with the provisions of the Constitution is of no force or effect to the extent of the inconsistency. *Grushman*, ibid. at paragraphs 22-25.
[32] (2003), 67 O.R. (3d) 441 (C.A.).
[33] Ibid. at paragraph 15.

assumes the supervisory jurisdiction to invalidate municipal by-laws for illegality. The Board has the power to assess the legality of a by-law when the issue of legality is directly tied to its planning merits – such as where a by-law is alleged to have been passed in bad faith rather than in accordance with a valid planning rationale. However, the power to assess legality in relation to the planning merits of a by-law does not give the Board the power to invalidate by-laws on other grounds. This remains the domain of the courts. This distinction stems from the fact that, unlike the courts, which have the express jurisdiction to quash by-laws for illegality, the Board has no supervisory jurisdiction over the legislative competence of municipal governments. On this point, the Ontario Court of Appeal in *Country Pork Ltd. v. Ashfield (Township)*[34] adopted the Divisional Court's reasons in *Toronto (City) v. Goldlist Properties Inc.*:[35]

> In Toronto, Blair R.S.J. held at pp. 248-49 O.R. that:
>
> > … *neither the Planning Act nor the Ontario Municipal Board Act, nor the Municipal Act, give the OMB a supervisory jurisdiction over the legislative competency of municipalities.* The Board is given supervisory jurisdiction, in this context, over their municipal planning competence ….
>
> He went on to add at p. 249 O.R.: "*If this were not the case … there would be no need for the statutory scheme which remains in effect in relation to the quashing of by-laws and the determination of their validity.*" He then referred to s. 57 of the *Municipal Act*, commenting at p. 250 O.R. that it implicitly, if not expressly, requires the OMB "to stay its hand while matters relating to the validity and legality of by-laws are determined by the court".[36] [emphasis added]

As the Ontario Court of Appeal stated in *Equity Waste Management of Canada v. Halton Hills (Town)*,[37] "[d]etermining the appropriate tribunal is a question of determining the legislative intent in conferring jurisdiction … More generally, the issue is whether the court or the OMB is best suited to decide the question in dispute."[38] In that case, the Court noted that the Board is an expert planning tribunal "best suited to decide the planning issues raised by municipal by-laws" while the courts "have typically intervened when a municipal council did not adhere to fair procedures or when it exceeded its statutory powers or ignored conditions precedent to the exercise of its jurisdiction."[39]

This is not to say the Board cannot consider the Code or the Charter. The jurisprudence clearly establishes that the Board can consider the Charter and Code when it is being asked to interpret its enabling legislation, such as the *Planning Act* and the OMB Act. In *Tranchemontagne* and *Nova Scotia (Workers' Compensation Board) v. Martin*,[40] the tribunals at issue were asked to interpret or apply a legislative provision in their enabling legislation. The courts in those cases held that when a tribunal is being asked to apply legislation, it can consider whether that legislation is constitutional and, if the legislation is not constitutional, the tribunal can and should decline to apply it.

By contrast, in the case of an appeal of an official plan or zoning by-law, the Board is not being asked to apply a provision of its enabling legislation. Rather, it is being asked to assess the planning merits of municipal legislative enactments. Declining to apply the enactment is therefore not an option.

There is a valid policy rationale for concluding that the Board cannot make free-standing determinations of constitutional validity. The decisions of most tribunals do not create legal precedents. When a tribunal such as the Social Benefits Tribunal declines to apply a legislative provision to a particular set of facts, that decision affects only the immediate parties. Even more importantly, the legislative provision continues to exist – the tribunal's decision has not invalidated it.

By contrast, if the Board allows an appeal and repeals a zoning by-law on the basis that it

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[34] (2002), 60 O.R. (3d) 529 (C.A.) at paragraphs 29-31 ["*Country Pork*"].
[35] (2002), 58 O.R. (3d) 232 (Div. Ct.), aff'd by (2003), 67 O.R. (3d) 441 (C.A.).
[36] *Country Pork*, supra note 34 at paragraph 30.
[37] (1997), 35 O.R. (3d) 321 (C.A.).
[38] Ibid. at 332.
[39] Ibid.
[40] 2003 SCC 54, [2003] 2 S.C.R. 504 ["*Martin*"].

does not comply with the Charter, that decision affects not just the parties to the hearing, but all the residents of the municipality. Moreover, the by-law ceases to exist. Such a result is therefore tantamount to a formal declaration of invalidity.[41]

It is therefore the authors' position that in exercising its jurisdiction under the *Planning Act*, the Board is limited to exercising the remedial powers granted to it under the *Planning Act* and the OMB Act in accordance with Charter values. The Board cannot make a determination that the instruments should be amended or repealed solely on the basis that they contravene the Charter, as such a determination would effectively constitute a declaration of invalidity.

### The Code Provides No Basis to Repeal or Modify Planning Instruments

Furthermore, while the Board has jurisdiction to consider Code issues, the Code does not empower tribunals – or the courts for that matter – to invalidate legislation. This was confirmed by the Divisional Court in *Malkowski v. Ontario (Human Rights Commission)*.[42] In that case, a hearing-impaired applicant sought amendments to the Building Code[43] to include a requirement that theatres be equipped with rear window caption boards. The Divisional Court ruled that the Human Rights Tribunal had no jurisdiction to grant the requested remedy.

Unlike the *Constitution Act, 1982*, the Code does not allow tribunals to set aside or amend legislation to bring it into compliance with the Code. Section 47(2) of the Code gives the Code primacy over other legislative enactments and in this respect, is similar to section 52 of the *Constitution Act, 1982*.[44] However, the provision merely requires tribunals to determine that the Code prevails where there is a conflict between another piece of legislation and the Code. As the Court explained in *Malkowski*:

> Not being a fully constitutional document, the Code stops short of setting aside legislation, but the Tribunal can exercise the power specifically given to it to apply the Code as prevailing over the actual enactment … where the latter has a discriminatory effect. However, the Code does not authorize the addition to legislation of words that are not there in order to bring the Building Code into compliance with the Code.[45]

The Code is directed towards the actions of persons and does not provide a source of authority for administrative tribunals to determine the validity of legislation.[46] As confirmed in *Malkowski*, such a remedy can only be achieved through a Charter challenge, "for only the Charter, as a part of the constitution, enables the court to strike down legislation or to read in provisions to make the law as written comply."[47] Thus, the Code does not provide any basis for repealing or modifying planning instruments.

## Conclusion

While it is important to recognize human rights issues as part of the land use planning process, the Board must be careful not to overstep its role and jurisdiction. In particular, the Board does not have jurisdiction to declare by-laws or official plans to be invalid because of conflict with the Code or Charter. The power to declare a municipal planning instrument invalid on the basis of Code and Charter violations remains a prerogative that belongs to the Court and is beyond the Board's scope of statutory power.

The Board's jurisdictional limits may not have significant implications in practice. A planning instrument that offends the Code or Charter values is unlikely to meet the test for good planning. The Board will likely refuse to approve such an instrument on planning grounds in the first place.

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[41] For a similar discussion on this point in relation to the jurisdiction of the Ontario Labour Relations Board, see *Cuddy Chicks v. Ontario (Labour Relations Board)* (1991), 81 DLR (4th) 122 at 130 (S.C.C.).

[42] [2006] O.J. No. 5140 (Div. Ct.) ["*Malkowski*"]. See, also, *Newfoundland and Labrador (Human Rights Commission) v. Newfoundland and Labrador (Workplace Health and Safety Compensation Commission)* (2005), 259 DLR (4th) 654 (N.L.C.A.) ["*Newfoundland*"].

[43] O Reg. 403/97.

[44] Section 47(2) of the Code states that: "where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act."

[45] *Malkowski*, supra note 42 at paragraph 31.

[46] *Newfoundland*, ibid. at paragraph 30.

[47] *Malkowski*, ibid. at paragraph 38.

While the Board may hear Charter and Code issues necessarily incidental to determining the planning merits of an instrument, the Board is limited in its remedial power. In the Interim Decision, the Board correctly noted that it must comply with the Code and Charter by not approving a discriminatory instrument. However, since the Board also lacked the power to repeal or amend the instrument in question, as the appellant had requested, the Board was correct in its decision to send the instruments back to the City for redrafting.