Supreme Court in *Martin:* Chronic Pain claims and administrative law implications

On October 3, 2003, the Supreme Court of Canada rendered its decision on two appeals by injured workers Donald Martin and Ruth Laseur against the Nova Scotia Workers' Compensation Board. The decision has the following legal implications:

- how Ontario's legislation might be substantively affected by the decision;
- how equality claims under s. 15 of the *Charter* are advanced;
- whether and how *Charter* arguments will need to be made at the Board and/or Tribunal level.

Background

The case involved claims by two workers who suffered from chronic pain resulting from a work-related injury. Donald Martin was employed as a foreman at Suzuki Dartmouth. His back was injured in February 1996 when he lifted a tow dolly and towed it backward about 15 feet. He attempted to return to work a number of times, but his pain recurred and he was not able to continue. He attended a work conditioning program, which ended on August 6, 1996. During the program, the WCB paid him benefits and provided rehabilitative services. When his program ended, his temporary benefits ceased.

Ruth Laseur worked as a bus driver for the City of Halifax. On November 13, 1987, she also injured her back, and her right hand, when she fell from the bumper of her bus while she was trying to clean off the windshield. She received temporary disability benefits for various periods in 1988 and 1989. She attempted to return to work, but her duties aggravated her conditions. She worked part time for awhile. Her doctor ordered her to stop working in 1990. She resigned her employment. She was not granted vocational rehabilitation assistance or permanent partial disability benefits. She took courses in business and accounting, which she financed by borrowing money from relatives. In 1994 she found work with a software firm in Edmonton. She worked on a modified schedule as she continued to suffer from chronic back pain.

Under section 10 (b) of its legislation, and associated regulation, the Nova Scotia Board had a Functional Restoration Program. Instead of the regular scheme for workers' compensation benefits, the Program applied a four-week functional restoration program for people with chronic pain, and no further benefits beyond that.

The definition of chronic pain is captured in the first paragraph of the decision. Justice Gonthier indicates;

> There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians.

The legislative provisions set up three different "entitlement categories" for people with chronic pain:

- people injured before March 1990 were precluded from receiving any benefits for chronic pain conditions;

- people injured between March 1990 and February 1996, and in receipt of temporary benefits or with an appeal for temporary benefits filed by November 1998, could receive

uniform limited benefits;

- people injured after February 1, 1996, would receive no benefits apart from those under regulations (essentially, the four week work hardening program and benefits during that period) There would be no income replacement benefits, retirement annuities, rehabilitation services, re-employment rights, or medical aid beyond the four-week period.

The claims of both Ms. Laseur and Mr. Martin were denied by the Board. They each appealed to the Appeals Tribunal, arguing that the *Act* and/or regulations infringed section 15 of the *Charter*. In Ms. Laseur's case, the Tribunal allowed the appeal in part, but held that she was not entitled to permanent partial benefits or rehabilitation assistance. The Board appealed the Tribunal's *Charter* findings, and Ms. Laseur cross-appealed the refusal to award benefits. The Nova Scotia Court of Appeal upheld the Board's Appeal and dismissed Ms. Laseur's cross appeal.

In Mr. Martin's case, the Board challenged the Appeals Tribunal's jurisdiction to hear the *Charter* argument. The Appeals Tribunal affirmed its jurisdiction to apply the *Charter* and allowed the appeal on the merits, holding that the regulations and *Act* violated s. 15 of the *Charter* and the violations were not justified under s. 1. The Tribunal ordered that Mr. Martin's temporary benefits be extended to October 15, 1996. The Board appealed the *Charter* findings, and Mr. Martin cross-appealed the cut off of benefits at October 1996. The Nova Scotia Court of Appeal allowed the Board's appeal and dismissed Mr. Martin's cross-appeal.

The Charter Issue

The Nova Scotia *Workers' Compensation Act* provides in s. 185(1) that the Board has "exclusive jurisdiction to inquire into, hear and determine all questions of fact and law arising pursuant to this Part, subject to the rights of Appeal provided in this *Act*". Section 243 provided a right of appeal from the Board to the Tribunal. The Appeals Tribunal applied these sections in both appeals to hold that they had the jurisdiction to determine whether or not the *Act* or regulations violated the *Charter*.

The Nova Scotia Court of Appeal held that a tribunal required in its governing legislation a clear grant of authority to interpret or apply any law necessary to reach its findings, to address general questions of law, or to apply the law of the land to the disputes before them, in order to establish that it had been given jurisdiction by the legislature to decide *Charter* issues. The jurisdiction could not be inferred simply from the tribunal's authority to interpret and apply its governing statute.

The court held that the Board was not an adjudicative body, as it could not refuse to apply the Board's policies on the grounds of inconsistency with the *Act*. Therefore the Board lacked the authority to refuse to apply a provision of the *Act* on *Charter* grounds. The Tribunal, in turn, only had jurisdiction to confirm, vary or reverse the decision fo the Board, so the Board's lack of jurisdiction to apply the *Charter* similarly eliminated the ability of the Tribunal to do so. Further, the Tribunal did not have any special expertise; it did not exercise policy-making functions; its members were not required to be lawyers; and it was required to issue decisions within 60 days, with brief reasons.

The Supreme Court followed its reasoning in the trilogy of *Douglas College, Cuddy Chicks, and Tetreault-Gadoury*, in holding that administrative tribunals should have jurisdiction to consider the constitutional validity of a provision of its enabling statute, for the following reasons:

- the constitution is the overriding law, and any law inconsistent with it should be held to be invalid as at inception;
- people should be able to assert their *Charter* rights in the most accessible forum available;
- *Charter* disputes do not take place in a vacuum, and require a decision maker with understanding of the legislative scheme, objectives, and practical constraints;
- administrative tribunal decisions are always reviewable on a correctness standard.

The Supreme Court in its decision indicates it is not necessary to overturn its decision in *Cooper v. Canadian Human Rights Commission [1996] 3 S.C.R. 854,* but goes ahead and does so just in case.

At paragraph 48 of the decision, the Court restates the question for determining whether administrative tribunals are able to apply the *Charter* to legislative provisions:

1. whether the tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision;

2. explicit jurisdiction will be found in the terms of the statutory grant of authority; implicit jurisdiction involves looking at the whole statute, including the statutory mandate; whether the mandate requires the tribunal to decide questions of law; whether the tribunal is adjudicative; and the tribunal's capacity to consider questions of law.

3. if the tribunal has jurisdiction to decide questions of law, the jurisdiction will be presumed to include *Charter* questions;

4. the party alleging lack of jurisdiction may rebut the presumption with explicit wording withdrawing the right to consider the *Charter*, or through an argument that the statute as a whole should lead to the conclusion that the legislature intended to exclude *Charter* questions.

Applying these questions to the Nova Scotia Appeals Tribunal, the Court held that s. 185 of the Act, which was almost identical to the Ontario Labour Relations Act provision considered in *Cuddy Chicks*, granted explicit jurisdiction to decide questions of law.

Also, there was implicit jurisdiction due to the barring of civil claims, and the requirement that all workplace injuries be determined by the Board and Tribunal.

The Court held that the Tribunal was adjudicative in nature, independent of the Board, setting its own rules of procedure, recording evidence, with power to summon witnesses, compel testimony, require production fo documents, and make findings of contempt. All appeal commissioners were lawyers even though this was not required.

There was no wording in the legislation explicitly removing the ability of the Tribunal to consider *Charter* questions.

As a result of these factors, the court held that the Appeals Tribunal had

jurisdiction to consider validity of its governing legislation in light of the *Charter*.

Equality Rights Analysis

The Court held that the legislation and regulation drew a formal distinction based on personal characteristics, between people with chronic pain, when compared with disabled workers with other disabilities.

The Court went on to find that the differential treatment was based on the enumerated ground of "physical disability". Even though the Board argued that not all people belonging to the group of persons with physical disabilities was equally mistreated, following *Janzen v. Platy*, discrimination did not require that all individuals in the affected group have to be treated identically to find discrimination.

Turning to the question, was there substantive discrimination against people with chronic pain, the court found that chronic pain sufferers did not have their true needs and circumstances considered, unlike claimants with other types of injuries.

The legislation did virtually nothing to assist in return to work. There was no rehabilitation, and no right to return to modified duties:

> In contrast to the scheme upheld in *Gosselin*, the chronic pain regime under the Act not only removes the appellants' ability to seek compensation in civil actions, but also excludes chronic pain sufferers from the protection available to other injured workers. it also ignorest he reeal needs fo workers who are permanently disabled by chronic pain by denying them any long-term benefits and by excluding them from the duty imposed upon employers to take back and accommodate workers. The Act thus sends a clear message that chronic pain sufferers are not equally valued and deserving of respect as members of Canadian society. In my view, the second contextual factor clearly points towards discrimination.

Finally, the court held that although the impugned legislation dealt with financial or economic benefits, the interests were not wholly economic.

Section 1 analysis

The government argued that the legislation could be justified under s. 1 based on:

- the financial viability of the accident fund: The court found that budgetary considerations in and of themselves could not justify discriminatory legislation;

- developing a consistent legislative response to chronic pain claims: the court held that administrative expediency alone could not be sufficiently pressing and substantial to override a Charter right;

- the provisions are rationally connected: the court agreed that the provisions could be rationally connected to dealing with fraudulent claims; however,

- The provisions minimally impair the rights of chronic pain claimants: the court disagreed as the provisions completely eliminated any right to benefits, but maintained the bar to civil actions.

How will this affect practice at the Tribunal and Board?

a) The Ontario Workplace Safety Insurance Appeals Tribunal: Prior to *Martin*, of about 30,000 decisions, the Tribunal had only considered *Charter* issues in 60.

The Tribunal in Decision 534/900R tentatively decided that it had jurisdiction to address *Charter* questions. After the release of that decision, the Supreme Court released its trilogy of decisions mentioned in *Martin,* following which the Tribunal held in Decision 534/90 that the legislature had implicitly granted it jurisdiction, in general, to determine questions involving the application of the *Charter*. However, it further held that where there were difficulties in its jurisdiction to fashion a remedy, then in those cases the Tribunal did not have jurisdiction. [The case involved a claim for benefits by a bank teller, who was excluded because banking was not a covered industry. To address the *Charter* argument would have required "reading in" coverage not listed in the legislation].

In addition to these two decisions, the Tribunal has in two decisions been asked to interpret its legislation and Board policies in light of the *Charter*.

Since the *Martin* decision, there has only been one case in which the Tribunal was asked to consider its *Charter* jurisdiction. In Decision 719/04, the employer appealed pursuant to section 4(1) paragraph 10 of the *Act*, asking for payment of first aid funding. The Tribunal held that it did not have to decide whether it had inherent jurisdiction to consider that issue pursuant to *Martin*, because section 4(1) fell under Part II of the *Act*, which is not within the Tribunal's jurisdiction under s. 123.

The Tribunal in previous decisions (see eg. Decision 1351/98I) indicated that it would only consider *Charter* issues after the merits of the claim/appeal had been heard and addressed, because constitutional issues should be dealt with only if they could not be avoided.

If a party intends to raise a constitutional issue at the Tribunal, it would be required to serve notice on the Attorneys General for Ontario and Canada when the validity of legislation is in question, or a remedy is claimed in relation to an act or omission of the Government. Service must occur as soon as the circumstances requiring notice become known, and at least 15 days before the day on which the question is to be argued.

The Tribunal, prior to *Martin,* had already indicated that it would consider *Charter* arguments. *Martin* provides comfort that there is solid jurisdiction for the Tribunal to do so.

Not yet determined is whether or not the Board's adjudicators will apply the *Charter*. While there has been some discussion at the Board about developing a policy regarding the *Charter*, it is seen to be unlikely that the Appeals Resolution Officers will accept jurisdiction to deal with constitutional arguments.

Substantive Application to *WSIA*

The *WSIA*, 1998, includes a provision, not yet brought into force, which would allow cabinet to address chronic pain claims separately and differently than other claims. There were consultations with the previous government in 2000-2001 concerning chronic pain. One of the proposals was to follow a process similar to the one adopted in Nova Scotia after 1996, to provide for

fixed time benefits only in order to limit costs of chronic pain claims. Advice from medical representatives was that there was no medical rationale for dealing with chronic pain claimants differently that regular claimants. The report and consultation paper has been 'shelved' since 2001.

It would be extremely unlikely, given the result in *Martin*, that Ontario would proclaim that provision in force. It is more likely that at some stage the legislation will be amended in order to remove section 14.

Section 13 of the Ontario legislation provides for a carving out of gradual onset mental stress. It is arguable that the carving out of this type of disability is on all fours with the exception for chronic pain claimants in Nova Scotia, pre-*Martin.*

Individuals receiving FEL and LOE benefits, under the Ontario legislation, cease receipt at age 65 (s. 43). A *Charter* challenge may be possible for an older injured worker, whose benefits are terminating at age 65.