THE ROAD TO THE PROMISED LAND RUNS PAST *CONWAY*: ADMINISTRATIVE TRIBUNALS AND *CHARTER* REMEDIES

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I. INTRODUCTION

In the 30 years since the *Canadian Charter of Rights and Freedoms*[1] was proclaimed, one of the most litigated issues has been the role of administrative tribunals in deciding *Charter* claims. Early Supreme Court jurisprudence suggested that only the provincial superior courts had the jurisdiction to decide *Charter* claims and remedy a *Charter* breach. Over time, and in concert with the expansion of the administrative state in Canada, the Supreme Court recognized that administrative tribunals could in fact decide *Charter* questions. However, the issue of whether they could remedy a *Charter* breach became bogged down by the test from *Mills v. R.*:[2] tribunals and courts had to analyze the tribunal's jurisdiction on a case-by-case basis by examining the remedy being sought, as opposed to analyzing jurisdiction on an institutional basis, which would examine the tribunal's statutory mandate and function.

In June 2010, the Supreme Court consolidated its jurisprudence on this issue and recast the test for determining whether an administrative tribunal can grant a remedy under s. 24(1) of the *Charter*. In *R. v. Conway*,[3] the Supreme Court held that if a tribunal can decide questions of law, and its governing statute has not specifically excluded the tribunal's jurisdiction to grant *Charter* remedies, the tribunal may order a s. 24(1) remedy. Though *Conway* is being heralded as transformative in that it potentially makes *Charter* justice more accessible for Canadians,[4] my view is that *Conway* is better understood as a restatement and consolidation of the law, and that its effects are likely to be less pronounced than a reading of the decision may first suggest. Though *Conway* may lead to better access to justice for *Charter* claimants, it is unclear how, in practice, *Conway* will be interpreted and applied by administrative tribunals.

This case comment begins in Part II by describing the facts in *Conway*, and the decisions of the Ontario Review Board and the Ontario Court of Appeal. In Part III, the s. 24(1) jurisprudence that frames *Conway* is briefly surveyed. Part IV describes the Supreme Court's decision in detail. Finally, in Part V, this comment concludes by analyzing what effect, if any, *Conway* will have on the remedial jurisdiction of administrative tribunals.

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[2] [1986] 1 S.C.R. 863 [*Mills*].

[3] 2010 SCC 22, [2010] 1 S.C.R. 765 [*Conway*].

[4] See e.g. the comments of Joseph Arvay, who represented the British Columbia Review Board in *Conway*, in Kirk Makin, "Administrative tribunals can apply Charter rights, Supreme Court rules" *Globe and Mail* (12 June 2010) A7: "The possibilities now are kind of endless … [w]hether in human rights, employment standards or a whole myriad of other areas, hundreds — or thousands — of these boards have been given a real boost."

II. FACTUAL BACKGROUND

A. FACTS

In February 1984, Paul Conway was tried for sexually assaulting his aunt at knife point. Conway had been convicted of assault a few years earlier and had a history of physical and sexual abuse as a child. The Court found Conway not guilty by reason of insanity.[5]

Following the verdict, Conway was diagnosed with an unspecified psychotic disorder, a mixed personality disorder, and potential post-traumatic stress disorder and paraphilia. From 1984 to the present, Conway has been detained in an Ontario mental health facility.[6]

B. ONTARIO REVIEW BOARD

The *Criminal Code* provides that a provincial Review Board shall hold an annual hearing to review any disposition it has made in respect of an accused.[7] In 2006, at his annual hearing, Conway alleged that his *Charter* rights had been breached. Conway sought an absolute discharge as a remedy for these alleged *Charter* breaches.[8]

At the hearing, the Review Board concluded that Conway was a threat to public safety and therefore an unsuitable candidate for an absolute discharge under the *Criminal Code*. On the issue of remedy, the Review Board held that it did not have the jurisdiction to consider Conway's *Charter* claims.[9]

C. ONTARIO COURT OF APPEAL

Conway appealed the Review Board's decision to the Ontario Court of Appeal.[10] The Court of Appeal agreed that the Review Board did not have the jurisdiction to grant Conway an absolute discharge as a remedy under s. 24(1) of the *Charter*.[11] As the Review Board did not have jurisdiction over the remedy being sought, Armstrong J.A., for the majority, held that the Review Board was not a court of competent jurisdiction within the meaning of s. 24(1).[12] Justice Lang, in dissent, would have found that the Review Board had the jurisdiction to make other orders as appropriate remedies for a breach of a patient's *Charter* rights.[13]

D. SUPREME COURT OF CANADA

On appeal, the Supreme Court of Canada took the opportunity to recast the test for determining whether an administrative tribunal can grant *Charter* remedies pursuant to s.

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5 *Conway*, *supra* note 3 at paras. 8-9.
6 *Ibid.* at para. 10.
7 R.S.C. 1985, c. C-46, s. 672.81(1).
8 *Conway*, *supra* note 3 at para. 12.
9 *Ibid.* at paras. 14-15.
10 *R. v. Conway*, 2008 ONCA 326, 90 O.R. (3d) 335.
11 *Ibid.* at paras. 50-61.
12 *Ibid.*
13 *Ibid.* at paras. 102-104.

24(1).[14] In applying this new test to Conway's appeal, the Supreme Court held that the Review Board was a court of competent jurisdiction and can therefore grant s. 24(1) remedies.[15] However, the Court held that the Review Board does not have the statutory authority to grant an absolute discharge to a dangerous offender.[16]

III. LEGAL BACKGROUND

A. *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

Section 24(1) of the *Charter* provides as follows:

> 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.[17]

The s. 24(1) remedy applies to breaches of the rights and fundamental freedoms as set out in ss. 2 to 23 of the *Charter*, including the rights and freedoms that Conway alleges were breached in the course of his detention. Peter Hogg notes that s. 24(1) generally provides a remedy for government *acts* that violate a person's *Charter* rights, whereas s. 52(1) of the *Constitution Act, 1982*[18] provides a remedy for government *laws* that violate a constitutional right.[19]

B. "COURT OF COMPETENT JURISDICTION"

The issue of whether an administrative tribunal can grant a *Charter* remedy turns largely on whether it is a court of competent jurisdiction within the meaning of s. 24(1). In *Weber v. Ontario Hydro*,[20] the majority of the Supreme Court held that an administrative tribunal is a court of competent jurisdiction if its constituent statute gives it power over: (1) the parties to the dispute, (2) the subject matter of the dispute, and (3) the *Charter* remedy that is sought.[21] In *Weber*, the Court held that a labour arbitrator, appointed pursuant to the *Labour Relations Act*,[22] could grant a declaration and damages under s. 24(1). The arbitrator had statutory authority over the parties and the subject matter of the dispute, and the *Act* granted the arbitrator the power to order declarations or award damages.[23]

As an example of the Court's application of the *Weber* test, in *Mooring v. Canada (National Parole Board)* the majority of the Supreme Court held that the National Parole Board did not have the jurisdiction to exclude evidence as a remedy for a *Charter* breach.[24]

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14 *Conway*, *supra* note 3 at paras. 81-82.
15 *Ibid.* at para. 84.
16 *Ibid.* at para. 97.
17 *Supra* note 1.
18 Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
19 Peter W. Hogg, *Constitutional Law of Canada*, 2010 student ed. (Toronto: Carswell, 2010) at 40-28.
20 [1995] 2 S.C.R. 929 [*Weber*].
21 *Ibid.* at para. 66.
22 R.S.O. 1990, c. L-2.
23 *Weber*, *supra* note 20 at para. 67.
24 [1996] 1 S.C.R. 75 [*Mooring*].

The majority held that the *Corrections and Conditional Release Act*[25] required the Board to consider "all available information that is relevant to a case"[26] and, as such, the Board cannot exclude otherwise relevant information from its consideration.[27]

C. THE JURISDICTION OF ADMINISTRATIVE TRIBUNALS TO DECIDE *CHARTER* ISSUES

Though an administrative tribunal may not be a court of competent jurisdiction, and therefore cannot grant a s. 24(1) remedy, it may still be able to rule on the validity of its governing statute. In *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, the Supreme Court held that an administrative tribunal that has the power to interpret law also has the power to determine whether that law is constitutionally valid.[28] This power is derived from s. 52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada."[29] The Court held:

> An administrative tribunal need not meet the definition of a court of competent jurisdiction in s. 24(1) of the *Charter* in order to have the necessary authority to subject its enabling statute to *Charter* scrutiny. In the present case, the relevant inquiry is not whether the tribunal is a "court" but whether the legislature intended to confer on the tribunal the power to interpret and apply the *Charter*.[30]

As a result, the Court concluded that the Ontario Labour Relations Board had the capacity to consider constitutional questions relating to its own jurisdiction, and could therefore rule on the validity of its own statute.[31] The Court declined to consider whether the Board was a court of competent jurisdiction for the purposes of s. 24(1).[32]

IV. THE SUPREME COURT'S DECISION IN *CONWAY*

The *Conway* decision, written by Abella J., begins by stating certain principles about the application of the *Charter* by administrative tribunals:

> We do not have one *Charter* for the courts and another for administrative tribunals. 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.

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25 S.C. 1992, c. 20.
26 *Ibid.*, s. 101(b).
27 *Mooring*, *supra* note 24 at para. 29.
28 [1991] 2 S.C.R. 5 at 13 [*Cuddy Chicks*]. See also *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 at 594 [*Douglas College*].
29 *Supra* note 18.
30 *Cuddy Chicks*, *supra* note 28 at 14-15.
31 *Ibid.* at 15-16.
32 *Ibid.* at 19.

> 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*.[33]

Against this background, Abella J. held that it is inconsistent to limit the "court of competent jurisdiction" inquiry to whether the tribunal has jurisdiction over the particular remedy being sought, to the exclusion of the broader question as to whether the tribunal has "the jurisdiction to grant *Charter* remedies generally."[34] If the court has the authority to grant a *Charter* remedy, then it is prima facie a court of competent jurisdiction.[35] For Abella J., this approach is appealing for two reasons: first, it is more doctrinally consistent with the jurisprudence and, second, it gives litigants some certainty about the tribunal's general jurisdiction, as opposed to the case-by-case jurisdiction determination that *Weber* proposed.[36]

Justice Abella's decision is framed as a review of the existing jurisprudence, which she divides into three strands: the court of competent jurisdiction cases, beginning with *Mills*; the *Charter* values cases, beginning with *Slaight Communications v. Davidson*;[37] and the *Cuddy Chicks* trilogy,[38] which held that specialized tribunals that have the authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates.

A. *MILLS V. R.*

In *Mills*, the Supreme Court considered whether a preliminary hearing judge is a court of competent jurisdiction for the purposes of granting a s. 24(1) remedy. The Court unanimously agreed that a court of competent jurisdiction must have power over: (1) the parties to the dispute, (2) the subject matter of the dispute, and (3) the *Charter* remedy that is sought.[39]

As discussed above, the scope of the *Mills* test was expanded in *Weber* to apply to administrative tribunals. Justice Abella noted that the majority in *Weber* expressed a preference for the "exclusive jurisdiction model," which directs that administrative tribunals should decide all matters that come within their specialized statutory jurisdiction.[40] In *Mooring*, Major J., writing in dissent, criticized the majority for abandoning the exclusive jurisdiction model and seemingly resurrecting the notion that only courts (and then only superior courts) could grant s. 24(1) remedies.[41] Justice Major would have found that the National Parole Board can exclude unconstitutionally obtained evidence because it had the implicit power to exclude irrelevant, unreliable, or inaccurate evidence.[42]

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[33] *Supra* note 3 at paras. 20-21 [citations omitted, emphasis in original].
[34] *Ibid.* at para. 22.
[35] *Ibid.*
[36] *Ibid.* at para. 23.
[37] [1989] 1 S.C.R. 1038 [*Slaight*].
[38] *Cuddy Chicks*, *supra* note 28; *Douglas College*, *supra* note 28; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.
[39] *Supra* note 2 at 884-85, 890, 955-56.
[40] *Conway*, *supra* note 3 at para. 30.
[41] *Mooring*, *supra* note 24 at paras. 61, 64.
[42] *Ibid.* at paras. 85-86.

In reviewing the court of competent jurisdiction cases, Abella J. made three conclusions about this jurisprudence:

(1) the *Mills* test applies to both courts and administrative tribunals;

(2) the *Mills* inquiry has almost always turned on whether the court or tribunal has jurisdiction to award the particular remedy being sought by the applicant, and not on whether the tribunal has jurisdiction over the parties or the subject matter; and

(3) *Mooring* may contradict the exclusive jurisdiction model preferred in *Weber*.[43]

B. *SLAIGHT COMMUNICATIONS V. DAVIDSON*

In *Slaight*, the Supreme Court considered whether an adjudicator appointed under the *Canada Labour Code*[44] could order an employer to write a content-restricted reference letter for an employee, and limit the employer's response to inquiries about the employee to the contents of the letter. The Court held that though the employer's freedom of expression was breached by the order, such an order was justified under s. 1 of the *Charter*.[45]

In coming to its conclusions, the Supreme Court held that an adjudicator exercising delegated powers cannot make an order that would infringe the *Charter*.[46] This principle has been upheld without exception, most recently in *Blencoe v. British Columbia (Human Rights Commission)*[47] and *Multani v. Commission scolaire Marguerite-Bourgeoys*.[48]

C. *CUDDY CHICKS* TRILOGY

As discussed above, the *Cuddy Chicks* trilogy deals with the issue of whether administrative tribunals could decide the constitutionality of the provisions of their own statutory schemes and decline to apply them as invalid. The Supreme Court held that tribunals with the power to interpret laws also have the power to declare the law unconstitutional.

The Supreme Court's decision in *Cooper v. Canada (Human Rights Commission)*[49] reflects the Court's initial unease with its *ratio* in those cases. In *Cooper*, two airline pilots challenged the mandatory retirement provision in their collective agreement as discriminatory. The *Canadian Human Rights Act* provided an exemption for mandatory retirement policies.[50] The pilots challenged the *CHRA* as unconstitutional — the issue before the Supreme Court was whether the Canadian Human Rights Commission and the Canadian Human Rights Tribunal had the jurisdiction to consider whether the *CHRA* breached the *Charter*. The majority of the Supreme Court held that the Commission and the Tribunal did

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43 *Conway*, *supra* note 3 at para. 40.
44 R.S.C. 1970, c. L-1.
45 *Slaight*, *supra* note 37 at 1057.
46 *Ibid.* at 1077-78.
47 2000 SCC 44, [2000] 2 S.C.R. 307 at paras. 38-40.
48 2006 SCC 6, [2006] 1 S.C.R. 256 at para. 22.
49 [1996] 3 S.C.R. 854 [*Cooper*].
50 R.S.C. 1985, c. H-6, s. 15(1)(c) [*CHRA*].

not have the statutory authority to decide questions of law.[51] For La Forest J., who wrote the majority decision, it was illogical that the tribunals, with a lack of expertise in constitutional decision-making and loose evidentiary rules, could determine *Charter* issues. The dissenting reasons of McLachlin J. (as she was then) argued that allowing the tribunals to decide *Charter* questions is an "economical and effective resolution of human rights disputes and best serves the values entrenched in the [*CHRA*] and the *Charter*."[52]

In *Nova Scotia (Workers' Compensation Board) v. Martin*,[53] the Supreme Court seemingly resolved the debate as posed in *Cuddy Chicks*, on one hand, and *Cooper*, on the other. The issue before the Supreme Court was whether the Nova Scotia Workers' Compensation Appeals Tribunal (WCAT) has the jurisdiction to consider whether the relevant provisions of the *Workers' Compensation Act*[54] breached the claimants' *Charter* rights. Justice Gonthier, writing for a unanimous Court, rejected the approach taken in *Cooper*. In doing so he affirmed two main principles: (1) a government agency given statutory authority to consider questions of law is presumed to have the jurisdiction to assess its governing law's constitutionality, and (2) litigants should not be required to refer constitutional issues to the courts where administrative tribunals are accessible and have exclusive jurisdiction over disputes arising from their enabling legislation.[55] Applying these principles to *Martin*, the Court held that the WCAT had both the express and implied jurisdiction to decide questions of law, and that allowing it to do so met the policy objectives of fast and inexpensive adjudication of a claimant's *Charter* rights under the legislative scheme.

In *Conway*, Abella J. summarized the cases following *Cuddy Chicks*, concluding 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."[56]

D. MERGING THE APPROACHES

Based on this review of the jurisprudence, Justice Abella formulated the following test for determining whether an administrative tribunal has the power to grant a remedy under s. 24(1):

(1) Does "the administrative tribunal [have] jurisdiction, explicit or implied, to decide questions of law"?[57]

(2) Did the legislature clearly intend to exclude the *Charter* from the tribunal's jurisdiction?[58]

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[51] *Cooper*, *supra* note 49 at paras. 46, 66.
[52] *Ibid.* at para. 73.
[53] 2003 SCC 54, [2003] 2 S.C.R. 504 [*Martin*].
[54] S.N.S. 1994-95, c. 10.
[55] *Martin*, *supra* note 53 at para. 29.
[56] *Supra* note 3 at para. 77.
[57] *Ibid.* at para. 81.
[58] *Ibid.*

(3) Can the tribunal "grant the particular remedy sought, given the relevant statutory scheme"? Is "the remedy sought … the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal [considering] the tribunal's statutory mandate, structure and function"?[59]

Professor Steve Coughlin describes *Conway* as the merger of "the existence of the remedy and the criteria for granting the remedy into a single question."[60]

The principled basis for enunciating this new test is, as stated in *Slaight* and the *Cuddy Chicks* trilogy:

> [F]irst, 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.[61]

The outcome of this approach is that Canadians can "assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals."[62] According to Abella J., it is inconsistent to require administrative tribunals to apply the *Charter* without allowing them to assess the appropriate remedy.[63]

E. APPLICATION TO THE ONTARIO REVIEW BOARD

In applying this test to the Ontario Review Board, Abella J. found that "[t]he Board is a quasi-judicial body with significant authority over a vulnerable population" and is "unquestionably authorized to decide questions of law."[64] As there is nothing in the *Criminal Code* which demonstrates that Parliament intended to withdraw *Charter* jurisdiction from the Board, Abella J. concluded that it is a court of competent jurisdiction.[65]

Though the Supreme Court decided that the Review Board has the jurisdiction to grant s. 24(1) remedies, it also found that the *Criminal Code* restricts the remedies available to the Board, including the discretion to grant an absolute discharge to a dangerous offender or an order directing particular treatment.[66] As such, the Board does not have the statutory authority to grant the remedy that Conway was seeking, notwithstanding any *Charter* breach.

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59 *Ibid.* at para. 82.
60 Steve Coughlan, "Tribunal Jurisdiction over *Charter* Remedies: Now You See It, Now You Don't" (2010) 75 C.R. (6th) 238 at 239. See also H. Archibald Kaiser, "*Conway*: A Bittersweet Victory for Not Criminally Responsible Accused" (2010) 75 C.R. (6th) 241.
61 *Conway*, *supra* note 3 at para. 78.
62 *Ibid.* at para. 79.
63 *Ibid.* at para. 80.
64 *Ibid.* at para. 84.
65 *Ibid.*
66 *Ibid.* at para. 97.

V. THE IMPLICATION OF THE COURT'S DECISION

A. RIGHT AND REMEDY

Though Abella J. suggests that there was a need to unify the *Mills*/*Weber* and *Cuddy Chicks* lines of cases, my view is that the effect on administrative tribunals will be negligible. Even in *Conway*, the Supreme Court found that the Ontario Review Board had the jurisdiction to award Conway a *Charter* remedy, but then refused to do so on the basis that the remedy he sought was outside the scope of the *Criminal Code*.

Following *Weber* it was easy to view administrative tribunals as being disempowered, in that they could hear evidence and argument as to a *Charter* breach in an area that they have exclusive jurisdiction over and make a finding that invalidates their governing statute pursuant to s. 52(1), but could not order a *Charter* remedy under s. 24(1). In practice, however, *Weber* has not been an obstacle to granting *Charter* claimants substantive remedies. In *Cuddy Chicks*, the applicant union was entitled to certify agricultural workers if the relevant provision of the *Labour Relations Act* was declared invalid. In *Douglas College*, the applicant professors could be reinstated only if the mandatory retirement provision was invalidated. In both cases, the tribunal's statutory jurisdiction provided the applicants with the remedy they sought and there was no need for recourse to s. 24(1). As Hogg notes, the statute itself would "give to the applicants all that they asked for."[67]

Conway itself demonstrates that recasting the *Mills*/*Weber* approach does not necessarily affect the ultimate remedy granted by the court. Conway conceded that the remedies he was seeking were outside the scope of the *Criminal Code*, but argued that he should be entitled to them as a matter of *Charter* remedy. The Supreme Court disagreed, holding that the four corners of the statute, not the *Charter*, decide the appropriate remedy. This strict interpretation of the Review Board's remedial jurisdiction is at odds with the Supreme Court's more liberal approach in *R. v. 974649 Ontario Inc.*[68] In that case, the Supreme Court held that it was implied in the *Provincial Offences Act*[69] that the provincial offences court could remedy a *Charter* breach by awarding costs.[70] *Dunedin Construction* seems to suggest that administrative tribunals and provincial courts (which are treated the same for the purposes of the *Mills* analysis) have broader remedial powers than the precise language of their governing statute might suggest, especially where a s. 52(1) remedy will not be satisfactory. In *Conway*, the Supreme Court does not discuss this aspect of *Dunedin Construction*, so it is unclear whether administrative tribunals can find an implied remedial jurisdiction in their governing statutes. In *Vancouver (City of) v. Ward*[71] the Supreme Court seems to resile from *Dunedin Construction*, making it clear that provincial criminal courts do not have jurisdiction to award damages as a *Charter* remedy, and other tribunals may not either.[72]

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[67] *Supra* note 19 at 40-44.
[68] 2001 SCC 81, [2001] 3 S.C.R. 575 [*Dunedin Construction*].
[69] R.S.O. 1990, c. P-33.
[70] *Dunedin Construction*, *supra* note 68 at para. 77.
[71] 2010 SCC 27, [2010] 2 S.C.R. 28 [*Ward*].
[72] *Ibid.* at para. 58.

Conway and *Dunedin Construction* are both contrary to the Supreme Court's earlier decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*,[73] but can be reconciled in a roundabout fashion. In that case the majority held, in discussing the superior courts' powers to grant s. 24(1) remedies, that

> [t]he power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of *Charter* rights is part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law. We note, however, that statutes and common law rules may be helpful to a court choosing a remedy under s. 24(1) insofar as the statutory provisions or common law rules express principles that are relevant to determining what is "appropriate and just in the circumstances."[74]

Doucet-Boudreau suggests that the superior courts have the inherent jurisdiction to grant s. 24(1) remedies and cannot be constrained by the legislature. In *Conway*, Abella J. states clearly that "[w]e do not have one *Charter* for the courts and another for administrative tribunals,"[75] but then limits a tribunal's remedial powers to its governing statute. *Dunedin Construction* seems to reconcile the two views by allowing courts to imply remedial powers into a tribunal's governing statute. Though the end result is that administrative tribunals likely have broad remedial powers, perhaps even broader than the legislature intended, there will likely be substantial litigation and judicial review around this issue.

B. ADMINISTRATIVE TRIBUNALS' POLICY-MAKING ROLE

Although administrative tribunals may traditionally be viewed as decision-makers in an exclusive area of the law, the administrative apparatus, which is intended to govern entire swaths of public policy, requires administrative bodies to formulate policies and rules that might then be subject to constitutional scrutiny. In *Black v. Law Society of Alberta*,[76] the Supreme Court held that the rules of regulatory bodies may be laws subject to *Charter* review. *Conway* might be viewed as transformative in that policies that infringe an individual's rights can give rise to a *Charter* remedy, including costs per *Ward*, which might be more meaningful and effective for the claimant than a declaration that the policy is unconstitutional.

The Supreme Court's decision in *Greater Vancouver Transportation Authority v. Canadian Federation of Students—British Columbia Component*[77]suggests that decision-makers will prefer to remedy an unconstitutional policy by striking it down rather than awarding a s. 24(1) remedy. In *GVTA*, the Supreme Court held that the transit authorities' policies limiting political advertising violated the freedom of expression.[78] The policies were "laws" for the purposes of s. 52(1). As such, the Court declared the policies to be of no force or effect. The Court considered whether the transit authorities' actions pursuant to the policies or the policies themselves should be declared unconstitutional. The Court concluded

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[73] 2003 SCC 62, [2003] 3 S.C.R. 3 [*Doucet-Boudreau*].
[74] *Ibid.* at para. 51.
[75] *Supra* note 3 at para. 20.
[76] [1989] 1 S.C.R. 591.
[77] 2009 SCC 31, [2009] 2 S.C.R. 295 [*GVTA*].
[78] *Ibid.* at para. 80.

that rules made by government entities should be dealt with under s. 52(1), in part because doing so leads to consistent decision-making and gives rise to a rule of general application.[79] As such, even if *Conway* opens the door for applicants to challenge an administrative body's policies at its tribunal, adjudicators may prefer the s. 52(1) remedy for the reasons outlined in *GVTA*.

Moreover, tribunals and administrative bodies do not have a "blank cheque" to grant *Charter* remedies — legislatures can restrict both their jurisdiction with respect to *Charter* questions, and the types of remedies they can award. For example, after *Doucet-Boudreau* the Alberta government enacted the *Designation of Constitutional Decision Makers Regulation*,[80] which limits administrative tribunals' powers to decide constitutional questions. Though legislatures can limit a tribunal's s. 24(1) jurisdiction, it cannot affect a tribunal's s. 52(1) power, meaning that *Conway* may not have a significant practical impact on how tribunals award remedies for *Charter* breaches, especially if tribunals exercise the s. 24(1) power sparingly to avoid a legislative rebuke.

C. ACCESS TO JUSTICE

The most profound effect of *Conway* may be that it makes it easier for *Charter* claimants to pursue their claims, and to do so in legal environments that are more procedurally flexible. Conway's case is a good example — if the Review Board could not grant him a s. 24(1) remedy, he would have to commence an application in the superior court seeking an order that his rights had been violated. For Conway and other similarly situated detainees, this might be an insurmountable task, whether because of the legal costs involved in retaining a lawyer (or the risk involved in acting as a self-represented litigant) or because of the procedural and evidentiary issues that court applications necessarily require. Moreover, there is the risk of an adverse costs award against the claimant if unsuccessful. On the other hand, the *Criminal Code* affords Conway an annual hearing at the Review Board, where he neither requires a lawyer nor risks an adverse costs award.

Though it remains to be seen what other tribunals now enjoy the power to grant s. 24(1) remedies (or if the legislatures will respond to *Conway* by specifically excluding that power for certain tribunals), *Conway* will likely afford greater access to justice for at least those individuals detained under Part XX.1 of the *Criminal Code*. Further, some commentators suggest that prisoners and students appearing before statutory tribunals may be the first to enjoy the benefits of *Conway*.[81] At the same time, there is the risk that *Conway* might have the opposite effect, in that it might diminish the *Charter* jurisdiction of administrative tribunals:

> If an applicant can succeed in obtaining the remedy under the ordinary rules of the statute (because the criteria are met), then the *Charter* remedy is not needed. If an applicant cannot succeed in obtaining the remedy under the ordinary rules of the statute (because the criteria are not met), then the *Charter* remedy is not available.[82]

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79 *Ibid.* at paras. 87-88.
80 Alta. Reg. 69/2006, Sch. 1.
81 See e.g. Makin, *supra* note 4.
82 Coughlan, *supra* note 60 at 239.

Undoubtedly, it will be the tribunals' and courts' initial jurisprudence following *Conway* that will determine the precise impact that it has on access to *Charter* remedies.[83]

VI. CONCLUSION

As with almost any Supreme Court or *Charter* decision, the effect of *Conway* on the development of the law will only be understood in time. There is no question that *Conway* is an important decision in that it consolidates three strands of jurisprudence that were at risk of being unwound the further the courts strayed from the principles in *Mills* and *Cuddy Chicks.* As to whether the decision will be the "substantial leap" that some have suggested depends on how legislators seek to govern administrative tribunals following *Conway*, and how those tribunals interpret their remedial discretion. At the very least, Paul Conway has better access to justice as a result of the Supreme Court's decision, something that might have eluded him before.

[83] As of 22 November 2010, *Conway* has been referred to in ten decisions, including by the Supreme Court in *Ward* and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, 325 D.L.R. (4th) 1, courts in Alberta, Ontario, and Quebec, and administrative tribunals in Ontario and New Brunswick. None of these decisions apply *Conway* to a claimant's application for *Charter* relief under s. 24(1).