Date: 19990126
Docket: CV 07835

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the Workers' Compensation Appeals Tribunal Decision No. 97-007-P1 dated the 31st day of July, 1998;

AND IN THE MATTER OF the appeal of Louise Nolan, pursuant to Sections 25 and 7.3 of the *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6, as amended

BETWEEN:

THE WORKERS' COMPENSATION BOARD OF THE NORTHWEST TERRITORIES

Applicant

- and -

LOUISE NOLAN and the APPEALS TRIBUNAL established pursuant to Section 7.1 of the *Workers' Compensation Act*

Respondents

Application for judicial review of a decision of the Appeals Tribunal established pursuant to s. 7.1 of the *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Heard at Yellowknife, Northwest Territories on November 9, 1998

Reasons filed: January 26, 1999

Counsel for the Applicant
Workers' Compensation Board: Michael D. Triggs
Counsel for the Respondent Louise Nolan: Joseph J. Arvay
Counsel for the Respondent Appeals Tribunal: John J.P. Donihee

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IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the Workers' Compensation Appeals Tribunal Decision No. 97-007-P1 dated the 31st day of July, 1998;

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BETWEEN:

THE WORKERS' COMPENSATION BOARD OF
THE NORTHWEST TERRITORIES

Applicant

- and -

LOUISE NOLAN and the APPEALS TRIBUNAL established pursuant to Section 7.1 of the *Workers' Compensation Act*

Respondents

REASONS FOR JUDGMENT

[1] The issue on this application is the jurisdiction of the Appeals Tribunal, established pursuant to section 7.1 of the *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6 as amended, to determine the constitutionality of provisions of the said *Act*.

[2] The facts can be stated briefly. The Respondent Louise Nolan lost her first husband in a work-related accident in 1958. She was granted a survivor's pension which was terminated in 1962 as a result of her remarriage. The termination was based on s.

29 of the *Workmen's Compensation Ordinance*, R.O.N.W.T. 1958 (2nd), c. 5, which read as follows:

> 29. Where a dependent widow remarries she shall be paid a lump sum of one thousand dollars within one month after the date of her remarriage, and monthly payments to her shall cease with the payment of the monthly payment for the month in which her remarriage occurs.

[3] In 1994, Mrs. Nolan applied for reinstatement of her monthly benefits. Her application was denied by a Review Committee established under the *Workers' Compensation Act*. The Review Committee decided in December, 1995 that Mrs. Nolan's benefits had properly been terminated in accordance with s. 29 of the *Ordinance*, cited above and it referred to s. 36 of the current *Act*:

> 36. Where
>
> a) a dependent surviving spouse, or
>
> b) a woman or man described in section 28,
>
> who is entitled to compensation remarries, or marries, that person shall not be entitled to any further payments of compensation after the month in which the remarriage or marriage takes place, but shall be paid a lump sum termination payment of an amount equal to 12 times the monthly rate of pension payable to that person, where the accident occurred on or after January 1, 1977.

[4] Mrs. Nolan appealed the decision of the Review Committee to the Appeals Tribunal. She took the position, as she had before the Review Committee, that s. 29 and s. 36 offend s. 15 of the *Canadian Charter of Rights and Freedoms*. She is, however, seeking reinstatement of benefits as at the date the *Charter* was proclaimed and not for the period of time prior to that.

[5] The preliminary issue put before the Appeals Tribunal was whether the Tribunal has jurisdiction to rule on Mrs. Nolan's argument and therefore to determine the constitutionality of provisions of the *Workers' Compensation Act*. The Tribunal decided that it does have that jurisdiction.

[6] The Applicant Workers' Compensation Board has throughout taken the position that the Appeals Tribunal does not have the jurisdiction in question. It now applies for

judicial review of the decision of the Appeals Tribunal on that point. The Board takes no position on the substantive question whether the legislation at issue is inconsistent with the *Charter*.

[7] I emphasize that the question before me is not whether the impugned provisions of the *Workers' Compensation Act* are inconsistent with s. 15 of the *Charter*. The question before me is simply whether the Appeals Tribunal has the jurisdiction to make that determination.

[8] Counsel submitted, and I agree, that the test for review of the Appeals Tribunal's decision that it does have jurisdiction is whether that decision is correct: *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890.

Statutory mandate of the Appeals Tribunal

[9] In a series of cases, *Douglas/Kwantlen Faculty Assn. v. Douglas College* (1990), 77 D.L.R. (4th) 94 (S.C.C.); *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)* (1991), 81 D.L.R. (4th) 121 (S.C.C.); *Tétreault-Gadoury v. Canada (Employment & Immigration Commission)* (1991), 81 D.L.R. (4th) 358 (S.C.C.); *Cooper v. Canada (Human Rights Commission); Bell v. Canada (Human Rights Commission)* (1996), 140 D.L.R. (4th) 193 (S.C.C.), the Supreme Court of Canada has considered whether administrative tribunals have the jurisdiction to apply s. 52(1) of the *Constitution Act, 1982* to render inoperative a statutory provision in proceedings before the tribunal. In those cases, the Supreme Court has decided that the *Constitution Act* itself does not grant any power to tribunals to consider constitutional arguments or grant remedies. Rather, one must look to the tribunal's statutory mandate to determine whether it was intended by the legislature that the tribunal have the jurisdiction to hear and determine constitutional issues.

[10] Many of the statutes which will come under scrutiny for purposes of this issue will have come into effect prior to the enactment of the *Constitution Act* and it will not be possible to say that the legislature intentionally gave the tribunal in question the mandate to determine constitutional questions.

[11] Since the Constitution is law, the inquiry starts with whether it was intended that the tribunal determine questions of law generally. Section 52(1) of the *Constitution Act* provides as follows:

> 52(1). The Constitution is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[12] In *Douglas/Kwantlen*, as confirmed in *Cuddy Chicks*, the Supreme Court articulated:

> ... the basic principle that an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid.
>
> (*Cuddy Chicks*, at p. 127)

[13] The power to consider questions of law can be conferred on an administrative tribunal either explicitly or implicitly: *Cooper*.

[14] The Appeals Tribunal is established by s. 7.1 of the *Workers' Compensation Act*. The Appeals Tribunal's jurisdiction is found in s. 7.3 of the *Act*:

> 7.3 Subject to section 7.7, the appeals tribunal has exclusive jurisdiction to examine, inquire into, hear and determine all matters arising in respect of an appeal from a decision of a review committee under section 24 or 64, and it may confirm, reverse or vary a decision of the review committee.

[15] Section 7.7 provides as follows:

> 7.7(1). The appeals tribunal shall, in determining an appeal, apply the policy established by the Board.
>
> (2) Where the Board considers that the appeals tribunal has failed to properly apply the policy established by the Board, or has failed to comply with the provisions of this Act or the regulations, the Board may, in writing, direct the appeals tribunal to rehear the appeal and give fair and reasonable consideration to that policy and those provisions.
>
> (3) The Board may stay a decision, ruling or order of the appeals tribunal pending a rehearing of the appeal.
>
> (4) The chairperson of the appeals tribunal shall not participate in any decision of the Board as to whether

> (a) the appeals tribunal has failed to properly consider the policy established by the Board;
>
> (b) the appeals tribunal should be directed to rehear an appeal; or
>
> (c) the Board should stay a decision, rule or order of the appeals tribunal.

[16] In *Cuddy Chicks*, the Supreme Court approached the issue by saying first that a tribunal prepared to address a *Charter* issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought. In this case, the Appeals Tribunal clearly has jurisdiction over the parties, Mrs. Nolan and the Workers' Compensation Board. The subject matter is Mrs. Nolan's entitlement to benefits and the remedy sought is payment to her of said benefits. The Review Committee has refused her application because of a provision of the *Workers' Compensation Act* that Mrs. Nolan claims is contrary to law. In order to decide that Mrs. Nolan should receive the benefits, a remedy which is within the mandate of the Appeals Tribunal, the Tribunal would have to decide that the impugned provision is inconsistent with the *Charter*.

[17] I must therefore look to the *Workers' Compensation Act* to determine whether it, either expressly or by implication, gives the Appeals Tribunal the jurisdiction to apply the *Charter*.

[18] In my view, the jurisdiction granted in s. 7.3 to examine, inquire into, hear and determine *all matters* arising in respect of an appeal from the review committee's decision must necessarily include matters or questions of law. On its face, s. 7.3 therefore implicitly grants to the Appeals Tribunal the jurisdiction to determine questions of law. It should therefore follow that the Appeals Tribunal must be able to address constitutional issues, including the constitutional validity of its enabling statute. This principle was stated by La Forest J. in *Cooper* (at p. 213):

> If a tribunal does have the power to consider questions of law, then it follows by the operation of s. 52(1) [of the *Constitution Act*] that it must be able to address constitutional issues, including the constitutional validity of its enabling statute.

[19] Counsel for the Applicant Workers' Compensation Board argued, however, that the Appeals Tribunal's jurisdiction to determine the constitutionality of its enabling legislation cannot be implied from s. 7.3 of that legislation because the legislature has elsewhere reserved that jurisdiction specifically and exclusively to the Supreme Court of the Northwest Territories. He submitted that the power to determine the constitutionality of a law has been conferred on the Supreme Court in s. 59 of the *Judicature Act*, R.S.N.W.T. 1988, c. J-1, as amended. That section provides as follows:

> 59. (1) In this section, "enactment" includes an Act, regulation, order, order in council, ordinance and any other statutory instrument made by or under the authority of Her Majesty, the Parliament of Canada, the Parliament of the United Kingdom, the Governor General, the Governor in Council, a minister, the Legislature or the Commissioner.
>
> (2) When in an action or other proceeding the validity of an enactment of the Territories or of Canada is brought in question, the enactment shall not be held to be invalid unless notice has been given to the Commissioner or the Attorney General of Canada, or both, as the case may require or as the Supreme Court may direct.
>
> (3) The notice referred to in subsection (2) shall
>
> (a) specify the enactment alleged to be invalid and the grounds on which the enactment is alleged to be invalid; and
>
> (b) be served on the Commissioner or the Attorney General of Canada, or both, as the case may require or as the Supreme Court may direct, not less than 14 days before the date fixed by the Supreme Court for the determination of the question, together with a copy of the pleadings in the case and any other material that has been filed in the Supreme Court or submitted in evidence.
>
> (4) The Commissioner and the Attorney General of Canada are entitled as of right to be heard, either in person or by counsel in any action or other proceeding to which this section applies.
>
> (5) Where the Commissioner or the Attorney General of Canada appears in person or by counsel in any action or other proceeding to which this section applies, the Commissioner or the Attorney General of Canada shall be deemed to be a party to the action or proceeding and, for the purpose of an appeal from a decision of the Supreme Court respecting the validity of an enactment, has the same rights as any other party.

[20] In my view it is clear from its wording that s. 59 is procedural only. It does not confer exclusive jurisdiction on the Supreme Court, but only contains certain notice requirements. Although those notice requirements may apply when the proceedings are before an administrative tribunal, that is a question entirely separate from the issue of jurisdiction. I was not referred to any case where similar provisions of provincial statutes were held to confer jurisdiction rather than simply prescribe notice to be given. On the hearing of this application, counsel advised me that in fact notice of the hearing of the preliminary issue before the Appeals Tribunal was given to the Attorney General of the Northwest Territories, who declined to make representations before the Tribunal.

[21] In my opinion, s. 59 of the *Judicature Act* is not a basis upon which to conclude that the legislature did not intend for the Appeals Tribunal to have the jurisdiction to determine whether provisions of its enabling statute are unconstitutional.

[22] Another factor that has been considered by the Supreme Court of Canada on the question of a tribunal's mandate is whether the tribunal is an adjudicative body. In *Cooper*, the majority of the Court found that the Canadian Human Rights Commission has an administrative and screening function only; its mandate is simply to determine whether complaints under the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 should be referred on to an inquiry. The Court concluded that there was no legislative intention that the Commission determine questions of law. If the Commission were to strike down legislation, it would be taking on an adjudicative role for which it has no mandate.

[23] In this case, the role of the Appeals Tribunal is clearly adjudicative. It is not simply a screening body. As the Appeals Tribunal itself said in its decision in this case:

> The Appeals Tribunal often has to deal with questions such as its own jurisdiction, applicability or inapplicability of the *Workers' Compensation Act*, and other legal and evidentiary questions essential to the rendering of appeals decisions.

[24] The Appeals Tribunal is the ultimate level of appeal within the administrative system. Its decisions are protected by a strongly worded privative clause in subsections 7.9(1) and (2) of the *Workers' Compensation Act*, which provide that a decision of the Appeals Tribunal on an appeal is final and conclusive and may not be questioned or reviewed in any court. Both in terms of the issues it is required to address as the ultimate level of appeal and the finality of its decisions, the Appeals Tribunal has a role quite different from that of the Human Rights Commission.

[25] Counsel for the Board argued, however, that the Appeals Tribunal cannot be said to be the final adjudicative body in the workers' compensation scheme because of s. 7.7 of the *Workers' Compensation Act*, set out above, which provides that the Board may direct the Tribunal to rehear a matter and to give consideration to Board policy. Counsel for the Board argued that because of this provision, it cannot be said that the Tribunal makes a final decision.

[26] The significance of s. 7.7 was discussed by Vertes J. in *Northern Transportation Co. v. Northwest Territories (Workers' Compensation Board)*, CV 06887, January 19, 1998, N.W.T.S.C. (now reported at [1998] N.W.T.R. 366). He held, and I agree, that s. 7.7 does not give the Board the power to overrule the Tribunal and that the policies of the Board do not replace the Tribunal's power of decision-making. It is still for the Tribunal to decide whether there is a relevant policy and whether and how that policy applies to the specific matter before it.

[27] Section 7.7 does not, in my view, detract from the Appeals Tribunal's adjudicative role or its status as the final administrative level of appeal. That the legislature intended the Appeals Tribunal to have that role and status is confirmed by the strongly worded private clause in s. 7.9 of the *Act*, to which I have already referred.

[28] In my view the legislature has implicitly, in s. 7.3 of the *Workers' Compensation Act*, granted to the Appeals Tribunal the power to consider questions of law. There is no basis in either the *Workers' Compensation Act* or the *Judicature Act* upon which to conclude that the legislature did not intend for the Appeals Tribunal to determine questions of law or the constitutionality of legislation when the latter determination is necessary to deal with a matter within the Tribunal's mandate.

Practical Considerations

[29] As I have already indicated above, my reading of the *Douglas/Kwantlen*, *Cuddy Chicks*, *Tétreault-Gadoury* and *Cooper* cases suggests that under the tests in those cases, the finding that a tribunal has the jurisdiction to consider questions of law effectively means it has the jurisdiction to rule on the constitutionality of its enabling statute. Counsel for the Applicant Board argued that even if this is so with respect to the earlier cases, in *Cooper* the Supreme Court of Canada retreated from this position on the basis of practical considerations.

[30] Practical considerations were taken into account in *Douglas/Kwantlen* when the Supreme Court of Canada was considering the advantages and disadvantages generally

of allowing administrative tribunals to determine constitutional questions. In the subsequent cases of *Cuddy Chicks* and *Tétreault-Gadoury,* the practical considerations specific to those cases were reviewed to determine whether they were more or less pronounced.

[31] In *Cooper*, La Forest J. said that practical considerations cannot dictate the outcome of the issue:

> It must be recognized at the outset that practical considerations cannot dictate the outcome of the issue presently before this Court. As I have already emphasized, the focus of the Court's inquiry must be the mandate given to the Commission by Parliament. In such an endeavour practical considerations may be of assistance in determining the intention of Parliament, but they are not determinative. Thus in *Tétreault-Gadoury, supra,* the Court found that the Board of Referees under the *Unemployment Insurance Act, 1971,* S.C. 1970-71-72, c. 48, had no jurisdiction to consider the constitutionality of its enabling statute, notwithstanding the fact that certain practical advantages argued in favour of granting the Board such a jurisdiction.

[32] In *Tétreault-Gadoury* the Court found that the power to decide questions of law had not been given by the *Unemployment Insurance Act* to the Board, but to another administrative tribunal in the unemployment insurance scheme.

[33] In *Cooper* the majority of the Supreme Court found that the Human Rights Commission's mandate was limited to screening applications and not to making decisions on the merits of those applications. The mandate for determination of constitutional questions simply was not there. Nor did the practical considerations weigh in favour of a finding that it was.

[34] Although in *Cooper* the Court seems to have taken a narrower view of the various practical considerations, I conclude that that view was very much influenced by the role of the Human Rights Commission. The general approach, however, remains the same. The question is whether the tribunal at issue has been given the mandate to decide the constitutionality of legislation. Practical considerations may assist in answering that question, but they are not determinative.

[35] In this case, counsel for the Applicant Board relied on four practical considerations which he argued militate against a finding that the legislature intended that the Appeals Tribunal have the jurisdiction in question. My assessment of those considerations follows.

[36] *Lack of legal expertise* - The Board argued that the Appeals Tribunal's lack of legal expertise and the complexity of the *Charter* issue are problems. The lack or otherwise of expertise was considered by the Supreme Court of Canada in its series of cases. In *Cooper*, La Forest J. reviewed those cases:

> A second and more telling problem in the case of the Commission is its lack of expertise. In *Tétreault-Gadoury, supra*, I pointed out, at p. 34, that an Umpire under the *Unemployment Insurance Act* was a Federal Court judge which would ensure that a complainant received "a capable determination of the constitutional issue". Similarly in both *Douglas/Kwantlen* and in *Cuddy Chicks, supra*, the expertise of labour boards and the assistance they could bring to bear on the resolution of constitutional issues was recognized. In contrast this Court has made clear in *Mossop, supra*, at pp. 584-85, and reiterated in *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at pp. 599-600, 133 D.L.R. (4th) 449 (S.C.C.), that a human rights tribunal, unlike a labour arbitrator or labour board, has no special expertise with respect to questions of law. What is true of a tribunal is even more true of the Commission which, as was noted in *Mossop*, is lacking the adjudicative role of a tribunal.

[37] I have already found that the Appeals Tribunal has an adjudicative role. Although its members may not have legal training, that has not been considered in any of the cases ruled on by the Supreme Court of Canada to be essential.

[38] As counsel for the Appeals Tribunal pointed out, the Tribunal is based on a tripartite model. Pursuant to s. 7.1 of the *Act*, it is composed of one member, who shall be the chairperson, appointed on the recommendation of the Workers' Compensation Board from among the members of the Board, two members appointed on the recommendation of representatives of workers and two members appointed on the recommendation of representatives of employers. The Minister responsible for the Board makes the appointments.

[39] In *Cuddy Chicks*, the Supreme Court said the following about the tripartite model in assessing the practical considerations in favour of a finding of jurisdiction in the Ontario Labour Relations Board:

> The overarching consideration is that labour boards are administrative bodies of a high calibre. The tripartite model which has been adopted almost uniformly across the country combines the values of expertise and broad experience with acceptability and credibility.

[40] The Court did not consider the Board members' lack of legal training an obstacle:

> It must be emphasized that the process of Charter decision-making is not confined to abstract ruminations on constitutional theory. In the case of Charter matters which arise in a particular regulatory context, the ability of the decision-maker to analyze competing policy concerns is critical. Therefore, while board members need not have formal legal training, it remains that they have a very meaningful role to play in the resolution of constitutional issues. The informed view of the board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance. This is evidenced clearly by the weight which the judiciary has given the factual record provided by labour boards in division of powers cases: see, for example, *Northern Telecom Canada Ltd. v. Communication Workers of Canada* (1983), 147 D.L.R. (3d) 1, [1983] 1 S.C.R. 733, 48 N.R. 161.

[41] In this regard, I note that one of the practical considerations which LaForest J. referred to in *Douglas/Kwantlen* as favouring jurisdiction in administrative tribunals was to allow "the simple, speedy and inexpensive processes of arbitration and administrative agencies to sift the facts and compile a record for the benefit of a reviewing court. It is important, in this as in other issues, to have the advantage of the expertise of the arbitrator or agency".

[42] The fact that the Appeals Tribunal has, under its enabling legislation, the exclusive jurisdiction to determine all matters in respect to an appeal of a review committee's decision, which must include matters or questions of law, suggests to me that it was contemplated by the legislature that the Appeals Tribunal would have and exercise an expertise that is quite different from the more limited expertise that might be expected of a committee whose function is mainly to screen complaints to determine whether an inquiry should be held, as was the case in *Cooper*.

[43] There is no question that although members of the Appeals Tribunal may in fact lack legal training and expertise, they have access to legal advice and counsel. Also, although the members or some of them may in fact lack legal training and expertise, there is no bar to an individual with such training and expertise being appointed as a member.

[44] I conclude that lack of legal expertise is not an impediment to a finding that the Appeals Tribunal has the jurisdiction in question.

[45] With respect to the complexity of the subject matter, there is no evidence before me that the law with respect to s. 15 of the *Charter* is any more or less complex than other legal issues the Appeals Tribunal may face in its work. Certainly such matters as the purpose of the provisions of the *Workers' Compensation Act*, the context of the benefits scheme, the effect on the claimants, as well as statistics and information relating

to labour force participation [matters that were dealt with in *Grigg v. British Columbia* (1996), 138 D.L.R. (4th) 548 (B.C.S.C.) and by the British Columbia Workers' Compensation Review Board in its Decision No. 95-1557-A, 12 Workers' Compensation Reporter 365, cases similar to Mrs. Nolan's], are well-suited to the Appeals Tribunal's usual area of work. I do not see the complexity of the subject matter as a problem and in any event, I do not see how complexity can affect the issue of jurisdiction. Either a tribunal has been given the jurisdiction to determine constitutional questions or it has not. I do not think the legislature's intention can depend on whether the questions are complex.

[46] The Appeals Tribunal cannot, of course, expect any deference from the courts to any decision it makes on the constitutionality of its enabling legislation. The law is very clear that on an application for judicial review of such a decision by an administrative tribunal, the test is whether the decision is correct: *Douglas/Kwantlen*.

[47] *Lack of evidentiary safeguards* - In *Cooper*, the Court gave as an example of the Human Rights Commission's not having a mechanism in place to adequately deal with multifaceted constitutional issues the fact that the Commission is not bound by the traditional rules of evidence and may therefore receive unsworn, hearsay or opinion evidence. The Court said that suitable evidentiary safeguards must be in place for purposes of determining the constitutional validity of a legislative provision.

[48] Counsel for the Applicant Board urged me to consider that because the Appeals Tribunal is not bound by the traditional rules of evidence, it too lacks the suitable evidentiary safeguards referred to in *Cooper*.

[49] I think it is important to keep in mind the function of the Human Rights Commission. As described in *Cooper*, its function is to screen a complaint to determine whether a tribunal should conduct an inquiry into it. The Commission does not hear evidence and does not adjudicate; it reviews an investigator's report and may hear submissions on that report from the parties concerned.

[50] The function of the Appeals Tribunal is an adjudicative one. Although not bound by the traditional rules of evidence, it may make rules respecting its procedure and the conduct of its business, exercise the powers of a board appointed under the *Public Inquiries Act* (for example, the power to summons witnesses, take sworn evidence and require production of documents) and cause depositions of witnesses outside the Northwest Territories to be taken in a manner similar to that set out in the Rules of the Supreme Court of the Northwest Territories (s. 7.5(2) of the *Workers' Compensation*

Act). The Appeals Tribunal can therefore develop or adopt more formal rules of procedure and invoke the traditional rules of evidence for a case involving constitutional issues. Certainly one would expect that the Appeals Tribunal as an adjudicative body would be alert to evidentiary requirements in a way that a screening body would not.

[51] *The status of the Appeals Tribunal in the statutory scheme* - Counsel for the Applicant Board argued that it cannot be said that the Appeals Tribunal is the final level of appeal in the statutory scheme because the Board has a supervisory role to ensure that the Appeals Tribunal abides by Board policy. My comments above with respect to s. 7.7 of the *Workers' Compensation Act* deal with this submission. The submission itself really amounts to saying that the Board controls the Tribunal. In my view, that is not what s. 7.7 says.

[52] Counsel for the Board argued as well that s. 7.7(2), which provides that the Board may direct a rehearing of an appeal where the Appeals Tribunal has failed to comply with the provisions of the *Act* and direct that the Appeals Tribunal give fair and reasonable consideration to those provisions means that the Tribunal does not have the power to determine which sections of the *Act* apply to a particular fact situation. I do not agree. Section 7.7(2) does not give the Board the power to direct the Tribunal to apply a certain section of the *Act*, nor does it require the Tribunal to apply any section to which the Board directs it give "fair and reasonable consideration". As was pointed out in *Northern Transportation Co.* with respect to Board policy, it is still for the Tribunal to make the decision as to whether any particular section of the *Act* applies to the case before it. The fact that the Board could direct the Appeals Tribunal to consider s. 36 of the *Act*, the survivors' benefits section, does not bar the Appeals Tribunal from considering whether that section is inconsistent with the *Charter*.

[53] *The effect on the integrity of the system as a whole* - As I understand the Board's argument in this regard, it is that since the Appeals Tribunal does not have the power to make a generally applicable declaration as to the constitutionality of a legislative provision, there would be inconsistency in the way cases are dealt with. A finding by the Appeals Tribunal in Mrs. Nolan's case that the impugned provision of the *Act* contravenes the *Charter* would apply to Mrs. Nolan alone and not to other cases like hers without a specific ruling in those cases.

[54] As counsel for Mrs. Nolan pointed out, there are a number of practical ways in which uniformity could be attained. The Board could choose to apply the ruling of the Appeals Tribunal to other claims. Alternatively, it could establish a procedure for "fast-tracking" claims so that even if they were denied at the initial levels of the claims

procedure on the basis of the legislative provision, each claim would quickly come before the Appeals Tribunal for a ruling that the provision is unconstitutional. As a further alternative, the legislation itself might be amended.

[55] I would assume that if the Appeals Tribunal rules in Mrs. Nolan's case that the impugned provision contravenes the *Charter* and if the Board is not satisfied with that decision, the matter will go on to judicial review, in which case a binding ruling will be made as to whether the decision of the Appeals Tribunal was correct or not. However, if the Board is satisfied with the decision of the Appeals Tribunal, then surely common sense dictates that it will act in such a way as to make the process for other claimants easier rather than more difficult. Whether claims are treated consistently following upon a decision by the Appeals Tribunal in Mrs. Nolan's case seems to me to be very much within the control of the Board. I do not, accordingly, view the concern raised by the Board as persuasive against a finding that the Appeals Tribunal has the jurisdiction in question.

[56] The practical considerations raised by counsel for the Board do not, therefore, affect my conclusion that the Appeals Tribunal has the mandate to determine whether s. 36 and former s. 29 of the *Workers' Compensation Act* are inconsistent with s. 15 of the *Charter*.

[57] In my opinion, there are in fact a number of practical considerations, reference to which may be found in the decisions of the Supreme Court of Canada, which favour allowing the Appeals Tribunal to determine constitutional questions. For one thing, a claimant in Mrs. Nolan's position might then have her claim adjudicated entirely within the administrative process rather than having to apply to the courts (*Douglas/Kwantlen*, at p. 125; *Tétreault-Gadoury*, at p. 366). Second, as I have noted above, the Appeals Tribunal may bring its skill and background to bear on issues relating to policy and the purpose of the legislation and compile a record which will be of assistance to a court on judicial review. Finally, but most importantly in my view, as stated by LaForest J. in *Douglas/Kwantlen* at p. 125:

> ... if there are disadvantages to allowing arbitrators or other administrative tribunals to determine constitutional issues arising in the course of exercising their mandates, there are clear advantages as well. First and foremost, of course, is that the Constitution must be respected. The 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.

Conclusion

[58] In the result, I conclude that the Appeals Tribunal does have the jurisdiction to determine Mrs. Nolan's *Charter* challenge to the survivors' benefits provisions of the *Workers' Compensation Act*. The decision of the Appeals Tribunal on this preliminary point is correct and the application for judicial review is accordingly dismissed.

[59] Mrs. Nolan will have her costs of this application.

[60] I thank counsel for their submissions and the materials which they filed, all of which were very helpful to me.

V.A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories
this 26th day of January, 1999.

Counsel for the Applicant
Workers' Compensation Board: Michael D. Triggs
Counsel for the Respondent Louise Nolan: Joseph J. Arvay
Counsel for the Respondent Appeals Tribunal: John J.P. Donihee

CV 07835

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