

BETWEEN:

WIESLAW KUDLA

Applicant

and

COACHMAN INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Suesan Alves

Heard: July 7, 2000, at the Offices of the Financial Services Commission of Ontario in Toronto.
Written submissions with respect to the constitutional question were received by September 22, 2000.

Appearances: Roland Spiegel for Mr. Kudla
Eric K. Grossman for Coachman Insurance Company
Hart Schwartz, Counsel, Ministry of the Attorney General
Constitutional Law Branch, provided submissions with respect to the constitutional question on behalf of the Attorney General for Ontario.

Issues:

Coachman seeks an Order that Mr. Kudla is precluded from proceeding to arbitration by section 50 of the *Schedule*.¹ Mr. Kudla submits that section 50 of the *Schedule* contravenes the *Canadian Charter of Rights and Freedoms*, and seeks an Order “quashing” or dismissing the hearing. The Attorney General for Ontario made submissions with respect to the constitutional question. His submissions were adopted by Coachman.

¹The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96 and 303/98.

The issues are:

1. Does an arbitrator at the Financial Services Commission of Ontario have jurisdiction to determine the constitutional validity of section 50 of the *Schedule*?
2. If yes, does section 50 of the *Schedule* contravene the *Charter*?

Result:

1. An arbitrator at the Financial Services Commission of Ontario has jurisdiction to determine the constitutional validity of section 50 of the *Schedule*.
2. Section 50 of the *Schedule* does not contravene the *Charter*.

By letter dated January 2, 2001, I informed the parties and counsel for the Attorney General of my decision on a number of preliminary issues, with reasons to follow. On February 7, 2001, Mr. Kudla's representative, Mr. Spiegel, wrote the Commission that the parties had settled the matter, and requested that the arbitration application be withdrawn. That letter was copied to Mr. Grossman, counsel for Coachman. The Commission received no objection to the Applicant's request to withdraw. I concluded that the issues between the parties were moot, and that I would not therefore be issuing reasons.

On April 7, 2001, the Applicant's representative wrote requesting that my reasons be issued as stated in my letter decision of January 2, 2001. By letter dated April 17, 2001, counsel for Coachman advised that he wished the reasons issued. By letter dated May 29, 2001, counsel for the Attorney General, Mr. Schwartz, confirmed that he also wished the reasons issued. Given the novelty of the constitutional question, the consent of the parties and of the Attorney General, I now issue the reasons for my decision, solely with respect to the *Charter* questions.

REASONS:

Mr. Kudla was injured in a motor vehicle accident on December 17, 1998, and submitted his claims for statutory accident benefits to Coachman. Coachman paid some of Mr. Kudla's claims for benefits, and rejected others. When Mr. Kudla applied for mediation, and again when he applied for arbitration, Coachman alleged that he was barred from commencing a mediation proceeding by section 50 of the *Schedule*. Mr. Kudla submits that section 50 of the *Schedule* contravenes the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, ("the Charter")*.

Section 50 of the *Schedule* provides:

- 50.** An insured person shall not commence a mediation proceeding under section 280 of the *Insurance Act* unless,
- (a) he or she notified the insurer of the circumstances giving rise to a claim for a benefit and submitted an application for the benefit within the times prescribed by this Part;
 - (b) he or she made himself or herself reasonably available for any examination required by the insurer under section 42; and
 - (c) he or she made himself or herself reasonably available for any assessment under section 43 and he or she complied with subsection 43 (2) in respect of the assessment.

Jurisdiction

Counsel for the Attorney General for Ontario and counsel for the Insurer questioned whether an arbitrator at the Financial Services Commission of Ontario has jurisdiction to deal with a constitutional question. They also submitted the Applicant's constitutional challenge was without merit, and should be

dismissed. They further submitted that this would be an appropriate case for an arbitrator to assume, without deciding, the jurisdiction to entertain the constitutional question. While that approach is expedient, an arbitrator is a creature of statute and only has such power as may be granted by statute, either expressly, or by necessary implication. In my view, I am obliged to first determine whether I have the authority to decide the constitutional question, before deciding whether section 50 of the *Schedule* contravenes the *Charter*.

Before the *Charter*, administrative tribunals decided constitutional questions dealing with division of powers issues. Once the Constitution was amended in 1982 to include the *Charter*, tribunals have also been asked to determine whether provisions of the tribunal's enabling legislation contravene the *Charter*.

Some tribunals are limited to determining questions of fact, while others are empowered to consider questions of law as well as fact. Some are expressly prevented by statute from addressing constitutional issues.² Other tribunals have express authority, or implied authority to address such issues.³ In making such a determination, a tribunal examines its statutory mandate, considers whether it is a "court of competent jurisdiction" within the meaning of section 24 of the *Charter*, and, if the tribunal has the requisite authority, decides what remedy it may appropriately grant. I will deal with each of these issues as they pertain to this case.

² s.67(2)(a) of the *Ontario Works Act*, S.O. 1997, c.25 Schedule A provides that the Social Benefits Tribunal "shall not inquire into or make a decision concerning, ... the constitutional validity of a provision of an Act or a regulation."

³ s.70(4) of the *Unemployment Insurance Regulations* C.R.C./1576, as am. by SOR/82-1046 contemplates the possibility that an Umpire may find a provision of the Act or regulations to be unconstitutional. It provides: "Where, in respect of a claim for benefit, an umpire has declared a provision of the Act or these Regulations to be *ultra vires* and an application is made by the Commission in accordance with the *Federal Court Act* to review the decision of the umpire, benefits are not payable in respect of any claim for benefit made subsequent to the decision of the umpire, until the final determination of the claim under review, where the benefit would not otherwise be payable in respect of any such subsequent claim if the provision had not been declared *ultra vires*."

Court of competent jurisdiction

Section 24(1) of the *Charter* provides that “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.” In the case of *Mills v. The Queen*, [1986] 1 S.C.R. 863, the Supreme Court of Canada considered whether arbitrators are courts of competent jurisdiction for purposes of section 24 of the *Charter*. The majority of the Court concluded:

a tribunal will be a court of competent jurisdiction, if its constituent legislation gives it power over the parties, the issue in litigation and power to grant the remedy which is sought under the *Charter*. Within their statutory powers they may fashion such remedies as the Charter breach may require, except for prerogative writs, traditionally the province of the superior courts. The superior courts are, of course, courts of competent jurisdiction. ... Nor is there magic in labels; it is not the name of the tribunal that determines the matter, but its powers. (It may be noted that the French version of s. 24(1) uses “tribunal” rather than “cour”.) The practical import of fitting Charter remedies into the existing system of tribunals, is that litigants have “direct” access to Charter remedies in the tribunal charged with deciding their case.

More recently, the Supreme Court of Canada affirmed that this is the appropriate test in determining whether a tribunal is a court of competent jurisdiction within the meaning of section 24 of the *Charter* in *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929. After applying the above test in the reasons given below, I conclude that a FSCO arbitrator is a court of competent jurisdiction within the meaning of section 24 of the *Charter*.

Subject matter and parties

There was no dispute that a FSCO arbitrator had jurisdiction over the parties – an insurer and an insured person. I find that each party seeks a resolution of the dispute in accordance with sections 280 to 283 of the *Insurance Act*.

Remedy

Where a person establishes that his or her rights have been infringed, sections 24 and 52 of the *Charter* used separately or together provide a broad range of remedial options. Section 24 of the *Charter* provides that a person whose rights have been infringed under the *Charter* “may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” Section 52 (1) of the *Charter* provides: “The Constitution of Canada 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.”

In the case of *Schachter v. Canada* [1992] 2 S.C.R. 679, Lamer, C.J. provided a detailed framework of constitutional remedies which a court might grant under sections 24 and or 52 of the *Charter*, along with guidelines as to the circumstances in which the remedies might be appropriate. The Chief Justice stated:

A court has flexibility in determining what course of action to take following a violation of the Charter which does not survive s. 1 scrutiny. Section 52 of the Constitution Act, 1982 mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only “to the extent of the inconsistency”. Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the Charter extends to any court of competent jurisdiction the power to grant an “appropriate and just” remedy to “anyone whose [Charter] rights and freedoms... have been infringed or denied”. In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

In this case Mr. Kudla submits that section 50 of the *Schedule* should be “struck out” ... “and subsequently, this preliminary hearing should be quashed forthwith.” He also submits that Coachman’s application should be “quashed or dismissed.”

A general declaration of invalidity can only be granted by a court which is a section 96 or section 101 court under the *Constitution Act, 1867*, not by a FSCO arbitrator. Should I conclude that section 50 contravenes the *Charter*, such a finding would not be a general declaration of invalidity for all purposes, but simply a conclusion reached in relation to this case. If I find section 50(c) of the *Schedule* contravenes the *Charter*, I would consider whether this hearing should be decided as if the section did not exist. Since that section is the basis on which Coachman has applied for an Order preventing Mr. Kudla from proceeding to arbitration, the preliminary issue would be dismissed, and Mr. Kudla would be permitted to proceed to arbitration. Since Mr. Kudla's request, as I understand it, is not a request for a general declaration of invalidity, I conclude that I have jurisdiction over the remedy sought.

Express or implied power to consider Charter questions

The question — whether a particular administrative tribunal has the requisite jurisdiction to decide if a provision of its enabling legislation is inconsistent with the *Charter*, and therefore of no force and effect — has been addressed by the Supreme Court of Canada in four cases, namely *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, and *Cooper & Bell v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854. In each of those cases the tribunals concerned were asked to determine whether the tribunal's enabling legislation contravened the equality rights guarantees in section 15 of the *Charter*.⁴

⁴ Section 15 of the *Charter* provides:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In two of the cases, *Douglas College* and *Cuddy Chicks*, the Supreme Court of Canada considered the question in relation to tribunals which had an express statutory power to deal with questions of law, while in *Tétreault-Gadoury* and in *Cooper*, the tribunals had no such express power. Counsel for the Attorney General and for Coachman rely on *Cooper*, the most recent of the four cases. However, these decisions must be read as a series.

Tribunals with express powers

In *Douglas College*, two faculty members were due to retire at age 65 under a mandatory retirement provision in their collective agreement. They filed a grievance and submitted that the mandatory retirement provision violated s.15(1) of the *Charter*. One of the issues before the Supreme Court of Canada was whether the board had jurisdiction to hear and determine a *Charter* question.

The Court held that:

A tribunal's power is that conferred by its statutory mandate. The jurisdiction of a statutory tribunal must be found in a statute and must extend not only to the subject matter of the application and the parties, but also to the remedy sought. A tribunal, in the exercise of its statutory mandate, is empowered to examine and rule upon the constitutional validity of a statute it is called upon to apply. Where a tribunal is engaged in performing what it was empowered to do by law, it is entitled not only to construe the relevant legislation but also to determine whether that legislation was validly enacted. Any law that is inconsistent with the provisions of the Constitution of Canada is, to the extent of its inconsistency, of no force or effect. A tribunal, if it finds a law it is applying to be constitutionally invalid, must treat it as having no force or effect under s. 52(1) of the Constitution Act, 1982.

The Supreme Court of Canada found that under the *Labour Code*, the arbitrator had express statutory powers to provide a final and conclusive settlement to a dispute arising under a collective agreement, to grant a wide range of appropriate remedies, and to interpret and apply any Act intended to regulate employment, including the *Charter*. The grievance was based on the terms of the collective agreement

and on the application of s.15(1) of the *Charter*. The Court concluded that the arbitrator had jurisdiction over the parties, the subject matter at issue and the remedy sought, and could therefore interpret and apply the *Charter* to the dispute.

In *Cuddy Chicks*, the second of the cases to come before the Supreme Court of Canada, a union filed an application before the Ontario Labour Relations Board for certification of employees at a chicken hatchery. The employer submitted that its employees were persons employed in agriculture, and by virtue of s.2(b) of the *Labour Relations Act*, that *Act* had no application. The union alleged that s.2(b) contravened the right to freedom of association and equality rights guaranteed in sections 2(d) and 15 of the *Charter*. The employer disputed the jurisdiction of the Board to subject its enabling statute to *Charter* scrutiny.

The Supreme Court of Canada held that:

An administrative tribunal which has been given the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid. It must respect the Constitution as the supreme law because of the principle of supremacy of the Constitution confirmed by s. 52(1) of the Constitution Act, 1982.

The Court stated:

It is essential to appreciate that s.52(1) does not function as an independent source of an administrative tribunal's jurisdiction to address constitutional issues. Section 52(1) affirms in explicit language the supremacy of the Constitution but is silent on the jurisdictional point per se. In other words, s. 52(1) does not specify which bodies may consider and rule on Charter questions, and cannot be said to confer jurisdiction on an administrative tribunal. Rather, jurisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, 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.

The Supreme Court of Canada considered s.106(1) of the *Labour Relations Act* which provides for the Board's jurisdiction. That section states: "The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes...."

The Supreme Court of Canada interpreted that provision as one which expressly granted the Board authority to decide points of law and to determine questions of law and fact relating to its own jurisdiction. The Court held that authority with respect to questions of law encompasses the question of whether a law violates the *Charter*. The Court concluded that the Board therefore had the requisite authority to rule on the constitutionality of s.2(b) of its enabling statute in the course of considering the union's application for certification.

Tribunals without express powers

In both of the above cases, *Douglas College* and *Cuddy Chicks*, Justices Wilson and L'Heureux-Dubé concurred in the result, but expressly left open the question whether an administrative tribunal without express power to consider all relevant law could nevertheless apply the *Charter*. In *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, the Supreme Court of Canada was asked to decide that issue for the first time.

Ms. Tétreault-Gadoury lost her job shortly after she turned 65 and applied for unemployment insurance benefits. The Employment and Immigration Commission ruled that she was no longer entitled to receive ordinary unemployment insurance benefits because of her age, and would only receive a small lump sum retirement benefit. Ms. Tétreault-Gadoury appealed to a Board of Referees and submitted that s.31 of the *Unemployment Insurance Act* was inconsistent with s.15 of the *Charter*.

One of the questions before the Supreme Court of Canada was whether that Board had the authority to decide the constitutional question. To determine that issue, the Supreme Court of Canada examined the scheme of the *Unemployment Insurance Act, 1971*. That *Act* provided for three administrative bodies — the Employment and Immigration Commission, the Board of Referees, and the Umpire — each of which had various roles. The legislation expressly conferred jurisdiction to consider all relevant law upon the Umpire, to whom an appeal from the Board of Referees could be made. The Court concluded that the “failure to provide the Board of Referees with a power similar to that given to the Umpire was not merely a legislative oversight. The power to interpret law is not one which is lightly conferred upon administrative tribunals. The particular legislative scheme ... contemplates that constitutional questions be more appropriately presented to the Umpire, on appeal, rather than to the Board itself.”

The Court emphasized that the tribunal must already possess the ability to decide questions of law in order to have the necessary jurisdiction to apply s.52(1) of the *Charter*. The Supreme Court of Canada then considered the remaining aspects of the test for jurisdiction set out in *Douglas College* and in *Cuddy Chicks*, and found that the:

Board of Referees had jurisdiction over the parties but not over the subject matter and the remedy. The subject matter concerned not simply the determination of the respondent's eligibility for benefits but also the determination of whether s. 31 of the Unemployment Insurance Act, 1971 violated s. 15 of the *Charter*. Similarly, the remedy would have required the Board to disregard s. 31 when awarding the respondent benefits, assuming it found s. 31 to be inconsistent with the *Charter*. Such a determination rested within the jurisdiction of the umpire, not the Board of Referees.

Justice L'Heureux-Dubé added that where the statute is silent or unclear, there are many “other factors” to be considered when determining whether the constitutional subject matter should properly be considered by an administrative tribunal. While the legislative mandate given to a board will usually be the most salient factor, it will not necessarily be determinative. The question of what “other factors” might be relevant in this regard should be left open.

In *Cooper & Bell v. Canada (Human Rights Commission)*, two airline pilots complained to the Canadian Human Rights Commission that the requirement in their collective agreement that they retire at age 60, five years earlier than most employees in Canada, was discriminatory. The pilots' employer submitted that the employment policy was a *bona fide* occupational requirement, and relied on section 15(c) of the *Canadian Human Rights Act*. Under that section, such a retirement practice would not be discriminatory if employment was terminated at the normal age of retirement for pilots working in similar positions. The Commission investigator recommended a dismissal of the pilots' complaints based on s.15(c) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, and no inquiry was ordered.

The question before the Supreme Court of Canada was whether the Commission, a tribunal without express power to address questions of law, could address *Charter* questions. All members of the Court agreed that the Commission did not have express statutory authority to determine questions of law. The Court then examined the scheme of the *Canadian Human Rights Act* to determine whether the Commission had implied authority to determine questions of law. In a 5-2 decision, the majority of the Court held that the tribunal did not have implied authority to determine questions of law, and could not determine the *Charter* issue. The minority concluded that the tribunal had implied authority to determine questions of law, and therefore to determine whether the "normal age of retirement defence" was rendered invalid by the *Charter*.

Justices La Forest, Sopinka, Gonthier and Iacobucci concluded that neither the Canadian Human Rights Commission, nor a tribunal appointed at the request of the Commission, had implied power to subject the legislation to constitutional scrutiny, or to determine the constitutional validity of a limiting provision of the *Act*. They concluded that a tribunal appointed under the *Canadian Human Rights Act* to inquire into a complaint referred by a Commission investigator is primarily engaged in a fact-finding inquiry in the course of which a tribunal has the jurisdiction to consider questions of law. While the

tribunal had the power to interpret and apply its enabling statute, it did not follow that it had jurisdiction to determine *general* questions of law.

Chief Justice Lamer agreed with the majority that the tribunal did not have jurisdiction to decide questions of law. However, he approached the case differently. He disagreed with the premise articulated in the *Douglas College* and *Cuddy Chicks* cases, that the intent to grant a tribunal the power to interpret general law in turn implies an intent to confer on tribunals a power to refuse to apply laws which violate the *Charter*. Instead of the legislature determining the jurisdiction of the tribunal, the tribunal determined its own jurisdiction. He was of the view that this principle was at odds with some fundamental principles of the Canadian Constitution, and called upon the Supreme Court of Canada to revisit this issue. He expressed doubt that administrative tribunals ought to consider *Charter* questions under any circumstances. The Chief Justice was of the view that the decisions of the Court which authorize tribunals to overstep their constitutional role are in need of serious revision. He agreed, however, that he was bound by the Court's decisions in *Douglas College* and *Cuddy Chicks*, that tribunals which have jurisdiction over the general law, have jurisdiction to refuse to apply—and hence effectively to render inoperative—laws that they find to be unconstitutional by virtue of s.52 of the *Constitution Act 1982*.

Justices L'Heureux-Dubé and McLachlin, who dissented, stated that in determining whether an administrative tribunal has the power to determine questions of law, various practical matters can be taken into account, in so far as they reflect the scheme of the enabling statute, and provide an insight into the mandate given to the administrative tribunal by the legislature. These included the composition and structure of the tribunal, the procedure before the tribunal, the appeal route from the tribunal, and the expertise of the tribunal. They concluded that the Canadian Human Rights Commission had jurisdiction to consider questions of law, including questions of statutory interpretation. They concluded that this was a clear indication that Parliament intended the Commission to have a general power to consider questions of law, including *Charter* questions, and would have allowed the appeal.

“Questions of law” and “general questions of law”

Justice L’Heureux-Dubé observes that the phrase “general questions of law” was first used by Justice La Forest, without elaboration, in the case of *Canada (Attorney General) v. Mossop* [1993] 1 S.C.R. 554.⁵ That case dealt with the standard of review and the degree of deference to be shown by the Court to the interpretation by the Canadian Human Rights Tribunal, of “family status,” a term in the tribunal’s empowering legislation. In that case, a civil servant was denied bereavement leave to attend the funeral of the father of his male common law partner because the collective agreement provided such leave only where a partner was of the opposite sex. The tribunal interpreted “family status” as including a same sex relationship and found the provision in the collective agreement discriminatory. The Supreme Court of Canada did not accord the tribunal deference, and substituted its own interpretation — namely, that a same sex relationship was not included in the term “family status.”

In *Mossop*, Justice La Forest stated:

The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one in issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed to be competent to perform. The courts cannot abdicate this duty to the tribunal. They must, therefore, review the tribunal’s decisions on questions of this kind on the basis of correctness, not on a standard of reasonability.

Justice L’Heureux-Dubé observes that since *Mossop*, the Supreme Court of Canada has used that phrase in relation to human rights tribunals only, when it disagrees with the tribunal’s interpretation of a question, accords the tribunal no deference, and substitutes its own interpretation.⁶ Therefore, it may be that the phrase will apply only to human rights tribunals. However, if the phrase is of more

⁵“The ‘Ebb’ and ‘Flow’ of Administrative Law on the ‘General Question of Law’ ” in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 308.

⁶ *Ibid.*

general application, a general question of law appears to be one which involves the interpretation of human rights or societal values, a question of statutory interpretation involving the constitution, the tribunal's enabling legislation, or a question which requires general legal reasoning for its resolution.

Statutory language which confers jurisdiction

The tribunal's express statutory mandate will normally be the most significant factor in determining whether a tribunal has authority to consider general questions of law and the concomitant power to address questions involving the *Charter*.⁷ The Supreme Court of Canada has held that statutory language which authorizes tribunals "to interpret and apply any Act intended to regulate employment,"⁸ or to "determine all questions of law and fact that arise in any matter before it,"⁹ or to "decide any question of law or fact that is necessary for the disposition of any appeal"¹⁰ confers jurisdiction to consider *Charter* questions.

FSCO arbitrators

Section 20(2) of the *Insurance Act*, R.S.O. 1990, c.I.8, provides that an arbitrator at the Financial Services Commission of Ontario, ("FSCO" or "the Commission") has:

exclusive jurisdiction to exercise the powers conferred upon him or her under this Act **and to determine all questions of fact or law that arise in any proceeding before him or her** and, unless an appeal is provided under this Act, his or her decision thereon is final and conclusive for all purposes. [emphasis added]

⁷ *Tétreault-Gadoury*, op. cit.

⁸ *Douglas College*, op.cit.

⁹Section 106(1) of the *Labour Relations Act* provides: "The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes...."

¹⁰*Tétreault-Gadoury*, op.cit.

Given the similarity between the wording of section 20 of the *Insurance Act*, and the statutory language interpreted in the above three cases, I find that FSCO arbitrators have a general power to determine all questions of law in any proceeding before them by virtue of section 20 of the *Insurance Act*, and the concomitant power to decide *Charter* questions.

Counsel for the Attorney General and counsel for Coachman rely on the case of *Cooper & Bell v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 decision to question the jurisdiction of a FSCO arbitrator to consider a *Charter* question.

However, in that case, the Supreme Court of Canada concluded that the Canadian Human Rights Commission had no express powers to determine general questions of law, and performed an administrative and screening function; not an adjudicative one.

In my view, the *Cooper* case is distinguishable from the present, because under section 20 of the *Insurance Act*, FSCO arbitrators are explicitly empowered to determine questions of law which bear on issues before them. They routinely make findings of fact or mixed fact and law, interpret legislation and apply the law to the facts. In short, this tribunal is one which “frequently resolves questions of law or fact in accordance with legislative rules or regulations,” and is an adjudicative tribunal as defined by the Supreme Court of Canada in *Tétreault-Gadoury*.

Further, *Cooper* was decided by the Supreme Court of Canada in 1996. In 1998, the *Canadian Human Rights Act* was amended to provide that: “In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.”¹¹ Again, the wording in the amendment is very similar to the powers given to FSCO arbitrators under section 20 of the *Insurance Act*.

¹¹S.C. 1998, c. 9, s.27(2).

In *Zundel v. Canada (Attorney General)*, [1999] 4 F.C. 289 (Federal Court, Trial Division), the court held that the recent amendment gave the Canadian Human Rights Tribunal jurisdiction to determine constitutional issues and laid to rest whatever doubt there might otherwise have been about the tribunal's jurisdiction to determine *Charter* questions. For these reasons, I conclude that a FSCO arbitrator has express statutory authority under the *Insurance Act* to determine questions of law in relation to the *Charter* and therefore the question of whether section 50 of the *Schedule* contravenes the provisions of the *Charter*.

Other considerations

In *Tétreault-Gadoury*, the Supreme Court of Canada stated that where express authority to deal with such questions is found in the statute, that would ordinarily be the end of the matter. In *Cooper*, Justice La Forest stated:

In considering whether a tribunal has jurisdiction over the parties, the subject matter before it, and the remedy sought by the parties it is appropriate to take into account various practical matters such as the composition and structure of the tribunal, the procedure before the tribunal, the appeal route from the tribunal, and the expertise of the tribunal. These practical considerations, in so far as they reflect the scheme of the enabling statute, provide an insight into the mandate given to the administrative tribunal by the legislature. At the same time there may be pragmatic and functional policy concerns that argue for or against the tribunal having constitutional competence, though such concerns can never supplant the intention of the legislature.

In my view, most of the “other considerations” which bear on the question support a legislative intent to grant jurisdiction to a FSCO arbitrator to deal with *Charter* questions. The statutory scheme currently provides that after mediation, an insured person may access either a court of competent jurisdiction, a FSCO arbitrator, or an arbitrator under the *Arbitrations Act, 1991*. If the insured person chooses a FSCO arbitrator, he or she may appear before an arbitrator at a pre-hearing, various types of interim proceedings and a hearing. FSCO arbitrators sit as single arbitrators, conduct quasi-judicial hearings and exercise a statutory power of decision under the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22, as amended.

All FSCO arbitrators are legally trained. While hearsay is permissible at arbitration hearings, the procedure under the *Dispute Resolution Practice Code* has been held to parallel to a significant degree the procedure provided under the Rules made under the *Courts of Justice Act*.¹² The legislation provides for an internal right of appeal to the Director of Arbitrations, and thereafter for judicial review to the Divisional Court. Since November 1996, the right of appeal has been restricted to questions of law. This implies that arbitrators decide questions of law. The standard to which arbitrators are held on questions of law is one of correctness.¹³ This is an expert tribunal which has been held to be entitled to deference on the issues it decides.¹⁴ Generally, courts are willing to accord some deference to administrative tribunals for reasons of relative expertise, and where the tribunal is interpreting its own statute.¹⁵ However, the principle of deference is not automatic. On such a question, the standard of correctness will be applied.

In 1982, the *Charter* became part of the Constitution. Some eight years later, in 1990, the Ontario Insurance Commission (later the Financial Services Commission of Ontario) was created under the *Insurance Act*, R.S.O. 1990, c.I.8. Although the governing legislation has been the subject of many amendments, there is no provision in the *Insurance Act* which expressly prevents this tribunal from deciding *Charter* questions.¹⁶

¹² *Machin v. Tomlinson* [1999] O.J. No. 5062 reversed on other grounds.

¹³ *Lenti and Zurich Insurance Company* (FSCO P98-00030, December 18, 1998)

¹⁴ *Ledenko and State Farm* (FSCO A99-001158 February 13, 2001), *Wancho v. Liberty Mutual* [2001] O.J. No. 579(Ontario Superior Court of Justice, Master Haberman), *Gignac v. Canadian General Insurance Company* (1997), 38 O.R. (3d) 425 (Ont. Ct. Gen. Div.), *Luu and Zurich Insurance Company* (1997) 32 O.R. (3d) 807 (Div.Ct.)

¹⁵ *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

¹⁶ Rule 78 of the *Dispute Resolution Practice Code*, made by the Director of Arbitrations under the rule making power of section 21 of the *Insurance Act* and section 25.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22, as amended, contemplates the hearing of such issues and provides for service of notice of the constitutional question on the Attorneys General for Ontario and for Canada. In this case the Applicant provided evidence that he served the Attorney General for Ontario who provided submissions. However, he provided no evidence that he served the Attorney General for Canada.

There is, however, one aspect of the statutory scheme which might suggest that a FSCO arbitrator does not have jurisdiction to deal with *Charter* questions. The *Insurance Act* currently provides an insured person with a choice of three forums in which his or her dispute may be determined. One forum is the Superior Court of Justice, a section 96 court of superior jurisdiction, which has authority to grant a full range of constitutional remedies, as described in *Schachter*. If that Court were to conclude that section 50 of the *Schedule* contravened the *Charter*, it could issue a general declaration of invalidity. It could be argued that since it is the only forum with such jurisdiction, it should be the forum of choice to decide all *Charter* questions.

That would be the case if only one forum in a legislative scheme could exercise *Charter* jurisdiction. However, there appears to be no such requirement. Where the legislature has provided concurrent forums for the adjudication of the same issues, all should have the same power to consider general questions of law. The fact that two or more adjudicative bodies have such authority does not mean that one is to be preferred.

In my view, this is a question of remedy — whether the remedy sought is one which the adjudicative tribunal is capable of providing, as described above. If the tribunal can grant the remedy sought by the Applicant, then a FSCO arbitrator ought not to decline jurisdiction. Where a general declaration of invalidity is sought for example, it will be necessary to seek such a remedy before a superior court. However, since the Applicant does not seek such a declaration, a FSCO arbitrator has the requisite jurisdiction to deal with the claim asserted in this arbitration.

For these reasons I conclude that by virtue of the provisions of the *Insurance Act*, a FSCO arbitrator has authority over the parties, the issue and the remedy sought, and is therefore a court of competent jurisdiction within the meaning of s.24 of the *Charter*. A FSCO arbitrator is therefore able to deal with the constitutional question raised by the Applicant. I will now decide whether section 50 of the *Schedule* contravenes the *Charter*.

Charter and section 50 of the Schedule

Mr. Kudla provided no authority or case law for any of the propositions which he asserted, although he did attempt to distinguish some of the cases cited by counsel for the Attorney General. Some of the submissions were not understandable. The law with respect to the *Charter* continues to evolve. It may well be that another arbitrator with the benefit of proper case law, authorities and submissions will decide these questions differently.

Section 50 of the *Schedule* provides that, “An insured person shall not commence a mediation proceeding under section 280 of the *Insurance Act* unless,....(b) he or she made himself or herself reasonably available for any examination required by the insurer under section 42; and (c) he or she made himself or herself reasonably available for any assessment under section 43 and he or she complied with subsection 43 (2) in respect of the assessment.”¹⁷ Mr. Kudla submitted that these provisions offend the right to life, liberty and security of the person, were discriminatory, amounted to cruel and unusual punishment of the insured person, and that section 50(c) therefore offended the *Charter*. Counsel for the Attorney General submitted that the grounds raised by the Applicant are addressed by s.7, 12 and 24(1) of the *Charter*.¹⁸

Section 7 of the Charter

Section 7 of the *Charter* provides that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

¹⁷Section 42 of the *Schedule* gives an insurer the right to require an examination of an insured person by a health practitioner or vocational rehabilitation practitioner to determine whether the person is entitled to a benefit. Section 43 deals with assessments by designated assessment centres.

¹⁸He also submitted that Mr. Spiegel may have intended a reference to the equality rights provisions of s.15 of the *Charter* when he alleged that s.50(c) creates a great imbalance favouring the insurance companies etc. If that is the case, I find Mr. Kudla advanced no basis for showing that any of the four basic equality rights provided in s.15 were infringed.

In order for s.7 of the *Charter* to be triggered, Mr. Kudla must establish that the interest in respect of which he asserts his claim, falls within the ambit of s.7.¹⁹ In this arbitration, Mr. Kudla claims statutory accident benefits and access to the dispute resolution process. A number of Ontario decisions cited to me by counsel for the Attorney General, and adopted by counsel for the Insurer, have held that claims for benefits and claims for damages for personal injury are claims for property or economic interests, and, since these interests are not specifically set out in s.7, they are excluded from protection under that section of the *Charter*.²⁰

In the case of *Filip v. City of Waterloo*, Ms. Filip slipped and fell on an icy city sidewalk, sustained various injuries and was hospitalized. Under the provisions of the *Municipal Act*, she was required to give seven days' notice in writing to the municipality. She did so after the seven day period. She alleged that the short notice period deprived her of her right to security of the person. Catzman, J.A. stated, "In my view,...this submission cannot prevail against the formidable array of authority, in this province and elsewhere, for the proposition that the right to security of the person under s.7 does not embrace the civil right to bring an action for the recovery of damages for personal injury."

In *Whitbread v. Walley*,²¹ the plaintiff sustained injuries in a boating accident and became quadriplegic. The *Canada Shipping Act* limited the damages he could claim against the owner and operator of the boat, and the plaintiff submitted that he would therefore be unable to obtain required care and assistance, would suffer actual deprivation of liberty and security of the person, and because he was deprived of the right to obtain adequate damages, he was deprived from the right to be made whole

¹⁹*Blencoe v. B.C. Human Rights Commission* [2000] 2 S.C.R. 307. In that case the issue before the Supreme Court of Canada was whether Mr. Blencoe's rights to liberty and security of the person under s.7 of the *Charter* were violated by state-caused delay in the human rights proceedings against him.

²⁰*Filip et al. v. City of Waterloo et al.* 98 D.L.R.(4th) 534, (Ont. C.A.); *Re Terzian and Workman's Compensation Board* (1983), 42 O.R. (2d) 114 at 145 (Div.Ct.).

²¹(1988), 26 B.C.L.R. (2d) 203, B.C.C.A., McLachlin, J.A. (Appeal to S.C.C. dismissed from the bench [1990] 3 S.C.R. 1273 at 1279)

again. He submitted that on the face of it that *Act* imposed economic restrictions; however, those restrictions were so directly connected to his physical and psychological liberty and security of the person that s.7 of the *Charter* applied.

The British Columbia Court of Appeal rejected his arguments, because they would involve reading into s.7 the words “or such economic benefit as the law may award in their stead” or “any benefit which may enhance life, liberty or security of the person.” The Court held that arguably the more serious problem was that the plaintiff’s argument requires reading into s.7, after the declaration that a person has the right to “life, liberty and security of the person”, the additional phrase that he has the right to “any benefit which may enhance life, liberty or security of the person.” This argument, in turn was undermined by an even more serious problem, because, “It is difficult to conceive of a property or economic interest which does not arguably impact on the life, liberty or security of the person.” The Court held that if the plaintiff’s argument were accepted, s.7 of the *Charter* would be made to apply to virtually all property interests. Given the scheme of the *Charter* and the absence of any reference to the right to property, the Court rejected such a construction as being inconsistent with the intention of the framers of the *Charter*. In *Hernandez and Palmer*, a similar argument was advanced.²² The Court held that no such right was captured by s.7 of the *Charter*.

Mr. Kudla submitted that although claims for accident benefits are claims to recover economic loss, they are also claims which protect a person’s right to timely access to medical and rehabilitation interventions. He submitted “these claims are made in pursuit of protection of the rights to productive life, liberty, and security and integrity of the person, including the insured person’s physical, psychological and mental well being.”

²²[1992] O.J. No. 2648, (Ontario Court of Justice, General Division)

The application of s.7 of the *Charter* to statutory accident benefits has been considered in two arbitration cases. In the case of *Avdalimov and CGU Insurance Company of Canada* (FSCO A00-000433, May 25, 2001), Arbitrator Palmer held that s.7 of the *Charter* does not guarantee economic or property rights and hence protects no right to bring a civil action for physical or psychological damages or an arbitration for statutory accident benefits.

In *Sanchez and CGU Insurance Company of Canada* (FSCO A00-000940 June 22, 2001), Arbitrator Leitch concluded that at “its widest, this expression may be interpreted to include the right to satisfy basic human needs [Footnote 8 in original: See the obiter comments of Madam Justice Wilson in *Singh v. Minister of Employment and Immigration...*] or the right to access medical treatment [Footnote 9 in original: *R. v. Morgentaler (No. 2)* [1988] 1 S.C.R. 30] and hence may, in some circumstances, affect the handling of claims for statutory accident benefits.” The nature of those circumstances may become clear over time.

Most of the jurisprudence cited to me does not support Mr. Kudla’s position that rights and interests protected by s.7 are infringed. Even if Mr. Kudla succeeded in establishing that section 50 of the *Schedule* contravened s.7 of the *Charter*, he must still show that it is not in accordance with principles of fundamental justice. In my view, Mr. Kudla has not demonstrated that this is the case.

In *Reference Re B.C. Motor Vehicles*, [1985] 2 S.C.R. 486, Lamer, J. held that fundamental justice included substantive as well as procedural justice. He stated that “the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system...[t]hose words cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7.”

In the context of this application, I find that the provisions of the *Schedule* and the practice at the Financial Services Commission of Ontario ensure both substantive and procedural justice. The *Schedule* requires that the examinations requested by the insurer be reasonable and on reasonable notice.

Following the *Wood* decision, when an insurer raises a preliminary objection to an insured person accessing the mediation process, the Commission's practice is to allow the insured person to proceed with the mediation.²³ The issue of the insured person's non-attendance at a DAC or at an insurer's examination is mediated as one of the issues in dispute. In some cases, insurers engage in the mediation process and the parties resolve the dispute with the assistance of the mediator. In other cases, as in this one, insurers object and refuse to participate, relying on section 50 of the *Schedule*. The insurer's objection is then reflected in the Report of Mediator.

If there is a failed mediation, the insured person may apply for arbitration or proceed to court. Where the insured person applies for arbitration, the validity of the insurer's objection under section 50 of the *Schedule* is determined by an arbitrator at a preliminary issues hearing. If an arbitrator concludes that the insured person complied with the *Schedule*, the arbitration proceeds. If an arbitrator concludes that there has been non-compliance with the *Schedule*, the arbitration is stayed pending compliance with the provisions of the *Schedule*.²⁴

Because mediation is a consensual process rather than an adjudicative one, no determination can be made at mediation on questions such as whether the insured person failed to attend an insurer's examination or whether an insurer's request for an examination was reasonable. The Commission's practice enhances the possibility of resolving disputes, provides for the determination of the validity of the insurer's objection at an early stage, and prevents the arbitrary or capricious exclusion of legitimate

²³ *Wood v. Ontario Insurance Commission*, [1999] O.J. No. 5237.

²⁴ *Belair Insurance Company Inc. and F. S.* (OIC P96-00039A, June 11, 1996)

disputes from adjudication. Section 50 of the *Schedule* does not create an absolute barrier to the mediation and arbitration process. The Commission's practice provides procedural protections and substantive guarantees.²⁵ The determination as to whether an insured person has access to arbitration is thus made by an adjudicator and not arbitrarily or capriciously by an insurer, as submitted by Mr. Spiegel.

At present, section 105(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, permits a court on motion to order a party whose physical or mental condition is in question to undergo a physical or mental examination by one or more health practitioners. Where a party fails to comply with such an examination, his or her pleadings may be struck out or the proceeding dismissed. In the case of *Manuel v. Head* [1988] N.J. No. 233, the Newfoundland Supreme Court considered whether a similar provision in the Newfoundland Rules of Court infringed the *Charter*. The court noted that the purpose of the medical examination was to enable the defendant to defend himself against the plaintiff's claim, and stated:

What is involved is a balancing of the first plaintiff's right to sue the defendant for damages and the right of the defendant to inform himself prior to trial by inspection of the damages which the first plaintiff claims from him. There was no obligation upon the first plaintiff to institute action against the defendant seeking damages for the injuries he sustained. However, by doing so, he voluntarily accepted the procedure provided in the rules of the Supreme Court for the processing of his claim. The question arising upon the application is whether the first plaintiff can invoke the *Charter* to assist him in avoiding a procedural step which provides that upon application of the defendant the court may order that he be examined by qualified medical practitioners for an assessment of his injuries. The *Charter* was not designed to take away rights of others in order to convenience persons who themselves are seeking to establish rights before the law. Accordingly, I hold that an order of the court directing the first plaintiff to submit himself to a medical examination would not offend s.7 of the *Charter* because it is a necessary step in a proceeding which he himself initiated.

²⁵ Ibid.

The provision in both Rules is analogous to section 50 of the *Schedule* in that the insurer is provided with a right of examination and sanctions when the party whose health condition is in issue fails to attend at an examination. These provisions have a long history and appear to be an accepted part of our justice system. Based on the submissions before me, I conclude that section 50 of the *Schedule* does not contravene fundamental principles of justice.

Right of access to the judicial system

Mr. Spiegel submitted that:

every Canadian is guaranteed unimpeded access to the judicial system under the provisions of the *Charter*. Whether or not an insured person made himself or herself reasonably available for an assessment/examination pursuant to sections 42 or 43(a) of the *Schedule* is not in itself sufficient or adequate reason to deny any person's fundamental right to pursue justice through the judicial process. Section 50 therefore contravenes section 24(1) of the *Charter* and should be struck out, and Coachman's application quashed or dismissed.

Section 24 of the *Charter* guarantees access to a court of competent jurisdiction to seek a remedy in relation to the infringement of *Charter* rights. However, courts have upheld the right of the legislature to restrict access to the courts for civil remedies by means of limiting the damages which may be recovered so that less than full compensation is awarded, and by means of privative clauses, and short limitation periods, as described earlier in the *Filip* and *Whitbread*. cases.

There are cases which contain broad language that the right of access to the courts is guaranteed by the rule of law, enshrined in the Constitution. For example: "Any action taken to prevent, impede or obstruct access to the courts runs counter to the rule of law and constitutes a criminal contempt. The rule of law, enshrined in our Constitution, can only be maintained if persons have unimpeded,

uninhibited access to the courts of this country.”²⁶ However, those statements must be read in context. These cases involved lawful picket lines which restricted a right of *physical* access to the courts by litigants, lawyers, witnesses, and the public at large, and the authority of the Court to order injunctions prohibiting such activity.

Counsel for the Attorney General and counsel for Coachman submitted that “the case law under s.15 of the *Charter* has also repeatedly held that legislation restricting the ‘right of access to the courts’ or affecting an individual’s ability to recover damages for physical or psychological harm, does not violate the *Charter*. Nor does legislation that provides an alternative method of restitution, e.g. automobile insurance, and workers’ compensation.”²⁷ I was provided with no authority or submissions which persuaded me to depart from this view.

Section 12 of the Charter

Mr. Spiegel submitted that:

Section 50(c) constitutes a punitive measure, which allows an insurer to arbitrarily and capriciously prohibit an insured person from accessing the judicial system/ process. Section 50(c) is a punitive measure by the insurer arbitrarily and surreptitiously inflicted and perpetrated on the insured person without giving the insured person any chance to advance his or her position or claim or defence before a designated arbitrator or court. Consequently s.50(c) contravenes section 12 of the Charter – the right not to be subjected to any cruel and unusual treatment or punishment.

²⁶*Newfoundland Association of Public Employees v. Her Majesty's Attorney General of Newfoundland and William Chafe* [1988] 2 S.C.R. 204. See also *Re British Columbia Government Employees Union et al. and A.-G. B.C. et al.* (1983), 2 D.L.R.(4th) 705.

²⁷ *Filip v. Waterloo* supra; *Terzian v. Ontario (Workers' Compensation Board)*, (1983), 42 O.R. (2d) 144, (Ont. Div. Ct.); *Mirhadizadeh v. Ontario* (1986), 57 O.R. (2d) 441, (Ont. H.C.); affirmed (1989), 69 O.R.. (2d) 422 (C.A.); *Rudolph Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695; *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922;

Section 12 of the *Charter* provides “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.” The phrase “cruel and unusual treatment or punishment” has been held to provide “a broad protection to Canadians against punishment which is so excessive as to outrage our society’s sense of decency.”²⁸ Although an insurer’s examination is intrusive, I do not agree that a reasonable examination, properly conducted, is so excessive as to “outrage our society’s sense of decency”, or to constitute “cruel and unusual treatment or punishment” within the meaning of the *Charter*. I find no evidence which would establish that the examination requested by Coachman amounted to cruel and unusual punishment. I also find that the possible barrier to adjudication, where an insured person unreasonably refuses to make him or herself available for an examination, does not constitute cruel or unusual treatment or punishment.

The burden of persuading me on a balance of probabilities that there has been a violation of the *Charter* is on the Applicant. He has not done so. For these reasons, I reject the Applicant’s submissions that section 50 of the *Schedule* contravenes the provisions of the *Charter*.

Suesan Alves
Arbitrator

January 11, 2002

Date

²⁸*R. v. Morrissey*, [2000] 2 S.C.R. 90

FSCO A99-001115

BETWEEN:

WIESLAW KUDLA

Applicant

and

COACHMAN INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. An arbitrator at the Financial Services Commission of Ontario has jurisdiction to determine the constitutional validity of section 50 of the *Schedule*.
2. Section 50 of the *Schedule* does not contravene the *Charter*.

Suesan Alves
Arbitrator

January 11, 2002

Date