CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

FRANCINE LAURENDEAU

Complainant

- and -
CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -
CANADIAN BROADCASTING CORPORATION

Respondent

RULING ON THE PRELIMINARY OBJECTION REGARDING THE JURISDICTION OF THE CANADIAN HUMAN RIGHTS TRIBUNAL

2003 CHRT 44
2003/12/09

MEMBER: Michel Doucet

(TRANSLATION)

I. INTRODUCTION

[1] On August, 27, 2003, counsel for the respondent, Robert Bonhomme, Esq., raised a preliminary objection regarding the jurisdiction of the Canadian Human Rights Tribunal (the 'Tribunal') for dealing with the constitutionality of a provision in its enabling legislation. Specifically, he contended that the Tribunal does not have the jurisdiction to

answer the complainant's question regarding the constitutionality of paragraph 15(1)(c) of the *Canadian Human Rights Act* (the "*Act*")[1].

[2] Following a teleconference held on September 11, 2003, it was agreed that the issue of the Tribunal's jurisdiction would be argued first and that questions relating to the substance would be handled after the Tribunal's decision on the preliminary objection.

[3] The hearing for the preliminary objection took place in Montreal on November 17, 2003.

II. FACTS

[4] Francine Laurendeau (the "complainant") was employed at the Canadian Broadcasting Corporation (the "respondent") from 1973 first as a producer, and then from 1989 as a producer and host of the respondent's Chaîne culturelle.

[5] On July 12, 2001, the respondent retired the complainant. This decision was made under a policy in effect with the respondent since 1978 and entitled Human Resource Policy No. 10.0, which states: "Retirement is based on age and is set as the last working day of the month in which the employee turns 65 years old."

[6] In anticipation of being retired, the complainant filed a complaint on June 6, 2001 with the Canadian Human Rights Commission (the "Commission") to contest the respondent's decision. In her complaint, she alleged that the respondent "acted in a discriminatory manner towards [her], by maintaining a mandatory retirement policy, because of [her] age (65), contrary to sections 7 and 10 of the *Canadian Human Rights Act*."

[7] On November 26, 2002, the Commission's investigator filed her investigation report on the complaint. Given paragraph 15(1)(c)[2], the Commission's investigator recommended "pursuant to [paragraph] 44(3)(b) of the *Canadian Human Rights Act*, that the Commission dismiss the complaint." Upon receipt of this report, the Commission invited the complainant to make additional representations, which she did on December 20, 2002.

[8] On February 27, 2003, the Commission informed the complainant and the respondent of its decision, following the investigation report. Among other things, it indicated:

After reviewing this information, the Commission has decided, pursuant to section 49 of the *Canadian Human Rights Act*, to ask the Chairperson of the Canadian Human Rights Tribunal to appoint a member to inquire into the complaint because the Commission is satisfied that, under the circumstances, an inquiry is warranted.

[9] On April 1st, 2003, the Registrar of the Tribunal informed the parties of their rights under section 50(1) of the *Act* to present evidence and legal representations to support their position in this case. In accordance with the Tribunal's Internal Rules of Procedure, the Registrar also asked the parties to submit short written statements listing the issues and the evidence that would be submitted to the Tribunal.

[10] In her disclosure of evidence filed on August 20, 2003, the complainant stated the issues as follows:

(1) Did the CBC commit an age-related discriminatory practice in violation of section 7 of the *Canadian Human Rights Act* by terminating Ms. Laurendeau's employment solely on the basis that she had reached 65 years of age?

(2) Alternatively, and if the Tribunal finds that the CBC's discriminatory practice falls within the exception of paragraph 15(1)(c), is this paragraph of the *Canadian Human Rights Act*

unconstitutional by being contrary to section 15 of the Canadian Charter of Rights and Freedoms.

[11] On August 27, 2003, the respondent informed the Canadian Human Rights Tribunal (the "Tribunal") that it intended to raise a preliminary objection and argue that the Tribunal does not have the jurisdiction to answer the complainant's question on the constitutionality of paragraph 15(1)(c) of the *Act*.

III. ISSUE DURING THE PRELIMINARY OBJECTION

[12] Does the Canadian Human Rights Tribunal have the jurisdiction to decide a question on the constitutionality of a provision in its enabling legislation, specifically paragraph 15(1)(c) of the *Act*?

IV. LEGAL ANALYSIS

[13] The issue of whether an administrative tribunal has the jurisdiction to decide a question on the constitutionality of a provision in its enabling legislation has been the subject of several Supreme Court of Canada decisions. We simply have to consider the decisions rendered by that Court in *Douglas/Kwanten, Faculty Assn. v. Douglas College*[3], *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*[4], *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*[5], Cooper v. Canada (Human Rights Commission)[6] and more recently in *Nova Scotia (Workers' Compensation Board) v. Martin*[7].

[14] For the purpose of this decision, we will consider the latter two cases in particular, namely *Cooper* and *Martin*.

[15] In his argument, counsel for the respondent greatly stressed the fact that, according to paragraph 44(3)(a) and section 49(1) of the *Act*, the Tribunal may not have a complaint before it unless it is following a request from the Commission. He concluded that, in this context, the Tribunal's jurisdiction is dependent on the Commission's jurisdiction. In other words, if the Commission does not have the jurisdiction for deciding an issue, the Tribunal does not have the jurisdiction either.

[16] In support of this argument, the respondent relied on two Quebec Court of Appeal decisions, namely *Québec (Procureure Générale) v. Commission des droits de la personne et des droits de la jeunesse*[8] and *Québec (Procureure Générale) v. Human Rights Tribunal*[9].

[17] In the first case, the respondent chiefly referred to comments by Rousseau-Houle J. who, for the majority, stated that "The Tribunal's jurisdiction is dependent on referrals from the Commission. [...]"[10] and those of Robert J. who, dissenting, mentioned "As we have seen earlier, the Tribunal is dependent on referrals from the Commission. »[11]

[18] Then, in reference to *Québec (Procureure Générale) v. Human Rights Tribunal*, the respondent mentioned the following passage from the Quebec Court of Appeal decision:

All parties before the Court properly recognize that the Tribunal's jurisdiction is dependent on referrals from the Commission. The Commission's jurisdiction to make the application in this appeal determines the Tribunal's jurisdiction to have this before it. [...][12]

[19] To understand the three short excerpts from these decisions, we must take our analysis of them a little further. First, recall that the issue in *Québec (Procureure générale) v. Commission des droits de la personne et des droits de la jeunesse* was as follows: should the principle of exclusive arbitral authority that is firmly established in Quebec yield to a theory that favours exclusiveness or even competing jurisdictions

between the grievances arbitrator and the Quebec Human Rights Tribunal because the dispute raises a question about human rights?[13] A question that deals essentially with the jurisdiction of the Quebec tribunal, in consideration of the grievance arbitrator's exclusive jurisdiction; a question that is very different from the one before us here. In this case, none of the parties is questioning the fact that the Commission had full jurisdiction to hear the complaint filed by the complainant, and nobody is contesting the jurisdiction of the Canadian Human Rights Tribunal to have the complaint before it. The issue involves the Tribunal's jurisdiction for deciding a question on the constitutionality of a provision in the *Act*.

[20] It is interesting that Rousseau-Houle J. is aware of the distinction between the federal and provincial legislation regarding the exclusive jurisdiction of the grievance arbitrator. She states:

Some Canadian human rights legislation contains provisions that eliminate the possibility for complaints from affected individuals to be simultaneously or successively referred to agencies responsible for this legislation and to grievance arbitrators. Thus, section 41 of the *Canadian Human Rights Act* and section 34(1) of the Human Rights Code of Ontario empowers the Human Rights Commission to not proceed with a complaint if it believes that the complainant has appropriate alternative recourse including the grievance process. In this regard, we see that, in *Cooper v. Canadian Human Rights Commission* regarding the jurisdiction of the Canadian Human Rights Commission to review the constitutionality of its enabling legislation, airline pilots who had to retire at age 60 in accordance with the collective agreement applied to the Canadian Human Rights Commission, not to the grievance arbitrator, because the *Canadian Human Rights Act* allowed it.[14]

[21] Therefore, if the same question had been raised at the federal level, everything seems to indicate that the decision could have been different.

[22] A little further on, speaking on the *Charter of Human Rights and Freedoms of Quebec*[15], she adds:

In Quebec law, the Charter's provisions assigning jurisdiction to the Tribunal do not, in my view, eliminate the exclusive jurisdiction of the grievance arbitrator when the dispute, in its factual background, results explicitly or implicitly from the collective agreement.[16]

[23] Faced with the exclusive jurisdiction of the grievance arbitrator, the Quebec Commission could not lodge its application with the Human Rights Tribunal and should have stated that it lacked jurisdiction *ratione materiae*.[17]

[24] Given the particular situation in this case, I do not see how this is relevant for deciding the issue before us here. In Quebec, the legislator has explicitly allowed that remedies for ensuring respect for Quebec Charter rights shall be exercised before forums other than the Tribunal. As a result, the Quebec Court of Appeal found that the principle of exclusive arbitral authority shall prevail since the dispute arose essentially from the application of the collective agreement and that the Labour Code is able to govern all aspects of the relations between the parties within the context of labour relations.[18]

[25] In *Québec (Procureure générale) v. Human Rights Tribunal*, the issues that the Court was asked to consider dealt with the authority of the Commission québécoise des droits de la personne to make an application regarding the validity or opposability of a legislative provision in the Quebec Charter of Human Rights and with respect to the jurisdiction of the Quebec Human Rights Tribunal for deciding it.

[26] After closely reviewing this decision, I observe that, from several perspectives, it does not necessarily support the respondent's position. As an example, I considered the following passage in the decision:

The Supreme Court of Canada cases shows that the legislator's intent must be determined in order to decide whether the administrative tribunal has jurisdiction to rule on general questions of law, which includes the authority to decide on the constitutional validity of a legislative provision. The analysis must go beyond simply finding a text that explicitly grants a given power. In the absence of an explicit provision depriving a tribunal of a power, its enabling legislation must be interpreted to give that body, which the legislator intended to be efficient, the necessary powers to carry out its mission. In Dunedin, dealing with the power of the justice of the peace in a dispute involving the *Provincial Offences Act*, the Chief Justice of the Supreme Court even seemed to give the tribunals a presumption of jurisdiction in the absence of a text excluding it

The functional and structural approach achieves this balance between real access to remedies provided for by the *Charter* and deference to the role of the legislative authorities. It rests on the theory that says, when a legislator gives a judicial or administrative tribunal a function leading it to decide issues likely to involve *Charter* rights and provides it with procedures for fairly and equitably ruling on these ancillary questions connected with the *Charter*, it must be deduced, in the absence of any contrary intent, that the legislator intended to empower the tribunal to enforce the *Charter*.[19]

[27] The passage from *Dunedin*, cited by the Quebec Court of Appeal, is even more applicable to the Canadian Human Rights Tribunal since in the *Act*, as we will see further on, there is a provision explicitly granting it the authority to decide questions of law and that it is provided with procedures for fairly and equitably ruling on these questions.

[28] As with the Attorney General of Quebec in *Québec (Procureure générale) v. Commission des droits de la personne et des droits de la jeunesse*, the respondent in the matter at hand greatly stressed what it believes is the decisive impact of the *Cooper* case. The respondent concluded from it that the Commission lacks the authority to determine whether a provision in the *Act*, which it must otherwise respect and implement, is invalid and that, as a result, the Tribunal as well lacks the authority to invalidate a provision in the *Act*. The respondent reiterated the comments of La Forest J. in *Cooper* to support its conclusion:

Given my finding that the Commission does not have the jurisdiction to question the constitutional validity of its enabling statute, it logically follows that a tribunal appointed under the *Act*, and indeed a review tribunal appointed pursuant to s. 56, must also lack the jurisdiction to declare unconstitutional a limiting provision of the *Act*. Take for example the case presently before us: if the Commission must apply the *Act* as it is written, then the appellants cannot get their complaint before a tribunal, depending as it does on s. 15(c) being found to be inoperative. The same is true of any complaint that requires the Commission to arrive at a decision on a constitutional matter before being able to find that the complaint warrants further inquiry by a tribunal. It would be something of a paradox for Parliament to grant tribunals under the *Act* a jurisdiction that could never be exercised.[20]

[29] However, I am of the view that this case, within the current legislative context and based on the state of the Supreme Court's recent cases, does not support the respondent's

claims. Moreover, to properly understand the *Cooper* passage, we must also refer to the following paragraphs in which La Forest J. adds:

64 As with the Commission there is [at that time] no explicit power given to a tribunal to consider questions of law. Taken together, ss. 50(1) and 53(2) of the *Act* state that a tribunal shall inquire into the complaint referred to it by the Commission to determine if it is substantiated. This is primarily and essentially a fact-finding inquiry with the aim of establishing whether or not a discriminatory practice occurred. In the course of such an inquiry a tribunal may indeed consider questions of law. As with the Commission, these questions will often centre around the interpretation of the enabling legislation. However, unlike the Commission, it is implicit in the scheme of the Act that a tribunal possesses a more general power to deal with questions of law. Thus tribunals have been recognized as having jurisdiction to interpret statutes other than the *Act* (see *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24 (C.A.)) and as having jurisdiction to consider constitutional questions other than those noted above. In particular, it is well accepted that a tribunal has the power to address questions on the constitutional division of powers *(Public Service Alliance of Canada v. Qu'Appelle Indian Residential Council* (1986), 7 C.H.R.R. D/3600 (C.H.R.T.)), and on the validity of a ground of discrimination under the *Act* (*Nealy v. Johnston* (1989), 10 C.H.R.R. D/6450 (C.H.R.T.)), and it is foreseeable that a tribunal could entertain Charter arguments on the constitutionality of available remedies in a particular case (see *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892). Even in such instances, however, the legal findings of a tribunal receive no deference from the courts. This position was firmly established by this Court in *Mossop*, supra, at p. 585:

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 at 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 competent to perform.

65 I would add a practical note of caution with respect to a tribunal's jurisdiction to consider *Charter* arguments. First, as already noted, a tribunal does not have any special expertise except in the area of factual determinations in the human rights context. Second, any efficiencies that are prima facie gained by avoiding the court system will be lost when the inevitable judicial review proceeding is brought in the Federal Court. Third, the unfettered ability of a tribunal to accept any evidence it sees fit is well suited to a human rights complaint determination but is inappropriate when addressing the constitutionality of a legislative provision. Finally, and perhaps most decisively, the added complexity, cost, and time that would be involved when a tribunal is to hear a constitutional question would erode to a large degree the primary goal sought in creating the tribunals, i.e., the efficient and timely adjudication of human rights complaints.

66 Taking all these factors into consideration, I am of that view that while a tribunal may have jurisdiction to consider general legal and constitutional questions, logic demands that it has no ability to question the constitutional validity of a limiting provision of the *Act*. (My underlining.)

[30] In *Cooper,* the Court, in concluding that the Tribunal could not decide a question on the constitutionality of a provision in its enabling legislation, based itself on the fact that the *Act* in force at the time did not explicitly give the Tribunal the authority to consider

and decide questions of law. It recognizes, however, that the scheme of the *Act* implicitly allowed the Tribunal to rule on general questions of law and constitutionality. In *Nova Scotia (Workers' Compensation Board) v. Martin*, the Supreme Court unanimously dismissed the distinction between general and limited questions of law.[21]

[31] Be that as it may, and with all deference to the position of the majority in Cooper, I have to focus now on the new legislative context and the Supreme Court's decision in *Martin* which proposes a new approach to answering the question raised in the current case.

[32] Before analysing the *Martin* decision, I must clear up some confusion regarding the respective roles of the Commission and the Tribunal. The respondent mentioned in its argument that the Commission is essentially an administrative body and that it is specifically responsible for administering and ensuring compliance with the *Act*. The respondent based itself on the comments of La Forest J., who indicated in *Cooper*[22] that:

The Commission is not an adjudicative body; that is the role of a tribunal appointed under the *Act*. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfils a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the *Act*, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it. Justice Sopinka emphasized this point in *Syndicat des employés de production du Québec et de L'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at p. 899.

[33] This is the role and function of the Commission; those of the Tribunal are different.

[34] Without going into the details of the roles of these two bodies, I want to state that in *Bell Canada v. Canadian Telephone Employees Association*[23] the Supreme Court did indeed take on the role and character of the Tribunal:

23 The main function of the Canadian Human Rights Tribunal is adjudicative. It conducts formal hearings into complaints that have been referred to it by the Commission. It has many of the powers of a court. It is empowered to find facts, to interpret and apply the law to the facts before it, and to award appropriate remedies. Moreover, its hearings have much the same structure as a formal trial before a court. The parties before the Tribunal lead evidence, call and cross-examine witnesses, and make submissions on how the law should be applied to the facts. The Tribunal is not involved in crafting policy, nor does it undertake its own independent investigations of complaints: the investigative and policy-making functions have deliberately been assigned by the legislature to a different body, the Commission.

[...]

26 [...] The Tribunal is part of a legislative scheme for identifying and remedying discrimination. As such, the larger purpose behind its adjudication is to ensure that governmental policy on discrimination is implemented. It is crucial, for this larger purpose, that any ambiguities in the *Act* be interpreted by the Tribunal in a manner that furthers, rather than frustrates, the *Act*'s objectives. (My underlining)

[35] The Tribunal is therefore an adjudicative body whose main function is deciding complaints referred by the Commission and interpreting the *Act* so as to achieve its objectives.

[36] The Commission refers complaints to the Tribunal. In this case, all parties including the respondent agree that the Tribunal has indeed been referred a complaint from the Commission.

[37] It is clear upon reading the letter from the Commission Chairperson to the Tribunal Chairperson that all aspects of the complaint, as they appear in the complaint form signed by the complainant in 2001, were referred to the Tribunal. Also, as my colleague, member Hadjis, so clearly pointed out in *Côté v. Attorney General of Canada* "one must not lose sight of the fact that although the Commission has the authority to decide whether a complaint is to be referred to the Tribunal (ss. 44(3) and 49 of the *Act*), the complaint continues to remain the complainant's, not the Commission's". [24]

[38] Once it receives a complaint, the Tribunal, in accordance with section 50(2) of the Act, which did not exist at the time of the *Cooper* decision, "decide[s] all questions of law or fact necessary to determining the matter." (My underlining.) The federal legislator, knowing the Supreme Court's conclusions in *Cooper*, clearly elected to broaden the Tribunal's jurisdiction by adopting this provision in 1998. This decision is consistent with principal of supremacy of the Constitution as set out in section 52 of the *Constitution Act*, 1982 and with 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[25] or, in the words of the Supreme Court in *Cooper* "if a tribunal does have the power to consider questions of law, then it follows by the operation of s. 52(1) [*Constitution Act*,1982], that it must be able to address constitutional issues, including the constitutional validity of its enabling statute" [26]. This conclusion is confirmed in Bell:

[...]The Tribunal's power to "decide all questions of law or fact necessary to determining the matter", under s. 50(2) of the Act, is clearly a general power to consider questions of law, including questions pertaining to the Charter and the Canadian Bill of Rights. [27]

[39] In *Douglas College, Cuddy Chicks and Tétreault-Gadoury*, the Supreme Court also considered this issue, and in each case it pointed out valid reasons, from a principle and general policy perspective, for conferring such a power on administrative tribunals. These reasons are clearly set out in paragraphs 28 to 32 of the *Martin* decision.

[40] Since the Tribunal has the power under section 50(2) to decide questions of law, then in the Supreme Court's words, it is presumed to have the concomitant power to consider and decide questions under the *Charter*, unless the legislator has withdrawn this power. "Thus an administrative tribunal that has the power to decide questions of law arising under a particular legislative provision will be presumed to have the power to determine the constitutional validity of that provision. In other words, the power to decide a question of law is the power to decide by applying only valid laws.[28]" (My underlining.) Or, in the words of the Supreme Court in *Bell*, "No invalid law binds the Tribunal."[29]

[41] In *Paul v. British Columbia (Forest Appeals Commission)*[30], the Supreme Court had to decide whether a province can confer on an administrative tribunal the power to hear and decide questions on aboriginal rights under section 35 of the *Constitution Act*, 1982. In response to this, the Supreme Court said the following:

As a preliminary issue, I note that there is no basis for requiring an express empowerment that an administrative tribunal be able to apply s. 35 of the Constitution Act, 1982. There is no persuasive basis for distinguishing the power to determine s. 35 questions from the

power to determine other constitutional questions, such as the division of powers under the Constitution Act, 1867 or a right under the Charter. Section 35 is not, any more than the Charter, "some holy grail which only judicial initiates may touch" (Cooper, supra, at para. 70, per McLachlin J. (as she was then), dissenting). [...] The arguments that s. 35 rights are qualitatively different - that they are more complex, and require greater expertise in relation to the evidence adduced - have little merit. As Moen J. noted in Ermineskin Cree Nation v. Canada (2001), 297 A.R. 226, 2001 ABQB 760, at para. 51, in determining that a Human Rights Tribunal had jurisdiction to consider a s. 35 argument:

[T]here is no principled basis for distinguishing Charter questions from s. 35 questions in the context of the Tribunal's jurisdiction to consider constitutional questions. In either case, the decision-maker is simply applying the tests set out in the case law to determine if the particular right claimed is protected by the Constitution. In either case, if the applicant is successful, the result is a declaration of invalidity or a refusal to apply only the particular statute or provision before the decision-maker.[31](My underlining)

[42] These comments also apply to the case before us. Interestingly enough, the Alberta trial court was rightly called upon, in *Ermineskin Cree Nation v. Canada*, cited in *Paul*, to rule on section 50(2) of the Act in the light of *Cooper* and it found that the power to decide questions of law gave the Tribunal the power to decide constitutional questions.

[43] In its recent decision in Martin, the Supreme Court presented the new approach for determining if a tribunal, such as the Canadian Human Rights Tribunal, may subject legislative provisions to Charter scrutiny. This approach can be summarized as follows:

(1) The first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision.

(2) a) Explicit jurisdiction must be found in the terms of the statutory grant of authority. b)Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself

(3) If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the *Charter*.

(4) The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption by a) pointing to an explicit withdrawal of authority to consider the *Charter*, or b) convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* from the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations.[32]

[44] In the case before us, the Tribunal's jurisdiction is explicitly provided for in section 50(2) of the Act. In the words of Gonthier J. in *Martin* "if it is endowed with the power to consider questions of law relating to a provision, that power will normally extend to assessing the constitutional validity of that provision...the consistency of a provision with the Constitution is a question of law arising under that provision" [33] Since the Tribunal

has the power to decide questions of law relating to a legislative provision, this power is presumed to include the power to decide on the constitutional validity of that provision under the *Charter*.

[45] It is true that in *Martin*, Gonthier J. indicated:

In my view, the result reached in Cooper could have been reached under the current restated rules, given La Forest J.'s finding that the *Commission had no authority, either explicit or implicit, to decide questions of law* arising under s. 15(c) of the Canadian Human Rights Act. It is thus unnecessary at this time to revisit the holding in that case [...] [34]

[46] Thus, the question of whether the Commission has such authority within the new legislative framework remains undecided. However, this question does not need to be answered in these proceedings because it is clear that the legislator explicitly gave this authority to the Tribunal.

[47] The Honourable Justice Gonthier added:

To the extent that it is incompatible with the present reasons, however, I am of the view that the ratio of the majority judgment in Cooper is no longer good law. This is particularly true insofar as it implies that the distinction between general and limited questions of law is generally relevant to the analysis of an administrative tribunal's jurisdiction to apply the *Charter*, or that the adjudicative nature of the administrative body is a necessary (or even preponderant) factor in the search for implicit jurisdiction. Likewise, the opinions expressed by Lamer CJ in his concurrence are at odds with the current approach and should not be relied on.[35]

[48] I am therefore of the view that, since the passage of the legislative amendments in 1998, the majority's conclusion in *Cooper* is no longer consistent, at least with respect to the Tribunal, with the Supreme Court's reasons in *Martin*.

[49] Since the Tribunal is explicitly granted the authority to decide questions of law, it is now up to the respondent, according to the approach in *Martin,* to rebut this presumption either by pointing to an explicit withdrawal of this authority to consider the *Charter*, which is not the case here, or by convincing the Tribunal that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* from questions of law to be addressed by the Tribunal. Such an implication should generally arise from the *Act* itself, rather than from external considerations.

[50] Given the quasi-constitutional nature of the *Act* and its purpose to identify and remedy discrimination, it is crucial that the *Act* be interpreted by the Tribunal in a manner that furthers, rather than frustrates, the *Act*'s objectives.[36] The *Act* evinces the legislator's intent to establish a Tribunal that follows a quasi-judicial process and has functions that allow it to be interpreted in a non-discriminatory manner.

[51] As a result of the foregoing, I am not satisfied that the responded has successfully met the burden of demonstrating that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* from the questions of law to be addressed by the Tribunal or that it intended to exclude constitutionality questions regarding provisions in its enabling legislation.

[52] I am also not satisfied with the argument that this intent to exclude the deciding of questions on the constitutional validity of a provision in the enabling legislation arises from section 49(5)[37] of the *Act*. Upon reading section 49(6)[38], it is clear that section 49(5) has only a procedural effect and that observing it in no way voids the proceedings.

V. CONCLUSION

[53] For the above reasons, I am dismissing the respondent's preliminary objection. My conclusions imply that the Tribunal has jurisdiction to proceed with the inquiry into all aspects of the case, including the constitutional validity of paragraph 15(1)(c) of the *Canadian Human Rights Act* with respect to section 15 of the *Canadian Charter of Rights and Freedoms*.

Michel Doucet

OTTAWA,Ontario
December 9, 2003

[1] R.S. (1985), ch. H-6.

[2] Paragraph 15(1)(c) of the *Canadian Human Rights Act* (the "*Act*") provides that: 15.(1) It is not a discriminatory practice if
[...]
(c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual.

[3] [1990] 3 S.C.R. 570

[4] [1991] 2 S.C.R.5.

[5] [1991] 2 S.C.R. 22

[6] [1996] 3 S.C.R. 854

[7] [2003] SCC 54

[8] [2002] R.J.D.T. 55

[9] [2002] R.J.Q. 628

[10] *Québec (Procureure Générale) v. Commission des droits de la personne et des droits de la jeunesse*, at para. 119.

[11] *Ibid.*, para. 66.

[12] *Québec (Procureure Générale) v. Human Rights Tribunal*, para. 69.

[13] *Québec (Procureure générale) v. Commission des droits de la personne et des droits de la jeunesse*, para. 90.

[14] *Québec (Procureure générale) v. Commission des droits de la personne et des droits de la jeunesse* para. 114.

[15] R.S.Q. c. C-12

[16] *Québec (Procureure générale) v. Commission des droits de la personne et des droits de la jeunesse*, para. 117.

[17] *Ibid.*, at para. 134.

[18] *Québec (Procureure générale) v. Commission des droits de la personne et des droits de la jeunesse*, para. 127.

[19] *Québec (Procureure générale) v. Commission des droits de la personne et des droits de la jeunesse*, at para. 32.

[20] *Cooper*, *supra*, para. 63.

[21] *Martin*, *supra*, at para 47.

[22] *Cooper*, *supra*, para. 53.

[23] 2003 SCC 36.

[24] 20003 CHRT 32, para. 12.

[25] *Cuddy Chicks*, at page 13.
[26] *Cooper*, para. 46.
[27] *Bell*, para. 47.
[28] *Martin*, para. 36.
[29] *Bell*, para. 47.
[30] 2003 SCC 55
[31] *Ibid.*, at para. 36.
[32] *Martin*, para. 48.
[33] *Martin*, para. 28. See also *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, at para. 39.
[34] *Martin*, para. 47.
[35] *Ibid.*
[36] *Bell*, para. 26.
[37] 49(5) If the complaint involves a question about whether another Act or a regulation made under another Act is inconsistent with this Act or a regulation made under it, the member assigned to inquire into the complaint or, if three members have been assigned, the member chairing the inquiry, must be a member of the bar of a province or the Chambre des notaires du Québec.
[38] 49(6) If a question as described in subsection (5) arises after a member or panel has been assigned and the requirements of that subsection are not met, the inquiry shall nevertheless proceed with the member or panel as designated.

PARTIES OF RECORD

TRIBUNAL FILE:	T785/3503
STYLE OF CAUSE:	Francine Laurendeau v. Canadian Broadcasting Corporation
DECISION OF THE TRIBUNAL DATED:	December 9, 2003
APPEARANCES:	
Mireille Bergeron	For the Complainant
Philippe Dufresne	For the Canadian Human Rights Commission
Robert Bonhomme	For the Respondent