C.A. No. 02831

NOVA SCOTIA COURT OF APPEAL

Matthews, Chipman and Freeman, JJ.A.

Cite as: Canada (Attorney General) v. Mousseau, 1993 NSCA 167

BETWEEN:	)	
	)	
THE ATTORNEY GENERAL OF CANADA	)	Michael F. Donovan
	)	and M. Michelle Gallant
Appellant	)	for the Appellant
	)	
- and -	)	
	)	
BLANCHE MOUSSEAU and	)	Peter M. Rogers
LORETTA BERNARD	)	for the Respondent
	)	
Respondents	)	
	)	Appeal Heard:
	)	September 20, 1993
	)	
	)	
	)	
	)	Judgment Delivered:
	)	September 29, 1993

THE COURT: The appeal is allowed, decision and order of Chambers judge is set aside and an order is granted dismissing the respondents' application in the Supreme Court as per reasons for judgment of Chipman, J.A.; Matthews and Freeman, JJ.A., concurring.

CHIPMAN, J.A.:

This appeal concerns the competence of the Supreme Court of Nova Scotia to grant a remedy pursuant to s. 24(1) of the **Charter** with respect to a matter falling within the exclusive jurisdiction of the Federal Court by reason of s. 18(1) of the **Federal Court Act**.

The respondents filed an Originating Notice (Application Inter Partes) in the Supreme Court for a declaration under the **Charter** that the appellants, the Attorney General of Canada and Millbrook Band Council unlawfully discriminated against them in connection with provision of housing subsidies. The respondents were status Indians who, some years ago, married non-natives and left the Band Reserve at Millbrook. Under the legislation in effect at the time, they lost their status as Indians.

In 1985, the Parliament of Canada passed Bill C-31 which in effect recognized the status as Indians of persons in the position of the respondents and placed them in all respects in the same position as other status Indians. This included rights with respect to housing on band reserve property. After the coming into force of Bill C-31, the respondents returned to the Millbrook Reserve and their status as Indians was recognized by the Band. They sought the same housing assistance to which other band members were entitled under federal legislation and federal government programs being administered by the Band Council. They claim that they were discriminated against by the Council in that they were not provided the same benefits as other members of the band not claiming status through Bill C-31. The respondents' Originating Notice sought a declaration that:

> ". . . The Plaintiffs (respondents) have been unlawfully discriminated against by the Defendants (appellants) as a result of the plaintiffs having married persons of non-native race and ordering such other relief as this Court deems just."

A preliminary question raised before the judge in Chambers was whether the Supreme Court had jurisdiction to hear the respondents' application in that it claimed relief against an indian band and the Attorney General of Canada. Reference was made to s. 18 of the **Federal Court Act** which provides in part:

> "18(1) Subject to Section 28, the Trial Division [of the Federal Court] has exclusive jurisdiction
>
> > (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and,

> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal."

On the argument before the Chambers judge, it was conceded that the respondent band council was a "federal board, commission or other tribunal".

The position taken by the Chambers judge was that despite the apparent exclusivity of jurisdiction of the Federal Court Trial Division, the Supreme Court nevertheless had jurisdiction in a **Charter** matter. He relied on the decisions of the Supreme Court of Canada in **Law Society (British Columbia) v. Canada (Attorney General)**; **Jabour v. Law Society of B. C.**, [1982] 2 S.C.R. 307; (1982), 1 37 D.L.R. (3d) 1 and **Canada Labour Relations Board et al. v. Paul L'Anglais Inc.**, [1983] 1 S.C.R. 147; that of the Saskatchewan Court of Appeal in **Re Bassett and Government of Canada et al.** (1987), 35 D.L.R. (4th) 537, that of the British Columbia Court of Appeal in **Re Lavers et al. and Minister of Finance of British Columbia et al.** (1989), 64 D.L.R. (4th) 193 and that of the Ontario Court of Appeal in **Reza v. Canada (Minister of Employment and Immigration)** (1992), 98 D.L.R. (4th) 88. The Chambers judge relied in particular upon the following passage from the judgment of Chouinard, J. in **Canada Labour Relations Board, et al. v. L'Anglais, supra,** at p. 162:

> "Parliament has a perfect right to enact that the superintending and reforming power over federal agencies, acting in the administration of the laws of Canada, understood in the sense defined above, will be exercised exclusively by the Federal Court, a court created for the better administration of those laws. However it cannot confer such an exclusive power on the Federal Court when what is involved is no longer the administration of a law of Canada, but the interpretation and application of the Constitution."

The Chambers judge concluded that as the relief sought was a **Charter** remedy, the Supreme Court had jurisdiction to entertain it as an application for dealing with the "interpretation and application of the constitution". The Chambers judge therefore ordered that the matter should

proceed to a hearing on the merits. The Attorney General of Canada and the Millbrook Band Council appeal from that decision.

Does s. 18(1) of the **Federal Court Act** preclude the Supreme Court from granting a **Charter** remedy in a matter which by s. 18 of the **Federal Court Act** falls within the exclusive jurisdiction of that Court?

Section 101 of the **Constitution Act 1867** provides:

> "101 The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the Constitution, maintenance and organization of a general Court of Appeal from Canada, and for the establishment of any additional courts for the better administration of the laws of Canada."

By the enactment of s. 18 of the **Federal Court Act** Parliament exercised this constitutional power to effectively divest provincial superior courts of the jurisdiction they had previously had over federal agencies and conferred this jurisdiction exclusively upon the Trial Division of the Federal Court.

There is no doubt that the authorities referred to by the Chambers judge support the proposition that s. 18 of the **Federal Court Act** cannot be read so as to deprive provincial superior courts of their jurisdiction to determine the constitutional validity and applicability of Federal legislation. Thus in **Jabour, supra**, the Supreme Court of British Columbia was held to have jurisdiction to determine whether the **Combines Investigation Act** was either inapplicable to the Law Society of British Columbia or **ultra vires** the Parliament of Canada. Estey, J. said in **Jabour, supra,** 137 D.L.R. (3d) at pp. 16 and 17:

> "The provincial superior courts have always occupied a position of prime importance in the Constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(15) of the **Constitution Act, 1867** and are presided over by judges appointed and paid by the federal government . . . The Federal Court, as the successor to the Exchequer Court of Canada which was first established by Parliament in 1875, was established pursuant to the authority of s. 100 of the **Constitution Act, 1867** [sic - this should read s. 101] which provides "for the

> establishment of any additional courts for the better administration of the laws of Canada". The expression "laws of Canada" has been settled as meaning the laws enacted by the Parliament of Canada, at least for the purposes of this appeal . . . It is difficult to see how an argument can be advanced that a statute adopted by Parliament for the establishment of a court for the better administration of the laws of Canada can at the same time include a provision that the provincial superior courts may no longer declare a statute enacted by Parliament to be beyond the constitutional authority of Parliament. . . In my view Parliament lacks the constitutional authority to so provide. To do so would strip the basic constitutional concepts of judicature of this country, namely, the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the **Constitution Act, 1867**. At the same time it would leave the provincially-organized superior courts with the invidious task of execution of federal and provincial laws, to paraphrase the **Valin** case, **supra**, while being unable to discriminate between valid and invalid federal statutes so as to refuse to "execute" the invalid statutes. For this second and more fundamental reason I conclude that the British Columbia Courts have the requisite jurisdiction to entertain the claims for declaration herein made. Moreover, it would amount to an attempt by Parliament to grant exclusive jurisdiction to the Federal Court to administer the "laws of Canada" while the validity of those laws remained unknown. Any jurisdiction in Parliament for the grant of exclusive jurisdiction to the Federal Court must be founded on exclusive federal powers under s. 91 of the **Constitution Act, 1867**. In so far as there is an alleged excess of that jurisdiction by Parliament, s. 101 of the **Constitution Act**, 1867 cannot be read as the constitutional justification for the exclusion from the superior courts of the jurisdiction to pronounce upon it."

In **L'Anglais, supra,** the Superior Court of Quebec was held to have jurisdiction to determine whether the Canada Labour Relations Board had jurisdiction to determine the constitutional applicability of the Canada Labour Code. Chouinard, J., for the Supreme Court of Canada said at p. 157:

> "What the respondents say is that the decision *a quo* of the Board does not constitute the administration of 'applicable . . . federal law.' The Board's decision **precedes** the administration of applicable federal law. Its purpose is to determine whether the federal law applies to respondents' activities. To do this, the Board must decide whether these activities fall within the scope of federal authority or within provincial authority. At this stage, therefore, the Board is not interpreting and applying federal law, it is interpreting and applying the Constitution."

(Emphasis Added)

There is, however, a distinction between jurisdiction to determine the constitutional validity or the applicability of legislation on the one hand and jurisdiction to pass upon the manner in which a board or a tribunal functions under such legislation on the other.

It is clear from the cases of **R. v. Mills** (1986), 67 N.R. 241 and **Cuddy Chicks Ltd. v. Labour Relations Board (Ont.) et al.** (1991), 122 N.R. 361, that jurisdiction to grant relief under s. 24 of the **Charter** must come from some source other than the **Charter**. In **Mills**, MacIntyre, J. said at p. 250 (National Reporter):

> ". . . In s. 24(1) of the **Charter** the right has been given, upon the alleged infringement or denial of a **Charter** right, to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The **Charter** has made no attempt to fix or limit the jurisdiction to hear such applications. It merely gives a right to apply in a court which has jurisdiction. It will be seen as well that it prescribes no remedy, but leaves it to the court to find what is appropriate and just in the circumstances."
>
> (Emphasis Added)

The respondents cannot point to any statutory provisions outside the **Charter** which could give the Supreme Court jurisdiction notwithstanding s. 18 of the **Federal Court Act**.

The courts have not yet given a clear answer to the question whether **Charter** challenges to federal legislation and agencies are, like challenges based on constitutional division of powers, not subject to the exclusive jurisdiction of the Federal Court. Specifically, the Supreme Court of Canada has not dealt with this issue head on. There are three lines of cases which have evolved in the jurisprudence in provincial superior courts.

(1) In **Re Gandam and Minister of Employment and Immigration** (1982), 140 D.L.R. (3d) 363, the Saskatchewan Court of Queen's Bench refused to issue a writ of **certiorari** to quash a deportation order under the **Immigration Act** on the ground that it was contrary to the **Charter**. The court concluded that it did not have jurisdiction to do so since the defendant was a federal board, commission or other tribunal within the meaning of s. 18 of the **Federal Court Act**.

The principle developed in **Jabour, supra**, did not apply. The appellant's contention was that the federal statute was inconsistent with or infringed upon the **Charter** and that therefore a constitutional issue arose. A section of a statute may be absolutely within the power of the Parliament of Canada, but infringe upon the **Charter**. In the court's opinion, such an issue did not bring into being a constitutional question dealing with the validity of statutes. The **Charter** simply provided that an application may be made to a court of competent jurisdiction and that court is the Federal Court. The same approach was taken in **Pecheries M.P.Q. Ltee. et al. v. Hache et al.** (1986), 68 N.B.R. (2d) 240 (Q.B.); **Strang v. Canada** (1987), 67 Nfld. and P.E.I. R. 193 (Nfld. S.C.T.D.)

(2) In **R. L. Crain Inc. v. Couture et al.** (1986), 6 D.L.R. (4th) 478 (Sask. Q.B.), a distinction was made between **Charter** challenges to legislation and **Charter** challenges to the conduct of federal officials acting under legislation. This distinction was recognized in **Kruger v. Kubica**, [1989] 2 W.W.R. 465 (Alta. Q.B.) where the court held that it had jurisdiction to declare that the search and seizure provisions contained in ss. 231.1 and 231.2 of the **Income Tax Act** violated the **Charter**. The court said at p. 477:

> "If the plaintiffs' complaint in this case had been the manner in which Kubica or Lee had carried out or attempted to carry out a search or a seizure and the application was for a remedy under s. 24(1) of the Charter, I would have deferred to the jurisdiction of the Federal Court. I have characterized the plaintiff's claim as one engaging s. 52 of the Constitution, however."
>
> (Emphasis Added)

See also **Kourtessis v. Minister of National Revenue**, [1993] 2 S.C.R. 53 at p. 113 per Sopinka, J.

(3) In **Lavers, et al.. v. British Columbia (Minister of Finance)** (1989), 64 D.L.R. (4th) 193 (B.C.C.A.), Lambert, J.A. said at pp. 200 - 201:

> "I agree with Chief Justice McEachern that the decisions of the Supreme Court of Canada in . . . [**Jabour** and **L'Anglais**] confirmed that the Supreme Court of British Columbia has jurisdiction, as a provincial court of general original jurisdiction, to declare that a

> particular application of federal legislation is contrary to the Constitution. I have no doubt that the principle confirmed by those decisions applies to declarations respecting applications of the Charter to federal legislation in the same way as to declarations respecting applications of ss. 91 and 92 of the *Constitution Act, 1867* to federal legislation. Nor do I think that those two decisions can be confined to cases of the total unconstitutionality of particular federal legislation as opposed to cases of the unconstitutional application of otherwise constitutional legislation. In both the **Jabour** case and the **L'Anglais** case the legislation in question was constitutional. It was the particular application in question that was said to be beyond the power of Parliament. In that respect this case is indistinguishable from those two cases."

See also **Reza v. Canada (MEI), supra**; **Gallichon v. Ontario (Commissioner of Corrections)**, [1993] O.J. No. 918 (April 21, 1993); **Solis v. The Queen**, Ontario Court of Justice (General Division) No. U346-93, unreported April 30, 1993; **R. v. Daniels** (1991), 5 W.W.R. 340 (Sask. C.A.), leave to appeal to the Supreme Court of Canada refused, [1992] 69 S.C.C. (3d) vi (note).

In my opinion, the issue in this case relates not to whether the legislation under which the appellants functioned infringed the **Charter**, but whether the manner in which they functioned under that legislation did so. The question is whether in such circumstances this amounts to a constitutional issue over which the Supreme Court has jurisdiction in the face of s. 18 of the **Federal Court Act**. Strong policy considerations exist for answering this question in the negative. Evans and Slattery in an article in (1989), 68 C.B.R. 817 point out at p. 839 that the **Charter** grounds involved in attacking proceedings of a federal tribunal are often closely related to standard administrative law arguments clearly within the exclusive jurisdiction of the Federal Court:

> ". . . Consider, for example, the double-barrelled argument that a federal agency failed to comply with the common law duty of fairness or, in the alternative, violated the principles of fundamental justice enshrined in section 7 of the Charter. If litigants were allowed to pursue the Charter argument in a provincial superior court, when the administrative law issue could normally only be decided in the

> Federal Court, a serious dilemma would arise. Should the provincial court decide the Charter issue, simply because everyone has the constitutional right to raise such issues in provincial courts? Or should it stay the proceeding pending the Federal Court's disposition of an application for review, on the ground that, since only the Federal Court can dispose of both Charter and non-Charter issues, it is the more appropriate forum? Or should the provincial court assert a pendent jurisdiction to decide both issues itself, since they are intertwined and arise from a common core of fact?"

In my opinion, the activities of federal agencies pursuant to federal law - as distinct from the law itself - are clearly matters which can be scrutinized under the **Charter** only by a court which is otherwise one of competent jurisdiction within the meaning of s. 24(1) of the **Charter**. The Supreme Court is not such a court. This position finds support in the first two of the three lines of cases to which I have referred. To the extent that the authorities falling within the third line of cases take the opposite view, I would respectfully disagree with them. In **Federal Court Practice 1993** (Sgayias, Kinnear, Rennie and Saunder), the authors say at p. 27:

> "The boundary between the Federal Court and the provincial superior courts is in dispute in the application of the Charter of Rights. The conflicting authorities have been noted above in discussing "Legislative Competence." The trend, if one can be identified at all is that the provincial superior courts can determine whether federal legislation conflicts with the Charter, but that remedies against the activities of federal authorities as impugning Charter rights are to be sought in the Federal Court."

It is not necessary here to decide whether the consistency between a statute and the **Charter** is an issue within the competence of a provincial superior court in a matter otherwise falling within s. 18 of the **Federal Court Act**. Nor is it necessary to consider the appellant's argument that the Chambers judge should have declined jurisdiction on the ground that the Federal Court is a more convenient forum, given the nature of the remedy sought.

I would allow the appeal, set aside the decision and order of the Chambers judge and grant an order dismissing the respondents' application in the Supreme Court. There should be no costs to any party either in this court or before the judge in Chambers.

J.A.

Concurred in:

Matthews, J.A.

Freeman, J.A.