

NOVA SCOTIA COURT OF APPEAL

Cite as: O'Quinn v. Nova Scotia (Workers' Compensation Board), 1997 NSCA 17  
Hallett, Roscoe and Bateman, JJ.A.

**BETWEEN:**

THE WORKERS' COMPENSATION BOARD  
OF NOVA SCOTIA

Appellant

- and -

HELENE O'QUINN, the NOVA SCOTIA  
HUMAN RIGHTS COMMISSION and  
SUSAN M. ASHLEY, a Board of Inquiry  
appointed pursuant to Section 31A(1) of  
the *Human Rights Act*

Respondents

) David P.S. Farrar  
) for the Appellant

) Valerie A. MacKenzie for  
) Human Rights Commission

) Louise Walsh Poirier  
) for Attorney General

) Appeal Heard:  
) November 19, 1996

) Judgment Delivered:  
) January 23, 1997

**THE COURT:** The appeal is allowed without costs. The order of the Board of Inquiry of the Human Rights Commission is set aside, per reasons for judgment of Bateman, J.A., and Hallett, J.A.; Roscoe, J.A. concurring with both.

**Bateman, J.A.:**

This is an appeal by the Workers' Compensation Board of Nova Scotia from a decision of a Board of Inquiry of the Nova Scotia Human Rights Commission.

**Facts:**

The Respondent, Helene O'Quinn, filed a human rights complaint against the Appellant, Workers' Compensation Board of Nova Scotia, with the Nova Scotia Human Rights Commission on September 2, 1994. The Respondent alleged that the Board discriminated against her contrary to s.5(1)(a) of the Nova Scotia **Human Rights Act**, R.S.N.S. 1989, c. 214, as amended S.N.S. 1991, c. 12. Her complaint stated:

On July 31, 1980 my common-law husband, Manuel Jesso, accidentally drowned in Nova Scotia during the course of his employment. I subsequently received a widow's pension from the Workers' Compensation Board of Nova Scotia, as well as benefits for our son. In July, 1986 I remarried. In accordance with s. 61 of the **Workers' Compensation Act** I received a lump sum payment from Workers' compensation and was no longer entitled to receive the monthly pension. At that time the Nova Scotia **Human Rights Act** did not prohibit discrimination in the provision of services on the basis of marital status. In October, 1991 [sic] the repeal of s. 61 of the **Workers' Compensation Act** became effective. Persons who now become widowed can continue receiving the benefits upon remarriage. I have requested that my benefits be reinstated as of the date of the repeal of s. 61 but have been refused. I believe that the Workers' Compensation Board can re-open my claim under s. 70 and that the reassessment of my claim should be done without consideration of my present marital status. I believe that I should not be treated differently than other persons who became widowed since October, 1992. I allege that these actions are in violation of s. 5(1)(a)(s) of the Nova Scotia **Human Rights Act**. I also allege that these actions are in violation of section 15 of the **Canadian Charter of Rights and Freedoms**.

At the time of Mr. Jesso's death in 1980, the **Workers' Compensation Act** provided:

61(1) If a dependent widow marries, her right to compensation under ss. 33(b) and (c) shall cease, but she shall be entitled to \$35.00 a month for a period of 25 months from the date of the marriage or, in the discretion of

the Board, to be paid in an amount equal to such payments in one or more amounts, payable during the said 25 months, and upon the payment of same all payments of compensation to her shall cease.

(2) If a dependent widow marries on or after the first day of January, 1974, her right to compensation under ss. 33(b) and (c) shall cease, but she shall be entitled to \$50.00 a month for a period of 25 months from the date of the marriage or, in the discretion of the Board, to be paid in an amount equal to such payments in one or more amounts, payable during the said 25 months, and upon the payment of same all payments of compensation to her shall cease.

(3) Subsections (1) and (2) shall not apply to payments to a widow in respect of a child.

Section 61 of the **Workers' Compensation Act** was repealed in 1992 by S.N.S. 1992, c. 35, s. 6 which simply stated "Section 61 of said chapter 508 is repealed." Accordingly, any widow(er) who has married since the repeal of s. 61 continues to receive pension benefits.

The Respondent submitted that the Workers' Compensation Board has the power to re-open her claim under s. 70 of the **Workers' Compensation Act**. The Board declined to do so and the Respondent lodged the Human Rights complaint that has led to this appeal.

In a preliminary matter, the Appellant Board disputed the Human Rights Board of Inquiry's jurisdiction to conduct a hearing into the complaint. A hearing on the jurisdictional issues was held on June 5, 1995.

The Respondent, Susan M. Ashley - the Board of Inquiry appointed pursuant to s. 32A(1) of the **Human Rights Act** - held that she did have jurisdiction. That decision on jurisdiction was appealed to this Court which, by decision dated December 20, 1995 ((1995) 147 N.S.R. (2d) 28), dismissed the appeal, holding that the Board of Inquiry did have jurisdiction.

The Board of Inquiry heard the complaint on its merits, rendering a decision on May 16, 1996. It ordered that the Workers' Compensation Board reconsider the Respondent's application for reinstatement, without regard to marital status, and that it notify all other potential claimants in the Respondent's position that they may also apply for reinstatement of their pensions. The Appellant then appealed to this Honourable Court.

**Issues:**

The Appellant submits that the issues may be summarized as follows:

- 1) Did the Board of Inquiry err in concluding that amendments to the **Workers' Compensation Act** would apply to the Respondent?
- 2) Did the Board of Inquiry err in concluding that the Appellant, expressly or by necessary implication, has the power under s. 70 of the **Workers' Compensation Act** to re-open the Respondent's claim which was legally terminated in 1986 pursuant to s. 61 of the **Workers' Compensation Act** as it then existed?
- 3) Did the Board of Inquiry err on any other grounds?

**Analysis:**

Despite the reference to the **Charter** in the Complaint, counsel for the Human Rights Commission has not, before this court nor before the Board of Inquiry, challenged the constitutionality of the repeal legislation.

**(a) Standard of Review:**

The Board, appointed under the **Human Rights Act**, was interpreting the governing legislation of another administrative body and, accordingly, not having any particular expertise in the field of workers' compensation, is not entitled to curial deference. The parties agree, as do I, that the appropriate standard of review, in these circumstances, is one requiring correctness.

(b) **Workers' Compensation Act**, Section 70:

Section 70 of the **Workers' Compensation Act** provides:

s. 70(1) The Board may reopen, rehear, review, or readjust **any claim, decision or adjustment**, including any finding or decision of a medical review board made between the twelfth day of April, 1957 and the thirteenth day of April 1962, either because an injury has proven more serious or less serious than it was deemed to be, or because new evidence relating to such claim, decision or adjustment has been presented to it, **or because a change has occurred** in the condition of a worker or **in the number, circumstances or condition of dependants or otherwise**. (emphasis added)

The Board found that s. 70 of the **Workers' Compensation Act** permitted the Workers' Compensation Board to reconsider Ms. O'Quinn's application for benefits and that its failure to do so constituted discrimination on the basis of marital status.

The key findings of the Board of Inquiry are as follows:

The conclusions as to the interpretation of section 70, stated at page 12 of the jurisdictional decision, stand. I found that interpreting the words "or otherwise" in section 70 to include an application such as the Complainant's would not place an unbearable strain on the plain words of the section; nor would it add a new class of claimants. On the question of fact - whether the Complainant is a "dependent" for the purposes of section 70 - I am satisfied that the Board practice is that, having met that criteria at the time of her husband's death, it is no longer an issue.

. . .

I find that there is nothing in the **Workers' Compensation Act**, 1989, c. 508 as amended, that requires the interpretation placed on it by the Board. Nor does the statute preclude the interpretation sought by Ms. O'Quinn and counsel for the Human Rights Commission. I conclude that the Board's failure to consider the Complainant's 1993 application for reinstatement without regard to the fact of her marital status has created a distinction within the class of 'compensable widows' based on the date of the remarriage, which imposed a burden on her and those in her position in that they were prohibited from receiving the benefits that otherwise would have been

available. This amounts to discrimination on the basis of marital status contrary to section 5(1) (a) of the **Human Rights Act**. I am not satisfied that a section 6 exception applies to this case. The financial information presented by the Board as to the cost of reinstatement does not satisfy me that this is a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society".

The complaint is allowed.

The earlier decision of this Court on the jurisdictional issue did not consider the interpretation by the Board of Inquiry as to the meaning of s. 70.

The decision of the Workers' Compensation Board is captured in a letter forwarded by Board pensions officer Don MacNeil to Roger Simmon's, M.P., who had written the Board in support of Ms. O'Quinn's request for reinstatement. The relevant part of that letter, which was an exhibit at the hearing, states:

. . . I am advised by legal counsel that it is not within the Board's power simply to agree to reinstate Mrs. O'Quinn's benefits. The decision to terminate her benefits was made in accordance with the law as it was in 1986. It was not a discretionary decision. Furthermore, the repeal of s. 61 in 1992 was not made retroactive so as to reinstate benefits (in contrast to another 1992 amendment which was explicitly made retroactive). If benefits are to be reinstated for Mrs. O'Quinn and others in her position, that is a decision that will have to be made by the Nova Scotia legislature and not by the Board.

The threshold issue is whether s. 70 admits of the interpretation imposed by the Board of Inquiry. The Board found that the words "or otherwise" could be interpreted to permit the Workers' Compensation Board to re-open a claim for compensation on account of the change in the legislation. Those words must, however, be interpreted in context. This the Board of Inquiry failed to do. Applying the principle of *ejusdem generis*, "or otherwise" is modified by the words and phrases preceding it. While the phrase, taken alone, is broad enough to include a

change in legislation, it is clear, upon a reading of the whole of section 70, that it is directed to changes in the following context:

- 1) Where the injury proves to be more or less serious than originally thought;
- 2) where new evidence arises;
- 3) where the condition of the worker or the number, circumstances or condition of the dependents change.

These concepts are linked in that they are all changes to a person's individual situation, not changes in the law. In my view, s. 70 does not admit of the interpretation applied by the Board of Inquiry.

The **Workers' Compensation Act** was enacted in 1915 and included the original versions of what became ss. 70 and 61. Section 61 (now repealed) expressly discontinued benefits received by widows who remarried. I am further persuaded to the view that s. 70 was not intended to be used in the manner directed by the Board of Inquiry in that the legislature cannot have intended, upon enacting the statute, that the discretion conferred under s. 70, to reopen claims would be used contrary to the provisions of s. 61, which terminated the benefits of remarried widows.

Legislation that is open to more than one interpretation should be interpreted so as to make it consistent with the **Charter**. **Charter** values cannot, however, be imposed upon legislation in order to make it consistent with the **Charter**, where the legislation lacks ambiguity. Lamer, J. wrote in **Canada (AG) v. Mossop**, [1993] 1 S.C.R. 554 at p. 581:

Absent a **Charter** challenge of its constitutionality, when Parliamentary intent is clear, courts and administrative tribunals are not empowered to do anything else but to apply the law. If there is some ambiguity as to its

meaning and scope, then the courts should, using rules of interpretation, seek out the purpose of the legislation and if more than one reasonable interpretation consistent with that purpose is available, that which is more in conformity with the **Charter** should prevail.

But, I repeat, absent a **Charter** challenge, the **Charter** cannot be used as an interpretive tool to defeat the purpose of the legislation or to give the legislation an effect Parliament clearly intended it not to have.

The Workers' Compensation Board derives its authority solely from the statute (**Workers' Compensation Act**). It did not have jurisdiction to use s. 70 in the manner directed by the Board of Inquiry. Had it done so, it would have exceeded its jurisdiction. The Board of Inquiry found that the Workers' Compensation Board's failure to use s. 70 to reopen Ms. O'Quinn's claim amounted to discrimination on the basis of marital status. The Workers' Compensation Board was, however, adhering to a proper application of s. 70. If doing so resulted in discrimination based upon marital status, and I make no finding in that regard, then the discrimination must be attributable to the legislation repealing s. 61 of the **Workers' Compensation Act**, not to the actions of the Board.

Through the lawful operation of s. 61 Ms. O'Quinn's benefits had terminated. She no longer had status as a claimant under the **Workers' Compensation Act**. This was due, not to a decision of the Workers' Compensation Board, but by operation of law. There is therefore no "claim, decision or adjustment . . ." to be reopened.

Counsel for the Human Rights Commission urges that we use **Charter** values as an interpretive aid, notwithstanding an absence of ambiguity, which is essentially the course followed by the Board of Inquiry. Such an approach was rejected by Iacobucci, J. in **Symes v. Canada**, [1993] 4 S.C.R. 695 at p. 753:



In both **Hills** and **Slaight Communications**, this Court was confronted with statutory language which was ambiguous. In each case, the values of the **Charter** were consulted to resolve the ambiguity. However, each case recognizes that **to consult the Charter in the absence of such ambiguity is to deprive the Charter of a more powerful purpose, namely, the determination of a statute's constitutional validity.** If statutory meanings must be made congruent with the **Charter** even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the **Charter**. Furthermore, it would never be possible for the government to justify infringements as reasonable limits under s. 1 of the **Charter**, since the interpretive process would preclude one from finding infringements in the first place. (emphasis added)

Accordingly, I would allow the appeal and set aside the Order of the Board of Inquiry. I agree, as well, with the analysis of my colleague Hallett, J.A. as an alternative basis upon which this appeal should be allowed. In the circumstances, there shall be no costs.

Bateman, J.A.

Concurred in:

Roscoe, J.A.

HALLETT J.A.:

I agree with Justice Bateman that s. 70 of the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508 as amended was misinterpreted by the Board of Inquiry. In addition, I am of the opinion that the Board of Inquiry erred: (i) in finding that there was no evidence that the Legislature intended that the two groups of widows would be treated differently; and (ii) in exceeding the limitations on its power.

In 1980 Mrs. O'Quinn's husband drowned in the course of his employment. Pursuant to the **Workers' Compensation Act** in force at the time Mrs. O'Quinn received a widow's pension. In 1986 she remarried and in accordance with s. 61 of the **Act**, the widow's pension ceased and she received a lump sum payment. In 1991 the **Human Rights Act** was amended to prohibit discrimination on the basis of marital status (S.N.S. 1991, c. 12). In 1991 Mrs. O'Quinn separated from her second husband. Mrs. O'Quinn was divorced by Order dated April 20th, 1992.

On June 30th, 1992, Royal Assent was given to Chapter 35, S.N.S. 1992, an **Act** amending the **Workers' Compensation Act**. Section 6 of that **Act** repealed s. 61 of the **Workers' Compensation Act**. Section 6 came into force on October 2nd, 1992. The pensions payable to widows of workers who die in the course of their employment, subsequent to October 1st, 1992, are not terminated on their remarriage.

In 1993 Mrs. O'Quinn requested that her benefits for widow's pension be reinstated. The Board refused on the ground that the current law did not apply to Mrs. O'Quinn.

There is a presumption that legislation is not intended to be applied retroactively or retrospectively. This presumption can be overcome if an Act expressly provides that the legislation is to have such application or if such an

intention is necessarily implied from the language of the Act. (**Gustavson Drilling (1964) Ltd. v. M.N.R.**, [1977] 1 S.C.R. 271; **Driedger on the Construction of Statutes**, 3rd edition at p. 552).

There is no doubt that human rights legislation is to be given such liberal interpretation as best ensures the attainment of its objectives but such a liberal interpretation does not extend to disregarding common law and statutory rules relating to the interpretation and application of statutes; the issue in this case related to the interpretation and application of amendments to the **Workers' Compensation Act**.

Sections 6 and 7 of Chapter 35 S.N.S. 1992 are relevant in a search for the legislative intent in repealing s. 61 of the **Act**. Sections 6 and 7 provide:

"6. Section 61 of said Chapter 508 is repealed.

7. (1) Subsection (1) of Section 84 of said Chapter 508 is amended by striking out the words "and is thereby disabled from earning full wages at the work at which he was employed" in the second and third lines thereof.

(2) Said subsection (1) of Section 84, and any provision that is a predecessor to said subsection (1), is deemed to have always read as amended by subsection (1) of this Section and shall accordingly be read, construed, interpreted and given effect."  
(emphasis added)

The amendment to s. 84 of the **Act** was expressly stated to have retroactive effect (s. 7(2)). The **Act** is silent as to the extent of the temporal application to be given to s. 6. In view of the amendment made to s. 84 of the **Act**, the legislative mind was clearly considering the time periods in which the amendments were to apply.

There is nothing in the **Act** that expresses an intent that the repeal of s. 61 was to be applied retrospectively to reinstate a widow's pension that had ceased

upon remarriage of a widow and her acceptance of the lump sum benefits as provided in the **Workers' Compensation Act** prior to the repeal of s. 61.

It is a reasonable inference that the repeal of s. 61 arose out of desire to bring the **Workers' Compensation Act** in line with the 1991 amendment to the **Human Rights Act** which added marital status as a characteristic of a person which could give rise to a claim of discrimination. But that in itself is an insufficient reason to necessarily infer that the Legislature intended that the repeal of s. 61 would be applied retrospectively to re-open closed transactions such as Mrs. O'Quinn's. It may be inferred that the Legislature intended that the repeal of s. 61 was not to have other than prospective effect; if the intention was otherwise the Legislature would have said so.

On the hearing before the Board of Inquiry Mr. Graham Steele, a legal advisor to the Workers' Compensation Board, testified that the Legislature, in connection with three other amendments made to the **Workers' Compensation Act** in the four years previous to the Board of Inquiry hearing, expressly stated that the amendments were to be given retroactive effect so as to extend benefits in situations which would not otherwise be covered were the legislation not stated to have retroactive application.

Mr. Steele testified before the Board of Inquiry that the estimated cost to reinstate the pensions of widows, whose pensions had ceased on their remarriage, was actuarially calculated at about \$11 million.

Mr. Steele also testified that this estimated cost information had been prepared in January, 1995, when a Bill, which made very substantial amendments to the **Workers' Compensation Act**, was before the Legislature. That Bill had been introduced in October of 1994. He testified that the information as to the cost of

reinstating the widows' benefits had been produced for the purpose of considering changes to the Bill after it was introduced in the Legislature.

Mr. Steele testified that prior to the substantial amendments to the **Workers' Compensation Act** in February 1995, the unfunded liability of the Board for claims was in the range of \$370 million to \$390 million which he described as being the worst funded Board in Canada. Mr. Steele testified that the issue of whether widows' pension benefits would be re-opened was a live issue right up until the time that Bill was given Royal Assent on February 6th, 1995.

Therefore, the Legislature had another opportunity in 1995 to reinstate the pensions of those widows who had remarried before October 2nd, 1992. The Legislature did not do so. There still is an opportunity for the Legislature to extend the benefits to those widows should the Legislature choose to do so.

In summary, what evidence there was before the Board of Inquiry as to the intention of the Legislature when s. 61 was repealed, does not assist in rebutting the presumption that the Legislature did not intend that the repeal of s. 61 would be applied retroactively or retrospectively so as to open up closed claims for compensation.

In the absence of a clear intention, either expressed in the **Act** or by necessary implication, that the repeal of s. 61 in 1992 was to have retrospective effect, Mrs. O'Quinn's claim to a widow's pension from the date of the repeal of s. 61 cannot be reopened. Retrospective application is not expressed in the amending **Act** and does not arise by necessary implication from the language of the amending **Act**. Mrs. O'Quinn's entitlement to widow's pension benefits under the **Workers' Compensation Act** ended in 1986.

In concluding that there was no evidence "that the distinction created by the repeal of s. 61 between those who remarried before or after 1992 was intended by the Legislature", the Board of Inquiry erred; it failed to adequately consider and apply rules of interpretation respecting the temporal application of statutes. Therefore, the Board of Inquiry erred in finding that the Workers' Compensation Board misinterpreted the relevant provisions of the **Workers' Compensation Act**.

If Mrs. O'Quinn was discriminated against, it was not due to the action of the Workers' Compensation Board in refusing to reinstate her pension, but, rather, a result of the Legislature enacting legislation that possibly violates the s. 15 **Charter** right of Mrs. O'Quinn and others in her situation.

In **Canada (A.G.) v. Mossop**, [1993] 1 S.C.R. 554, Lamer, C.J., writing for the majority stated at p. 581:

"Absent a **Charter** challenge of its constitutionality, when Parliamentary intent is clear, courts and administrative tribunals are not empowered to do anything else but to apply the law. If there is some ambiguity as to its meaning or scope, then the courts should, using the usual rules of interpretation, seek out the purpose of the legislation and if more than one reasonable interpretation consistent with that purpose is available, that which is more in conformity with the *Charter* should prevail.

But, I repeat, absent a *Charter* challenge, the *Charter* cannot be used as an interpretative tool to defeat the purpose of the legislation or to give the legislation an effect Parliament clearly intended it not to have.

Of course, if the effect of the legislation is in violation of the *Charter*, and a challenge of the constitutionality of the law is made before the courts, then the courts are commanded under s. 52 of the *Constitution Act, 1982* to declare the section inoperative or to amend it when permissible along the lines set out in *Schachter* as did the Ontario Court of Appeal in *Haig*."

The Board of Inquiry erred in failing to recognize this limitation. The intent of the Legislature was clear. Therefore, neither the **Charter** nor the **Human Rights Act** could be used as interpretative tools to give the **Workers' Compensation Act** an effect that was clearly not intended.

The Order of the Board of Inquiry required the Workers' Compensation Board to: (i) reconsider Mrs. O'Quinn's application for reinstatement; and (ii) notify all other potential claimants in Mrs. O'Quinn's situation that they may also apply for reinstatement of their pensions.

The effect of the Board of Inquiry's decision and the remedy imposed is to declare invalid the legislation which does not reinstate the pensions of widows who remarried before the repeal of s. 61 of the **Workers' Compensation Act**.

Sections 34(7) and (8) of the **Human Rights Act** provide:

"34 (7) A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision.

(8) A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor."

It would appear that by reason of the broad provisions of ss. 34(7) and (8) of the **Human Rights Act** that a Board of Inquiry, appointed under that **Act**, has jurisdiction to address constitutional issues (**Douglas/Kwantlen Faculty Assn. v. Douglas College**, [1990] 3 S.C.R. 570, (1990), 77 D.L.R. (4th) 94, [1991] 1 W.W.R. 645; **Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)** (1991), 81 D.L.R. (4th) 121, [1991] 2 S.C.R. 5, 3 O.R. (3d) 128; and **Tétreault-Gadoury v. Canada (Employment and Immigration Commission)** (1991), 81 D.L.R. (4th) 358, [1991] 2 S.C.R. 22, 50 Admin. L.R. 1).

In **Bell v. Canada (Canadian Human Rights Commission)**, [1996] S.C.J. No. 115, the majority (LaForest, Sopinka, Gonthier and Iacobucci JJ. dismissed an appeal from the Federal Court of Appeal that had confirmed the dismissal of a claim of age discrimination by airline pilots that they were being discriminated against because they were required to retire at age 60 whereas normal retirement for most Canadian employees is age 65. The majority of the Court held that no administrative tribunal has an independent source of jurisdiction pursuant to s. 52(1) of the **Constitution Act, 1982**. A court must, therefore, as a matter of statutory interpretation determine whether Parliament has granted the administrative tribunal through its enabling statute, either explicitly or implicitly, the power to determine questions of law. If so, the administrative tribunal by the operation of s. 52(1) must be able to address constitutional issues including the constitutional validity of its enabling statute.

The majority held that in considering whether an administrative tribunal has the power to determine questions of law, 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 can appropriately be taken into account. 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's having constitutional competence, though such concerns can never supplant the intention of the legislation.

In **Bell v. Canada** (supra), Lamer, C.J. agreed that the appeal ought to be dismissed but expressed obvious concerns about prior decisions of the Supreme Court of Canada on the question of the jurisdiction of tribunals to declare legislation unconstitutional. He stated at paragraphs 28 and 29 of his reasons:



"In my respectful view, the decisions of this Court in **Douglas College, Cuddy Chicks** and **Tétreault-Gadoury** stand in contradiction to two fundamental principles of the Canadian constitution - the separation of powers and Parliamentary democracy. By authorizing tribunals to declare provisions of their enabling legislation inoperative for the purposes of the proceedings before them, this Court has effectively allowed those bodies to make declarations of invalidity. Furthermore, this power also permits tribunals to invert the hierarchical relationship between the executive and legislative branches which is fundamental in a Parliamentary democracy.

By limiting the operation of s. 52 to the courts, we may avoid the complicated jurisprudence which is in full evidence in this decision. Although we are bound by the prior decisions of this Court, I strongly urge my colleagues to revisit those decisions in order to ensure that the **Charter** does not distort the deep structure of the **Canadian Constitution**."

In my opinion, absent a determination by the Supreme Court of Nova Scotia, which would take into consideration the matters referred to by the majority in **Bell v. Canada**, that a Board of Inquiry appointed under the **Human Rights Act** has jurisdiction to declare unconstitutional the workers' compensation legislation in question, the Board of Inquiry in this matter ought not to have exercised such a jurisdiction. The majority of the Court in **Bell v. Canada** were of the opinion that it would be more efficient, both for the parties and to the system in general, that a declaration of constitutional invalidity ought to be sought in a superior court rather than have the matter determined by a tribunal. The majority was of the view that in such a setting the issue could be debated in the fullness it requires and proper expertise brought to bear on its resolution.

I am further of the opinion that the Legislature, in enacting s. 34(7) and (8) of the **Human Rights Act**, did not intend to confer on a Board of Inquiry jurisdiction to declare invalid other provincial legislation. The conferring of such a jurisdiction would require language similar to s. 52 of the **Constitution Act, 1982**. There is no

such provision in the **Human Rights Act**. In the absence of a **Charter** challenge, the Board of Inquiry clearly exceeded its jurisdiction in rendering a decision and imposing a remedy that, in effect, declared the legislation in question invalid.

Counsel for the Nova Scotia Human Rights Commission stated to this Court that it was not challenging the constitutional validity of s. 6 of the amending **Act**.

If the Commission is of the opinion that s. 6 of the amending **Act** is unconstitutional in that the effect of the amendment discriminates in that it does not reinstate the pension of those widows who remarried before the repeal of s. 61, the proper, or at least the more appropriate, procedure is to challenge the legislation by proceeding in the Supreme Court of Nova Scotia seeking a declaration that the legislation infringes those widow's section 15 **Charter** right.

I would allow the appeal and set aside the Order of the Board of Inquiry.

Hallett, J.A.

Concurred in:

Roscoe, J.A.

NOVA SCOTIA COURT OF APPEAL

**BETWEEN:**

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HUMAN RIGHTS COMMISSION and  
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Respondents

)  
)  
) REASONS FOR  
JUDGMENT BY:

)  
) BATEMAN, J.A.  
) and  
) HALLETT, J.A.  
) (Roscoe, J.A.  
) concurring with  
) b o t h