Docket: CA 162161
Date: 20001108

NOVA SCOTIA COURT OF APPEAL

[Cite as: Nova Scotia (Workers' Compensation Board) v. Martin 2000 NSCA 126]

Freeman, Flinn and Cromwell, JJ.A.

BETWEEN:

WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

Appellant
Respondent by Cross-Appeal

- and -

DONALD MARTIN

Respondent
Appellant by Cross-Appeal

- and -

WORKERS' COMPENSATION APPEALS TRIBUNAL OF NOVA SCOTIA

Respondent
Respondent by Cross-Appeal

Docket: CA 162160 & 162130

AND BETWEEN:

WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

Appellant
Respondent by Cross-Appeal

- and -

RUTH A. LASEUR

Respondent
Appellant by Cross-Appeal

- and -

WORKERS' COMPENSATION APPEALS TRIBUNAL OF NOVA SCOTIA

Respondent
Respondent by Cross-Appeal

REASONS FOR JUDGMENT

Counsel:	Brian A. Crane, Q.C., David P.S. Farrar and John R. Ratchford for the appellant/respondent on cross-appeal in both appeals Kenneth H. LeBlanc, Anne S. Clark and Patricia Dunn for the respondent/appellant by cross-appeal Martin and the respondent/appellant by cross-appeal Laseur Louanne Labelle and Karen Crombie for the respondent Tribunal William M. Wilson, Q.C. for the Attorney General of Nova Scotia
Appeals Heard:	June 13 and 14, 2000
Judgment Delivered:	November 8th, 2000
THE COURT:	Appeals allowed and cross-appeals dismissed per reasons for judgment of Cromwell, J.A.; Freeman and Flinn, JJ.A. concurring.

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CROMWELL, J.A.:

I. INTRODUCTION:

[2] In 1996, the Governor in Council passed regulations eliminating the possibility of long term workers' compensation benefits for certain injured workers with chronic pain. In 1999, the Legislature amended the **Workers Compensation Act** to give these regulations statutory force. In the two cases now before this Court, the Workers' Compensation Appeals Tribunal decided that some of these provisions are unconstitutional because they violate the equality rights of injured workers with chronic pain. The Workers' Compensation Board appeals from those decisions. (In these reasons, I will refer to the **Workers' Compensation Act**, S.N.S. 1994 - 95, c. 10 as amended as the "**Act**", the Workers' Compensation Appeals Tribunal as "WCAT" or the "Tribunal" and to the Workers' Compensation Board as the "Board".)

[3] These cases raise two important issues relating to Nova Scotia's workers' compensation system. The first is whether WCAT has the authority to refuse to apply provisions of the **Workers' Compensation Act** which, in its opinion, violate the **Canadian Charter of Rights and Freedoms**. This question concerns the role of WCAT: is its purpose simply to provide a prompt and independent review of the Board's application of the **Act** or is it to have the more sweeping role of assessing whether the workers' compensation scheme itself is consistent with the *Charter*? The second issue is whether WCAT erred in finding that these provisions unjustifiably discriminate against workers with chronic pain and thereby violate their rights under s. 15 of the *Charter*.

This question concerns the limits of the Legislature's authority to design and implement a workers' compensation system for the Province. It asks whether the Legislature's decision not to extend benefits to persons in need is a legitimate legislative action or unconstitutional discrimination.

[4] For reasons I will set out at length, I have concluded that WCAT does not have authority to refuse, on *Charter* grounds, to apply provisions of the **Workers' Compensation Act** which confer or limit benefits. In my view, the **Act** makes it clear that WCAT's role is to provide an independent and prompt review of the Board's application of the **Act**, not to determine whether the Legislature has exceeded the constitutional limits of its authority. I have also concluded that the challenged chronic pain provisions are not discriminatory. While even the proponents of these provisions recognize that they are inadequate to address the needs of injured workers with chronic pain, the provisions are the result of a decision the Legislature was legally entitled to make.

II. FACTS:

II.1 The Legislation:

[5] These appeals concern the constitutionality of the Functional Restoration (Multi-Faceted Pain Series) Program Regulations (FRP Regulations) (96-207) which came into force in 1996 and portions of the 1999 "chronic pain" amendments to the **Workers' Compensation Act**, S.N.S. 1999, c. 10 which incorporate them by reference.

Before turning to the facts of each of the appeals, it will be helpful to provide a brief overview of the legislation. (For convenience, the FRP Regulations are attached as Appendix I and the text of s. 10A - I of the 1999 amendments are attached as Appendix II).

[6] The compensability of chronic pain following work injury has been problematic for the workers' compensation system. Some of the difficulties were discussed by the decisions of WCAT and of this Court in **Doward v. Workers' Compensation Board (N.S.),** 1996 Decision No. 96-010D May 21, 1996 (W.C.A.T. N.S.), rev'd (1997), 160 N.S.R. (2d) 22 (C.A.). The Hearing Officer in the **Doward** case found that what is now referred to as chronic pain was not a compensable condition under the Nova Scotia workers' compensation scheme. The Tribunal reversed the Hearing Officer on this point and found that, at least in certain circumstances, chronic pain may be compensable. The Tribunal stated:

> The Panel finds that the Hearing Officer erred in deciding that chronic pain syndromes are not compensable in Nova Scotia. Further, the Panel finds that in certain circumstances chronic pain syndromes can result in both a physical impairment and economic loss, and that a traumatic incident such as a work place accident, can be both the factual and the legal cause of a chronic pain syndrome.
> (**Doward** - WCAT, p. 76)

[7] The 1996 FRP Regulations effectively reverse this conclusion. Chronic pain is defined in both the Regulations and the 1999 legislation in these terms:

> 10A In this Act, "chronic pain" means pain
> (a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or
> (b) disproportionate to the type of personal injury that precipitated,

> triggered or otherwise predated the pain,
>
> and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed. (See s. 10A of the **Act** and s. 2(b) of the FRP Regulations)

The Regulations specify in s. 3(2) that, except as provided for therein:

> ... chronic pain is and is deemed always to have been excluded from the operation of Part I of the **Act** [i.e., the part dealing with compensation] and no compensation is payable in connection with chronic pain except in accordance with the Regulations.
> (emphasis added)

[8] This limitation is reflected in s.10B(c) of the 1999 amendments to the **Act** which provide that, subject to certain transitional provisions, "... no compensation is payable to a worker in connection with chronic pain except ... as provided for in the Functional Restoration (Multi-Faceted Pain Services) Program Regulation...".

[9] The FRP Regulations establish a Multi-faceted Pain Services Program for injured workers with chronic pain. By s. 7(1), it is limited to four (4) weeks. During that period, the worker will participate in the program and is eligible to receive an amount equal to a temporary earnings-replacement benefit under s. 37 of the **Act**. There are three eligibility requirements set out in ss. 5 and 6 of the FRP Regulations:

1. the worker must be suffering from chronic pain (as defined above);
2. the worker must be experiencing "... a loss of earnings subsequent to a compensable injury" and identify "... pain and pain-related symptoms

as the reason for the loss of earnings"; and

3. no more than 12 months have elapsed since the worker's date of injury.

[10] The limitation of the benefits provided by the Regulations is subject to certain transitional provisions. Section 10E applies to workers injured during what has become known as the "window period" (March 23, 1990 to February 1, 1996), who had chronic pain that commenced following their injury and who were receiving temporary earnings-replacement benefits (TERB) as of November 25, 1998 or who had an appeal pending at any level as of that date. These workers are entitled by s. 10E to receive 50% of a permanent impairment benefit calculated on the basis of a 25% impairment rating and 50% of an extended earnings-replacement benefit (EERB) (if payable pursuant to ss. 37 to 49). Any pending appeal is void. Section 10G entitles persons receiving benefits under s. 10E to medical aid.

[11] Section 10D does not relate specifically to chronic pain cases and applies to those workers who were injured before March 23, 1990, had been granted disability benefits under the former **Act** in relation to the injury and who had been granted an amended earnings-replacement loss benefit under the former **Act** which was reduced on or before the new **Act** came into force. Under s. 10D, the worker is to continue to receive that benefit subject to the worker abandoning any pending appeal.

[12] Mr. Martin was injured after February 1, 1996 and was subsequently diagnosed as having chronic pain disentitling him to further earnings-replacement benefits pursuant to s. 3 of the FRP Regulations. As the Tribunal observed, the application of the FRP Regulations to Mr. Martin is confirmed by s. 10B(c) of the **Act**. Ms. Laseur was injured in 1987 and was subsequently diagnosed as suffering from chronic pain. Further benefits are precluded by s. 10B(b) of the **Act**.

II.2 The Martin Appeal:

[13] Donald Martin worked as a foreman at Suzuki Dartmouth when on February 6, 1996, he lifted a tow dolly and towed it backward about 15 feet. He reported experiencing a sudden severe pain in his lumbar spine. Although he continued to work that day, he went to family physician who, on February 8, diagnosed a lumbar sprain.

[14] Over the next several months, Mr. Martin returned to work several times, but experienced pain requiring him to stop work. He attended a work conditioning program and a work hardening program. During this period, the Board provided temporary benefits and rehabilitation services. The Board refused to continue his temporary benefits beyond August 6, 1996.

[15] Mr. Martin sought review of this decision, but a Review Officer denied his claim for further temporary earnings-replacement benefits and chiropractic treatment. The Review Officer noted that “... there is no demonstrated pathology to support this worker’s complaint of pain”, that he was developing early signs of chronic pain and that

under the Functional Restoration Program Regulation (96-207) chronic pain is (except as therein provided) excluded from the operation of the **Act**". The Review Officer concluded that:

> Taking into consideration the Chronic Pain Regulations as well as the lack of demonstrated pathology on examination, there is no evidence to support further earnings replacement benefits beyond August 6, 1996.

[16] Mr. Martin appealed to a Hearing Officer who denied the appeal. The Hearing Officer concluded that in light of the FRP Regulations, Mr. Martin was not entitled to compensation with respect to the development of his chronic pain.

[17] Mr. Martin appealed to WCAT, arguing that the FRP Regulations violated s. 15 of the *Charter.* The Board challenged the jurisdiction of WCAT to hear this *Charter* argument.

[18] WCAT affirmed its jurisdiction to deal with the *Charter* issue and, on the merits, decided that the FRP Regulations violate s. 15 of the *Charter* and are not saved under s. 1. WCAT also concluded that s.10B(c) of the **Act** is similarly unconstitutional. The Tribunal awarded Mr. Martin temporary benefits from August 6 to October 15, 1996, but declined to award benefits beyond that date.

[19] The Board appeals the *Charter* holdings and Mr. Martin cross-appeals the cut-off of benefits as of October 15, 1996.

II.3 The Laseur Appeal:

[20] Ruth Laseur was a bus driver for Metro Transit. On November 13, 1987, she climbed up onto the front bus bumper in order to clean the windshield. She fell and reported bruising her right hand and wrenching her back. The accident was reported to the Workers' Compensation Board. She returned to work after ten days. With occasional days off due to back pain, she worked until February 16, 1988.

[21] From February 16 to May 1, 1988, she received temporary total disability benefits. She returned to work for a month and then again received compensation from June 13 to August 8, 1988. She returned to work again in August for several months with days off due to back pain as well as a hospital admission for a myelogram in November. In March, 1989, she again stopped working and received compensation from March 16 to April 13 and May 29 through July 24, 1989. The benefits were then extended to October 30 but terminated as of that date.

[22] Ms. Laseur continued to pursue her claim and returned to work part time on February 23, 1990. A Summary Report by the Workers' Compensation Board on February 21, 1990 noted that Ms. Laseur had "fallen into the usual chronic pain picture" and considered that there was "no objective evidence to justify a PMI (permanent medical impairment) examination".

[23] Ms. Laseur worked part-time until April 10, 1990, when Metro Transit required her to return to full-time hours. This aggravated her back pain. She stopped work on April 18 and returned to work on a part-time basis until July 30. Subsequently, her

family doctor ordered her to stop working again.

[24] In October of 1990, the Workers' Compensation Appeal Board (as it then was called), awarded Ms. Laseur temporary total disability benefits for the periods of October 31, 1989 to February 22, 1990 and from April 18, 1990 to July 2, 1990, 50% temporary partial disability benefits from February 23 to April 10, 1990 and July 3 to July 30, 1990 and temporary total disability payments from August 1 until an assessment could be carried out for a permanent partial disability.

[25] Ms. Laseur attended for an estimation of her permanent medical impairment (PMI) on January 17, 1991. The medical services administrator noted that "This is basically a chronic pain problem, perhaps even a chronic pain syndrome although she seems to be a very pleasant individual with not the usual features of this type of problem. However, there is no organic evidence to justify a PMI as far as I can tell based on the examination done today." A permanent partial disability award was denied.

[26] Ms. Laseur filed a notice of appeal. She was enrolled in a computerized accounting course funded through Canada Manpower from July 1991 to July 1992. The Workers' Compensation Appeal Board's decision of January 30, 1992, stated that "since Ms. Laseur is presently in a retraining program sponsored by the Federal Government, it would be premature to award a permanent partial disability or further retraining at this time."

[27] After finishing the course, she enrolled in a business computer programming

course at N.S. Community College for the year 1993. In 1994, she moved to Alberta and obtained employment almost immediately. Ms. Laseur continued to be bothered by chronic back pain. Her work schedule was modified and various accommodations made by her employer.

[28] Ms. Laseur continued to seek permanent partial disability benefits retroactive to January 1991. A decision of August 12, 1994 from the Workers' Compensation Board rejected her claim, stating that "...she probably has a full blown chronic pain syndrome, which is a non-compensable condition and is well known to be virtually totally related to psychosocial factors." All of this occurred prior to introduction of the FRP Regulations in 1996 or the addition of sections 10A *et seq.* to the **Act** in 1999.

[29] Ms. Laseur appealed to a Hearing Officer and then to WCAT. She raised a *Charter* argument challenging s. 10B of the **Act** which had since come into force.

[30] WCAT held that it had jurisdiction over *Charter* matters, based upon the decision in **Martin**. On the merits, the Tribunal found that Section 10B of the **Act** violates s. 15(1) of the *Charter* and is not saved under s. 15(2) or s. 1. Pursuant to s. 227 of the 1994-95 **Act**, WCAT applied the *PMI Guidelines* and assigned a zero rating based upon the lack of objective findings. Accordingly, Ms. Laseur was held not to be entitled to either a permanent impairment benefit or to vocational rehabilitation benefits.

[31] As in **Martin**, the Board appeals WCAT's *Charter* decisions. Ms. Laseur

cross-appeals, challenging the “zero-rating” for her permanent impairment.

III. ANALYSIS:

III.1 The Cross-appeals:

[32] The issues on both appeals are the same: can WCAT refuse, on *Charter* grounds, to apply provisions of the **Act** which otherwise apply to a case before it, and are the chronic pain provisions unconstitutionally discriminatory? There are also cross-appeals in both cases which raise issues of how the workers’ compensation scheme would apply to these persons but for the chronic pain provisions.

[33] The cross appeals are premised on the Board’s appeals being dismissed. In other words, the argument on the cross-appeals is that, assuming as WCAT decided, the chronic pain provisions are unconstitutional and therefore do not bar recovery, WCAT erred in its conclusions concerning the benefits to which Mr. Martin and Ms. Laseur would be entitled under the general provisions of the **Act**.

[34] As noted earlier, I have concluded that the chronic pain provisions are constitutional and that WCAT erred in finding otherwise. It is, therefore, not strictly necessary to address the issues raised on the cross-appeals. In my view, however, it is helpful to the *Charter* analysis to address the issues raised on the **Laseur** cross-appeal. As noted, WCAT found that Ms. Laseur is not entitled to a permanent impairment rating even if the chronic pain provisions were inapplicable. It is, therefore, relevant to the issue of whether the chronic pain provisions deprived Ms. Laseur of benefits to which

she would otherwise be entitled under the **Act** to address this issue.

[35] The situation, in my view, is different in the **Martin** cross-appeal. There is no question that the chronic pain provisions had the effect of depriving Mr. Martin of earnings-replacement benefits to which he otherwise would have been entitled. The argument on the cross-appeal is simply that his entitlement is greater than that found by WCAT. There being no doubt that the challenged provisions deprived Mr. Martin of benefits, it is not helpful for the *Charter* analysis to determine the precise extent of that actual deprivation.

(i) Laseur:

[36] WCAT determined that Ms. Laseur had chronic pain, that this condition was due at least in part to her work injury, and that it was permanent. Pursuant to s. 227 of the **Act**, her entitlement to permanent impairment benefits was to be determined under the Board's *PMI Guidelines* annexed to Board Policy 3.3.2R. The *Guidelines* set out various types of injuries and conditions and assign a percentage of impairment (or a range of percentages) to them. WCAT decided that the applicable category under the *Guidelines* was that of soft tissue injury to the lumbar spine with ongoing subjective complaints with no significant objective abnormalities on examination. The *Guidelines* provide for a rating of 0% of medical impairment of the total body for that category. Accordingly, Ms. Laseur was found not to be entitled to a permanent impairment rating or benefit. Applying Board policy, the Tribunal also concluded that, in light of its finding

that no permanent impairment benefit was payable, no vocational rehabilitation benefits could be awarded.

[37] Ms. Laseur's cross-appeal assumes the validity of her *Charter* arguments. The focus of the cross-appeal is on WCAT's finding that the *PMI Guidelines* also bar recovery. There is no challenge to the *PMI Guidelines* in this case; Ms. Laseur simply challenges WCAT's interpretation and application of them to her situation. Specifically, the submission is that WCAT committed reversible error by applying the spine section of the *Guidelines* to Ms. Laseur's chronic pain. It is submitted that chronic pain does not fit into a specific category of the *Guidelines* and therefore a judgement rating (i.e., a rating to determine the percentage of impairment when it does not fit into a specific category of the *Guidelines*) should be made as is provided for in the Introduction to the *Guidelines*. Alternatively, it is argued that the psychiatric impairment section of the *Guidelines* should be applied.

[38] For the purposes of the cross-appeal, the parties agree that the interpretation of the *PMI Guidelines* (which form part of a Board Policy) is a question of law within the meaning of s. 256(1) of the **Act** and that the appropriate standard of review by the Court of the Tribunal's decision is reasonableness *simpliciter*. I will accept this agreement for the purposes of the cross-appeal. The issue, then, is whether WCAT's decision to apply the lumbar spine section of the *PMI Guidelines* to Ms. Laseur is unreasonable.

[39] Ms. Laseur submits that the Tribunal's reversible error is in limiting itself to

considering whether the worker had a PMI as a result of the initial back injury. Ms. Laseur's injury, by the time of the Tribunal's decision, was properly characterized as chronic pain which, it is submitted, is a secondary cause of the initial injury; with chronic pain, the physical injury may well have fully healed and so it is clearly wrong to consider a category of injury in the *PMI Guidelines* which no longer applies.

[40] I cannot accept these submissions. Throughout the medical evidence, the focus of the ongoing difficulty and the site of the ongoing pain is Ms. Laseur's back. It was and is back pain that results in the ongoing impairment. The work injury giving rise to the claim was an injury to the back. In applying the *PMI Guidelines* to Ms. Laseur, I see nothing unreasonable in concluding that the sections of the *Guidelines* dealing with the back should be applied.

[41] The *PMI Guidelines* do not specifically address chronic pain. However, there is in this case no challenge to the *Guidelines* and so the absence of a specific provision relating to chronic pain simply means, for the purposes of this case, that the Board and the Tribunal must reasonably classify Ms. Laseur's injury under the existing *Guidelines.* Her problems originate with an injury to the lumbar spine and she has ongoing subjective complaints with no significant objective abnormalities on examination**.** It is not, in my opinion, unreasonable to apply that classification in the *PMI Guidelines* to her situation.

[42] It is submitted that WCAT should have ordered a judgement rating rather than applying the lumbar spine section. I cannot accept this submission. Under the *Guidelines*, judgement ratings are made "... when the impairment does not fit into a specific category of the schedule." Having reasonably concluded that Ms. Laseur's medical impairment fitted within a specific category of the schedule, a judgement rating was not authorized by the *Guidelines* and it was, therefore, not reversible error on the part of WCAT to fail to order that a judgement rating be made.

[43] It is also submitted, in the alternative, that since chronic pain may incorporate an element of mental disability, the Tribunal should have directed an assessment under the psychiatric impairment section of the *Guidelines*. I cannot give effect to this submission. While chronic pain may sometimes have a psychiatric dimension, there is no evidence that there is any psychiatric dimension to Ms. Laseur's pain. It was not unreasonable for the Tribunal to refrain from ordering such an assessment given that there was no factual basis to support that sort of inquiry.

[44] For these reasons, I would not give effect to the submissions made on the cross-appeal. It follows that I will address the issues on the main appeal on the basis that Ms. Laseur, apart from the operation of the challenged chronic pain provisions, is not entitled under the general scheme of the **Act** to permanent medical impairment benefits.

(ii) Martin:

[45] On his cross-appeal, Mr. Martin challenges the Tribunal's decision not to award earnings-replacement benefits beyond October 15, 1996. For reasons given earlier, it is not necessary for me to address this question.

III.2 Charter Jurisdiction of WCAT:

(i) WCAT's decisions and the Board's position:

[46] In its preliminary decision in the **Martin** appeal, WCAT ruled that it had jurisdiction to address Mr. Martin's *Charter* challenge to the FRP Regulations. In **Laseur**, a differently constituted WCAT panel adopted this reasoning and reached the same result.

[47] WCAT noted that the Board (under s. 185) is given the authority to determine all questions of law under Part I of the **Act** and that this must include *Charter* issues arising in the course of applying the **Act**. The Tribunal (under s. 252) has the authority on appeal from the Board to "..confirm, vary or reverse" the Board's decisions. WCAT concluded that "[l]ogic dictates that the appellate Tribunal must have the same powers as the [Board] below so as to allow it to confirm, vary or reverse the decision being appealed."

[48] Briefly put, the Board's submission is that WCAT erred in reaching this conclusion because the Board itself does not have jurisdiction to refuse to apply the **Act**

on *Charter* grounds. It follows that WCAT does not acquire, through its power to "confirm, vary or reverse" the Board on appeal, any authority to rule that provisions of the **Act** are inoperative by virtue of the *Charter*. WCAT does not, in the Board's submission, have the authority to determine general questions of law and, therefore, it does not have authority to rule that provisions of the **Act** are inoperative by virtue of the *Charter*.

[49] It is important to be precise about the jurisdictional issue presented in these appeals, and also about what is not in issue.

[50] To start, there is no question that the Nova Scotia workers' compensation system is subject to the *Canadian Charter of Rights and Freedoms*. The *Charter* is part of the Constitution which is the supreme law of Canada. Under the terms of s. 52 of the **Constitution Act, 1982**, any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. The workers' compensation system is established by provincial legislation and that legislation must comply with the Constitution, including the *Charter*. The question in this case is not whether the Legislature must respect the *Charter* when it enacts workers' compensation legislation. The question is who decides whether the Legislature has done so.

[51] Second, it is not argued here that WCAT is a court of competent jurisdiction for the purposes of awarding *Charter* remedies pursuant to s. 24(1) of the *Charter*. That

is a different question which does not arise on this appeal.

[52] Third, we are concerned on this appeal only with provisions of the **Act** and Regulations that confer and restrict benefits; to the extent that the *Charter* jurisdiction analysis might be different in relation to other types of provisions (on which I make no comment), this appeal addresses only *Charter* jurisdiction in relation to such benefit provisions, and all subsequent references in my reasons to WCAT's *Charter* jurisdiction should be understood in that way.

(ii) Applicable legal principles:

[53] May WCAT, on *Charter* grounds, refuse to apply provisions in its enabling statute limiting benefits which would otherwise apply to the case before it? Before turning to a detailed analysis of this issue, a brief summary of the applicable principles may be helpful.

[54] The starting point is that the authority of statutory tribunals, such as WCAT and the Board, must be found in duly enacted legislation. The question of whether a tribunal has the authority to invoke the *Charter* in order to refuse to apply provisions of its enabling statute is, therefore, first and foremost, a question of statutory interpretation.

[55] The authority of a tribunal to apply the *Charter* may be conferred (or withheld) expressly or by implication. If the enabling statute which defines the tribunal's authority is clear on the point, that ends the inquiry. So, for example, provisions which confer on

an adjudicative tribunal the authority to consider all questions of law in relation to matters coming before it will generally be found to have an express statutory mandate to refuse to apply statutory provisions which it thinks violate the *Charter*. On the other hand, non-adjudicative tribunals which have authority only to interpret and apply their enabling statutes may be found to lack such a mandate.

[56] Where the relevant legislation is not explicit as regards a tribunal's *Charter* authority, it is appropriate to take into account various practical considerations as part of the effort to discern the intention of the Legislature. These practical concerns may include the role and capacity of the tribunal, the desirability of facilitating access to *Charter* adjudication and several other matters.

[57] With that overview, it will now be helpful to review the relevant decisions of the Supreme Court of Canada.

[58] The first, **Douglas/Kwantlen Faculty Association v. Douglas College**, [1990] 3 S.C.R. 570, raised the issue of whether an arbitrator, acting under a collective agreement, had jurisdiction to hear and determine a grievance challenging the constitutionality of a provision in the collective agreement. The Court held that the arbitrator had such jurisdiction.

[59] LaForest, J. (with whom Dickson, C.J. and Gonthier, J. concurred and Sopinka and Cory, JJ. agreed on this point) held that it was not necessary to decide

whether the arbitrator was a “court of competent jurisdiction” within the meaning of s. 24(1) of the *Charter*. He held that, since any law that is inconsistent with the provisions of the Constitution is, to the extent of its inconsistency, of no force or effect, a tribunal that finds a law that it is called upon to apply invalid, is bound to treat it as having no force or effect. As LaForest, J. put it, “... an administrative tribunal is limited to exercising its statutory mandate. ... [T]he 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. In the exercise of that jurisdiction, it can in the exercise of its mandate find a statute invalid under the *Charter*.” (at p. 595)

[60] LaForest, J. found that the arbitrator had jurisdiction over the parties. The arbitrator had statutory power to provide a final and conclusive settlement of a dispute arising under the collective agreement and, as well, to interpret and apply any Act intended to regulate employment. On this basis, LaForest, J. concluded that the arbitrator also had jurisdiction over the subject matter and the remedy or order sought by the grievors.

[61] Next came the decisions in **Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)**, [1991] 2 S.C.R. 5 and **Tétreault-Gadoury v. Canada (Employment and Immigration Commission)**, [1991] 2 S.C.R. 22.

[62] **Cuddy Chicks** concerned the jurisdiction of the Ontario Labour Relations

Board. The Board had before it a certification application relating to employees in a sector which, as a result of a specific provision, was excluded from the application of the **Labour Relations Act**. The union seeking certification asked the Board to rule whether this exclusion was contrary to ss. 2(d) and 15 of the *Charter*. The question of whether the Board had jurisdiction to do so arose. The Supreme Court found that it did.

[63] LaForest, J. (Lamer C.J.; Sopinka, Gonthier, McLachlin and Stevenson, JJ., concurring) began his reasons with a summary of the Court's decision in **Douglas College** which bears repetition in full:

> The power of an administrative tribunal to consider *Charter* issues was addressed recently by this Court in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570. That case concerned the jurisdiction of an arbitration board, appointed by the parties under a collective agreement in conjunction with the British Columbia *Labour Code*, to determine the constitutionality of a mandatory retirement provision in the collective agreement. In ruling that the arbitrator did have such jurisdiction, this Court articulated the basic principle that an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid. This conclusion ensues from the principle of supremacy of the Constitution, which is confirmed by s. 52(1) of the *Constitution Act, 1982:*
>
> .....
>
> Distilled to its basics, the rationale for recognizing jurisdiction in the arbitrator in the *Douglas College* case is that the Constitution, as the supreme law, must be respected by an administrative tribunal called upon to interpret law.
> (emphasis added) (pp. 13-14)

[64] The Court emphasized that s. 52 of the **Constitution Act** is not an independent source of an administrative tribunal's jurisdiction to subject its enabling legislation to *Charter* scrutiny; such authority must be found, expressly or impliedly, in the enabling legislation or otherwise:

> ..... 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. ..... 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. While this analytical framework mirrors the requirements for a court of competent jurisdiction under s. 24(1) of the *Charter* ..... it is unnecessary to have recourse to s. 24(1) to determine whether the Board has jurisdiction over *Charter* issues. An administrative tribunal need not meet the definition of a court of competent jurisdiction in s. 24(1) of the *Charter* in order to have the necessary authority to subject its enabling statute to *Charter* scrutiny. In the present case, the relevant inquiry is not whether the tribunal is a "court" but whether the legislature intended to confer on the tribunal the power to interpret and apply the *Charter*.
> (emphasis added) (p. 14)

[65] Assuming the Tribunal has jurisdiction over the parties, the key question is how to characterize the issue before the tribunal for the purposes of determining whether it has jurisdiction over the subject matter and the remedy. In **Cuddy Chicks**, the Court held that the subject matter and remedy could not be characterized simply as an application for a certification order because the application required the Board to subject the relevant section of its enabling statute to *Charter* scrutiny. It followed, reasoned the Court, that since the subject matter (the certification application) and the remedy (the certification order) were premised on the application of the *Charter*, the question of jurisdiction over the subject matter and the remedy turned on the Board's statutory authority to apply the *Charter* (at p. 15).

[66] In its submissions, WCAT argues that it has jurisdiction over the subject matter of these appeals because they relate to entitlement to benefits provided for under the **Act**. I do not accept this characterization of the issues for the purposes of assessing the Tribunal's *Charter* jurisdiction. In **Cuddy Chicks** at page 15 it was

pointed out that where, as here, the issue before the Tribunal requires the provisions of its statute to be subjected to *Charter* scrutiny, the issue of whether the tribunal has jurisdiction over the subject matter and remedy is the same as whether the tribunal has authority to apply the *Charter*.

[67] The Court in **Cuddy Chicks** noted that the relevant legislation gave the Board exclusive jurisdiction to determine all questions of fact or law that arise in any matter before it, as well as power to determine questions of law and fact relating to its own jurisdiction. LaForest, J. concluded that this power to determine questions of law and jurisdiction in relation to matters before it included the authority of the Board to apply the **Charter** and to rule on the constitutionality of the challenged provision of its enabling statute:

> Section 106(1) of the *Labour Relations Act* stipulates that the Board has exclusive jurisdiction "to determine all questions of fact or law that arise in any matter before it .... ." The legislature expressly, and without reservation, conferred authority on the Board to decide points of law. In addition, the Act confers powers on the Board to determine questions of law and fact relating to its own jurisdiction. Section 124, for example, gives it authority to decide if a matter is arbitrable. The issue, then, is whether this authority with respect to questions of law can encompass the question of whether a law violates the *Charter*. It is clear to me that a *Charter* issue must constitute a question of law; indeed, the *Charter* is part of the supreme law of Canada. This comports with the view expressed in *Douglas College* that the statutory authority of the arbitrator in that case to interpret any "Act" must include the authority to interpret the *Charter*. In the result, the Board has the authority to apply the *Charter* and to rule on the constitutionality of s. 2(b) of its enabling statute, in the course of the Union's application for certification. (emphasis added) (p. 14)

[68] Concurrently with **Cuddy Chicks**, the Court gave judgment in **Tétreault-Gadoury**. That case concerned the jurisdiction of the Board of Referees and an umpire under the **Unemployment Insurance Act, 1971**, to consider a challenge to the

constitutional validity of certain provisions of that **Act**. The issue arose in the context of an argument that provisions of the **Act** barring payment of ordinary unemployment insurance benefits to applicants over age 65 offended s. 15 of the *Charter*.

[69] LaForest, J. (Lamer, C.J.; Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci, JJ. concurring) summarized the principles established by **Douglas College** and **Cuddy Chicks** and noted the distinction between those cases and **Tétreault-Gadoury**:

> ..... In both these cases [i.e., **Douglas College** and **Cuddy Chicks**], the Court held that an administrative body, which by virtue of its legislative mandate has expressly been given the power to interpret or apply any law necessary to reaching its findings, has the power to apply the *Charter* to determine that a particular provision of an Act is without force or effect. .....
>
> In this case, for the first time, the Court is faced with the question whether an administrative tribunal that has not expressly been provided with the power to consider all relevant law may, nonetheless, apply the *Charter*. .....
> (emphasis added) (p. 31)

[70] LaForest, J., stressed that the Tribunal's legislative mandate is the most important factor in determining whether it has the power to find a legislative provision inconsistent with the *Charter*. He noted, however, that where the legislature has not spoken definitively on the question, it will be necessary to examine other factors: see page 32.

[71] The Court concluded that the Board of Referees did not have jurisdiction over the subject matter or the remedy but that the umpire did. As a matter of statutory interpretation, there were strong indications that Parliament intended the umpire to have

power to find provisions of the **Act** or its accompanying regulations inconsistent with the *Charter*. The umpire was expressly given authority by the statute to decide any question of law or fact that is necessary for the disposition of any appeal and the regulations made under the **Act** specifically contemplated the possibility of an umpire finding a provision of the **Act** or Regulations unconstitutional: pp. 32 - 33. This specific statutory grant of authority to the umpire to decide questions of law contrasted with the absence of any similar grant to the Board of Referees. This contrast persuaded the Court that Parliament's intention was to give the power to interpret all relevant law to the umpire but not to the Board of Referees (page 35).

[72] The scheme established for decision-making under the **Unemployment Insurance Act, 1971** involved a multi-level, administrative structure with administrative appeals. In this respect, it very roughly parallels the various levels of decision-making under the **Workers' Compensation Act**. It will be helpful, therefore, to set out LaForest, J.'s comments in this regard:

> ..... The administrative scheme set up under the *Unemployment Insurance Act, 1971* is comprised of administrative bodies that cover a broad range of the judicial spectrum. At one end of this spectrum is the Employment and Immigration Commission, which is charged under the Act with, among other things, making all the initial determinations regarding an insured's eligibility, monetary entitlement, benefit period and compliance with the provisions of the Act. To ask the Commission to consider constitutional challenges as well would undoubtedly impede the important process of getting unemployment insurance payments out to the individual applicants as quickly as possible and would frustrate the very purpose of the Act. The careful consideration essential to undertaking an adequate assessment of the constitutional issue is fundamentally at odds with the speedy procedure required to allow the Commission to fulfill the functions it was designed to perform.
>
> At the opposite end of the spectrum is the umpire. Section 92(1) of the *Unemployment Insurance Act, 1971* (as am. by S.C. 1980-81-82-83, c. 158, s. 55), provides that umpires are to be appointed from among the judges of the

> Federal Court. The extensive legal training and experience required of a Federal Court judge ensures that the litigant will receive a capable determination of the constitutional issue. Such a determination would clearly not fall outside the judge's normal area of expertise and, since the umpire is already expected to hear appeals on all relevant questions of law, would not delay the proceedings to an unacceptable degree.
> (emphasis added) (pp. 34 - 35)

[73] Next came **Cooper v. Canada (Human Rights Commission)**, [1996] 3 S.C.R. 854 which concerned the authority of the Canadian Human Rights Commission and a tribunal appointed at its request to find a provision of the enabling statute unconstitutional and treat it as inoperative.

[74] Cooper (and Bell) were pilots who were to be retired by their employer at age 60 in accordance with the provisions of their collective agreement. They filed complaints of age discrimination with the Commission. Section 15(c) of the **Canadian Human Rights Act**, R.S.C., 1985, c. H-6 provided that it is not a discriminatory practice to terminate an individual's employment at the normal age of retirement. The Commission refused to request the appointment of a tribunal to inquire into the complaints. Bell and Cooper sought judicial review on the basis that s. 15(c) was unconstitutional and accordingly an inquiry should have been recommended. The Supreme Court, by a majority, held that neither the Commission nor a tribunal had authority to refuse to apply, on *Charter* grounds, provisions of the enabling statute limiting their jurisdiction.

[75] LaForest, J. (Sopinka, Gonthier and Iacobucci, JJ. concurring; Lamer C.J.C. concurring in the result) set out a summary of the preceding jurisprudence which I will

substantially reproduce:

> ....the essential question facing a court is one of statutory interpretation — has the legislature, in this case Parliament, granted the administrative tribunal through its enabling statute the power to determine questions of law? .....
>
> If a tribunal does have the power to consider questions of law, then it follows by the operation of s. 52(1) that it must be able to address constitutional issues, including the constitutional validity of its enabling statute. .....
>
> ... what must be scrutinized is the mandate given under the Act to the Commission and the tribunals. There is no doubt that the power to consider questions of law can be bestowed on an administrative tribunal either explicitly or implicitly by the legislature. .....
>
> 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.
> (emphasis added) (pp. 887 - 889)

[76] LaForest, J. examined the scheme of the **Act** and the role of the Commission in detail. He characterized the role of the Commission in the intake of complaints as the performance of ".. screening analysis somewhat analogous to that of a judge at a preliminary inquiry." (page 891). He observed that the Commission is not an adjudicative body and that its central role is the assessment of the sufficiency of the evidence before it for the limited purpose of deciding whether there is a reasonable basis in the evidence for proceeding to the next stage: page 891.

[77] Three sections of the **Act** (ss. 27, 40 and 41) were relied on by the complainants as showing Parliament's intention that the Commission should determine

questions of law.

[78] Under s. 27, the Commission is responsible for the administration of Parts I (Proscribed Discrimination), II (relating to the Commission itself) and III (Discriminatory Practices) of the **Act**. Under s. 27(1)(g) , the Commission is entitled to review any instrument made pursuant to any Act of Parliament and to report any inconsistency with the principle of equality and freedom from discriminatory practices. Under s. 27(2), the Commission may issue guidelines setting out its opinion concerning the manner in which any provision of the **Act** applies in a particular case or class of case and such guidelines, until revoked or modified, are binding on the Commission, Human Rights Tribunals and Review Tribunals: s. 27(3).

[79] Section 40 sets out the authority of the Commission to receive and to initiate complaints and, in subsections 5 and 7, sets out limitations on the Commission's jurisdiction in relation to complaints. Section 41 (which is subject to s. 40) directs the Commission to deal with complaints unless, among other things, the alleged victim ought to exhaust other redress procedures or the complaint is beyond the jurisdiction of the Commission.

[80] LaForest, J. considered that these sections "... amount to no more than that the Commission has power to interpret and apply its enabling statute" (page 891), adding that "[i]t does not follow that it then has a jurisdiction to address general

questions of law.” (p. 891)

[81] LaForest, J.’s majority judgment in **Cooper** emphasized a distinction between, on one hand, the authority of a tribunal to interpret and apply its enabling statute and, on the other, the authority of a tribunal to address general questions of law. LaForest, J. elaborated on this distinction as follows:

> ..... Every administrative body, to one degree or another, must have the power to interpret and apply its own enabling statute. If this were not the case, it would be at the mercy of the parties before it and would never be the master of its own proceedings. The power to refuse to accept a complaint, or to turn down an application, or to refuse to do one of the countless duties that administrative bodies are charged with, does not amount to a power to determine questions of law as envisaged in *Douglas/Kwantlen, Cuddy Chicks* and *Tétreault-Gadoury*. To decide otherwise would be to accept that all administrative bodies and tribunals are competent to question the constitutional validity of their enabling statutes, a position this Court has consistently rejected.
>
> In his argument, counsel for the Commission focused on the obligation and power granted to the Commission in s. 41(c) of the Act to refuse to deal with a complaint beyond its jurisdiction. In particular he argued that because in exercising this power the Commission often determines whether a given complaint falls within the federal sphere pursuant to the constitutional division of powers, then it followed that the Commission had jurisdiction to consider constitutional questions in general.
>
> I am unable to accept this. When deciding whether a complaint falls within its jurisdiction the Commission is bound to look to its enabling statue for the limits of that jurisdiction. Thus it is well accepted that the Commission only has jurisdiction over a complaint when it is in respect to an activity or undertaking within the federal sphere. In making such a determination the Commission must obviously make reference to the constitutional division of powers. Similarly, pursuant to s. 40(1) of the Act the Commission only has jurisdiction over complaints of alleged discriminatory practices. In determining what is a discriminatory practice the Commission is bound by s. 15(c) which states that job termination at the normal age of retirement is not a discriminatory practice. The process of the Commission in determining its jurisdiction over a given complaint through reference to the provisions of the Act is conceptually different from subjecting the same provisions to *Charter* scrutiny. The former represents an application of Parliament’s intent as reflected in the Act while the latter involves ignoring that intent.
> (emphasis added)[pp. 891 - 893]

[82] Central to the majority’s decision is the finding that the Commission is not an

adjudicative body:

> The role of the Commission as an administrative and screening body, with no appreciable and adjudicative role, is a clear indication that Parliament did not intend the Commission to have the power to consider questions of law. (emphasis added) [page 893]

And further at p. 894:

> ... since the Commission is not an adjudicative body it cannot be considered a proper forum in which to address fundamental constitutional issues. (emphasis added)

[83] LaForest, J. concluded, first, that the Commission did not have authority to refuse to apply its enabling statute on *Charter* grounds and, second, that a tribunal appointed on its recommendation could not do so. This second conclusion flows as a matter of logic from the first: if the Commission cannot refuse to apply limitations on its jurisdiction, then a complaint raising that issue cannot be referred to a tribunal. As LaForest, J. said, "[i]t would be something of a paradox for Parliament to grant tribunals under the **Act** a jurisdiction that could never be exercised."

[84] That aside, LaForest, J.'s determination with respect to the tribunal's (as opposed to the Commission's) *Charter* jurisdiction was more guarded:

> ¶ 64 As with the Commission there is 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 possess 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.)), 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). .....
>
> ¶ 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 the 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.
> (emphasis added)

[85] I note particularly the last sentence of this passage; the tribunal was found to be able to consider questions of law, even though its statutory mandate was expressed in terms of inquiring into a complaint to determine if it was justified. The holding respecting its *Charter* jurisdiction was limited to the conclusion that it could not rule on the constitutional validity of a limiting provision in the **Act** because such issues could never be referred to a tribunal by the Commission. (p. 898)

[86] McLachlin and L'Heureux-Dubé, JJ. dissented and would have found that the

Commission and the Tribunal had been granted authority to consider *Charter*

McLachlin, J. stated that :

> ..... In my view, every tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the effect of the Charter does not change the matter. The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people then it must find its expression in the decisions of these tribunals. (page 899 - 900).

[87] However, the dissenting judges did not take issue with the general principle that a tribunal's authority to apply the *Charter* (or a limitation on such authority) is found in its constituent statute. McLachlin, J. said at § 79:

> ¶ 79 While all tribunals must apply the law of the land, the powers they can exercise in doing so may be limited by Parliament or the Legislature. Save for the superior courts, which enjoy inherent jurisdiction, a tribunal can do only that which its constituent statute empowers it to do. Some tribunals are limited to questions of fact only. Other tribunals are empowered to consider questions of law as well as fact.
> (Emphasis added)

[88] Moreover, the dissenting judges did not specifically disagree with the majority's view that a non-adjudicative body could not decide that its enabling statute infringed the *Charter*. McLachlin, J. stated at § 103:

> I conclude that the Commission has the power to consider the issue of whether the Charter renders invalid the "normal age of retirement" defence. Given that the Commission's duty only is to screen the complaint, it need not decide the question finally, but only determine whether it has a reasonable chance of success.
> (emphasis added)

[89] The final case to be reviewed is **Weber v. Ontario Hydro**, [1995] 2 S.C.R.

929. It raised the question (among others) of whether, as between an employer and an employee bound by a collective agreement, an arbitrator had exclusive, first-instance jurisdiction over an employee's allegation that the employer breached the *Charter* by conducting secret surveillance of the employee. All members of the Court participating in the appeal (LaForest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Iacobucci and Major, JJ.) agreed first, that the arbitrator was bound to apply the *Charter;* and secondly, that the relevant test is whether that power has been granted (or withheld) by the relevant statute.

[90] McLachlin, J., (L'Heureux-Dubé, Gonthier and Major, JJ. concurring) put it as follows:

> ¶ 56 The appellant Weber also argues that arbitrators may lack the legal power to consider the issues before them. This concern is answered by the power and duty of arbitrators to apply the law of the land to the disputes before them. To this end, arbitrators may refer to both the common law and statutes: *St. Anne Nackawic; McLeod v. Egan*, [1975] 1 S.C.R. 517. As Denning L.J. put it, "[t]here is not one law for arbitrators and another for the court, but one law for all": *David Taylor & Son, Ltd. v. Barnett*, [1953] 1 All E.R. 843 (C.A.), at p. *847. This also applies to the Charter: Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 597.
> (Emphasis added)

[91] Iacobucci, J., (LaForest and Sopinka, JJ., concurring) put it this way:

> ¶ 23 In *Douglas College, supra*, a labour arbitrator was called upon to determine whether or not a mandatory retirement provision in a collective agreement violated s. 15(1) of the *Charter*. .....
>
> ¶ 24 At issue in the case was whether the arbitrator had the jurisdiction to disregard the provision of the collective agreement which was judged to be in violation of the Constitution. La Forest J., writing for the majority, did not find it was necessary to consider the issue whether an arbitrator is a court of competent jurisdiction under the *Charter*; he resolved the appeal by reference to s.

52(1). To the degree an enactment is not valid constitutionally, the tribunal must disregard it, as s. 52(1) requires. La Forest J. stated (at p. 594):

> Section 52(1) of the *Constitution Act, 1982* provides that any law that is inconsistent with the provisions of the Constitution of Canada — the supreme law of the land — is, to the extent of its inconsistency, of no force or effect. A tribunal must respect the Constitution so that if it finds invalid a law it is called upon to apply, it is bound to treat it as having no force or effect.
>
> Where, however, a tribunal is asked to determine whether *Charter* rights have been infringed or to grant a remedy under s. 24(1), the situation is different. A tribunal's power is that conferred by its statutory mandate. . . . In a word, an administrative tribunal is limited to exercising its statutory mandate.

¶ 25 What results from this passage and from the decision of the Court is that the ability to verify the validity of an enactment is part of a tribunal's power to decide questions of law. It is called upon to apply the law, and thus must be able not to apply laws which violate the supreme law of the country.

¶ 26 In *Cuddy Chicks, supra*, the tribunal in question was the Ontario Labour Relations Board. At issue was the Board's jurisdiction to determine, in the course of its consideration of an application for certification, the validity under the *Charter* of a provision of the *Labour Relations Act*. La Forest J., again writing for the majority, is careful to note that s. 52(1) is not attributive of jurisdiction, and that as such, it does not function as an independent source of the tribunal's jurisdiction. Jurisdiction must be expressly or impliedly conferred on the tribunal by its enabling statute or otherwise. ....

¶ 27 It follows from this passage that the ability to decide *Charter* issues flows from the text of s. 52(1) and not s. 24(1). However, as s. 52(1) is not attributive of jurisdiction, the tribunal must already possess the ability to decide questions of law in order to have the necessary jurisdiction to apply s. 52(1). That was precisely the issue in the third case of the trilogy, *Tétreault-Gadoury, supra*. In that case, the Court decided that the absence of a provision granting a power to decide questions of law to the Board of Referees (constituted under the *Unemployment Insurance Act, 1971*) prevented it from applying s. 52(1). Given the findings of this Court concerning the ability to decide Charter issues, it cannot be argued that such a power constitutes an empowerment to award s. 24(1) remedies.
(emphasis added)

[92] I conclude that there are three main principles emerging from this line of cases.

[93] The question of a tribunal's authority to refuse to apply provisions of its enabling statute on *Charter* grounds is first and foremost a question of statutory interpretation. As LaForest, J. put it in **Cuddy Chicks**, the relevant inquiry is not whether the tribunal is a "court" but whether the legislature intended to confer on the tribunal the power to interpret and apply the *Charter*: at p. 14. (See also **Cooper** at § 59).

[94] Second, the tribunal's power to interpret and apply the *Charter* will generally not be inferred from the tribunal's authority simply to interpret and apply its own enabling statute. What is required is an express or implied grant of authority to the tribunal to interpret or apply any law necessary to its findings (to use the language of LaForest, J. in **Tétrault-Gadoury, supra**, at p. 31), or to address "general questions of law" (to use the language of LaForest, J. in **Cooper** at pp. 891 - 2) or to "apply the law of the land to the disputes before them ..." (to use the language of McLachlin, J. in **Weber** at § 56).

[95] Third, where there is no express grant or withdrawal of authority to decide questions of law, one may be implied from the scheme of the **Act** and the role of the tribunal. A key consideration is whether the tribunal performs an adjudicative function. Where it does not, as was the case with the Commission in **Cooper**, it will generally be found not to be a proper forum in which to determine whether a statute is inoperative by virtue of the *Charter*:: see LaForest, J. in **Cooper** at p. 894.

[96] The Court has addressed various policy and practical arguments for and against the authority of tribunals to subject their enabling statutes to *Charter* scrutiny. It is clear, though, that these considerations are always subject to the overriding requirement to discern the intention of the Legislature. Where the Legislature has spoken definitively, that is the end of the matter. But where it has not, these other factors should be examined:

> ¶ 47 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. (**Cooper**)
> (emphasis added)

[97] It will be helpful to summarize the relevant practical considerations.

[98] Tribunal *Charter* jurisdiction improves access to justice by preventing parallel court proceedings on *Charter* issues and permitting people to make their *Charter* arguments in the less formal administrative setting. Consequently, respect for and adherence to the Constitution will be enhanced: **Douglas**, p. 604. LaForest, J. in **Tétreault-Gadoury** adopted the following remarks at p. 36:

> So long as the procedure in such [administrative] tribunals presents no obstacle to their doing so, litigants should be able to assert the rights secured by the Charter in the natural forum to which they can apply. ... These are speedy, inexpensive and readily accessible proceedings, which should be within the immediate reach of the persons for whom they were enacted.

[99] Proceedings before tribunals will facilitate the generation of an appropriate record for the *Charter* analysis and will provide the reviewing court with the advantage of the views of the specialized and, perhaps, expert tribunal; in short, the *Charter* issue will be considered in its detailed factual and practical context. (**Douglas** at pp. 604 - 5). There may be advantages to tribunal *Charter* jurisdiction even where the members of the tribunal are not lawyers. As LaForest, J. put it in **Cuddy Chicks** at pp. 16 - 17:

> In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical. Therefore, while Board members need not have formal legal training, it remains that they have a very meaningful role to play in the resolution of constitutional issues.

[100] On the other side of the ledger, however, concern has been expressed that tribunal *Charter* jurisdiction may undermine the *raisons d'être* of tribunals, namely, specialization of functions, simple rules of evidence and procedures and speedy decisions: **Douglas** at p. 602. As LaForest, J. put it in **Cooper** at § 60:

> ..... one of the aims of the Commission, to deal with human rights complaints in an accessible, efficient and timely manner, would be disrupted and interfered with by allowing the parties to raise constitutional issues before the Commission.

He further stated the following in **Tétreault-Gadoury** at p. 34:

> ..... To ask the Commission to consider constitutional challenges as well would undoubtedly impede the important process of getting unemployment insurance payments out to the individual applicants as quickly as possible and would frustrate the very purpose of the Act. The careful consideration essential to undertaking an adequate assessment of the constitutional issue is fundamentally at odds with the speedy procedure required to allow the Commission to fulfill the functions it was designed to perform.

[101] Moreover, not all tribunals are of the same "calibre" (the word is LaForest,

J.'s: **Douglas** at p. 602); they are not necessarily presided over by lawyers and lack the guaranteed independence of courts: **Douglas** at p. 602. It bears remembering that **Douglas College**, **Cuddy Chicks** and **Weber** arose in the labour relations context in which the courts have affirmed the broad jurisdictional scope of these tribunals and extended considerable deference to their decisions on the merits. In **Cuddy Chicks**, LaForest, J. emphasized this point:

> The overarching consideration is that labour boards are administrative bodies of a high calibre. The tripartite model which has been adopted almost uniformly across the country combines the values of expertise and broad experience with acceptability and credibility. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at pp. 235 - 36, Dickson J. (as he then was) characterized the particular competence of labour boards as follows:
>
> > The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law; but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.
> >
> > (emphasis added) (p. 16)

[102] The role and expertise of the Human Rights Commission was contrasted to that of labour tribunals in **Cooper** at pp. 893 - 894:

> The role of the Commission as an administrative and screening body, with no appreciable adjudicative role, is a clear indication that Parliament did not intend the Commission to have the power to consider questions of law. .....
>
> A second and more telling problem in the case of the Commission is its lack of expertise. In *Tétreault-Gadoury, supra*, I pointed out, at p. 34, that an Umpire under the *Unemployment Insurance Act* was a Federal Court judge which would ensure that a complainant received "a capable determination of the constitutional issue". Similarly in both *Douglas/Kwantlen* and in *Cuddy Chicks, supra*, the expertise of labour boards and the assistance they could bring to bear on the resolution of constitutional issues was recognized. In contrast this Court has made clear in *Mossop, supra*, at pp. 584 - 85, and reiterated in *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at pp. 599 - 600, that a human rights

> tribunal, unlike a labour arbitrator or labour board, has no special expertise with respect to questions of law. What is true of a tribunal is even more true of the Commission which, as was noted in *Mossop*, is lacking the adjudicative role of a tribunal.
> (emphasis added)

[103] While informality and simplicity of procedure may help improve access to justice, they may not always benefit the proper consideration of *Charter* issues. As LaForest, J. put it in **Cooper** at § 60:

> ..... since the Commission is not an adjudicative body it cannot be considered a proper forum in which to address fundamental constitutional issues. As this Court has previously found, there is no requirement for anything more than a "paper hearing" for the parties before the Commission. Although I readily acknowledge that the informal and accessible process of administrative bodies may well be a considerable advantage to a party, as compared to the regular court system, there comes a point where a body such as the Commission simply does not have the mechanism in place to adequately deal with multifaceted constitutional issues. .....

[104] In summary, analysis of these practical considerations may assist in determining whether the Legislature intended to and did confer *Charter* jurisdiction on the Tribunal. But the key question remains, whether the Legislature intended to confer this authority on the Tribunal.

(iii) The Legislation:

[105] Whether WCAT has *Charter* jurisdiction is a question of statutory interpretation: has the Legislature granted or withheld the power to subject the Tribunal's enabling statute to *Charter* scrutiny?

[106] The necessary statutory review in this case must take place in the general context of the overall purposes of workers' compensation legislation as well as the specific context in which this Tribunal was established. It will, therefore, be helpful to begin with a brief and general review of the purposes and overall essential features of workers' compensation schemes and then to provide a brief account of the context in which WCAT came into being.

[107] To speak broadly, workers' compensation is a system of no-fault compensation for workplace injuries administered by the state: **Pasiechnyk v. Saskatchewan (Workers' Compensation Board)**, [1997] 2 S.C.R. 890 at 907. At the foundation of the scheme is the so-called "historic trade-off": workers lose their right to sue in the courts for claims arising from work place injuries, but are granted compensation without regard to fault or the employer's ability to pay. Employers, while forced to contribute to the compensation fund, receive immunity from suit. Thus, four fundamental principles of workers' compensation have been identified:

> (a) compensation paid to injured workers without regard to fault;
> (b) injured workers should enjoy security of payment;
> (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
> (d) compensation to injured workers provided quickly without court proceedings. (**Pasiechynk, supra**)
>
> (emphasis added)

[108] At the centre of this scheme is the Workers' Compensation Board. It is representative of both employers and workers. It has a broad statutory mandate to establish and administer the compensation system and to raise the necessary money.

As I shall detail shortly, the Board, within its statutory mandate, has virtually complete policy control over the whole scheme and its policy choices, provided they are within the statutory mandate, are binding on WCAT. While the workers' compensation process has become judicialized to an extent that many may find regrettable, one must not lose sight of the fact that providing "quick compensation without the need for court proceedings" is one of its central objectives. (**Pasiechnyk** at § 27)

[109] The Board is not simply a policy-making body. It must process the multitude of claims for compensation presented under the **Act**. In this respect, the role of the Board in assessing claims and providing compensation is at least roughly comparable to the Employment and Immigration Commission described by LaForest, J. in **Tétreault-Gadoury**. Like the Commission, the Board, among other things, must make initial determinations of a large number of claims concerning entitlement to and quantum and duration of benefits as quickly as possible.

[110] In Nova Scotia, the **Workers' Compensation Act** is a comprehensive code for the establishment and administration of the workers' compensation system. At its centre is the Board. The Board is entrusted with the administration of Part I of the **Act** which deals with all aspects of workers' compensation. It is convenient to summarize the Board's authority and duties under headings which reflect its various areas of responsibility.

(a) Assessment and Maintenance of the Accident Fund:

[111] Workers' compensation benefits are paid out of the Accident Fund (s. 114); the Board is required to assess and collect funds for that purpose and has broad statutory power to determine how much money will be required, to devise principles of assessment and to divide employers into classes and subclasses for assessment purposes (ss. 115, 120 and 121).

(b) Payment of Compensation:

[112] The **Act** obliges the Board to pay compensation for work place injuries caused by accident (s. 10(1)) and occupational disease (s. 12) and defines, in broad terms, the nature of the benefits. With respect to permanent impairment benefits, the Board is empowered to determine the existence and degree of a worker's permanent impairment and to establish a rating schedule for the calculation of benefits (s. 34). With respect to earnings-replacement benefits (s. 37 ff.), the Board has considerable authority in relation to the calculation of the benefit (see, for example, ss. 39(3), 40(2), 40(3), 42(2) and 43). The Board is authorized to review and adjust permanent impairment and earnings-replacement benefits (ss. 71, 72 and 73).

(c) Policy and Regulation-making Power:

[113] Under ss. 183 and 184, the Board is given broad authority to adopt policies or (with the approval of the Governor in Council) to make regulations. This latter power permits the Board to include or exclude any type or class of personal injury or

occupational disease from the operation of Part I of the **Act**: s. 10(6) and (7). Policies adopted by the Board are binding on it, every officer and employee of the Board and, provided the policy is consistent with the **Act** and the regulations, on WCAT: ss. 183(5) and (5A). It follows that, if it acts consistently with the statute, the Board has effective policy control over the whole scheme and its policy choices are binding on the Tribunal.

(d) Investigation and Decision-Making Authority:

[114] The Board, its officers and employers (and members of WCAT) have the authority of a commissioner under the **Public Inquiries Act**, R.S.N.S. 1989, c. 372 to summon witnesses and require production of documents (s. 178) and certain powers of entry (s. 180(2)). Members of the Board have immunity from suit for action within their jurisdiction and good faith action outside it: s. 167. The Board is given exclusive decision-making authority in these terms:

> **185.** (1) Subject to the rights of appeal provided in this Act, the Board has exclusive jurisdiction to inquire into, hear and determine all questions of fact and law arising pursuant to this Part, and any decision, order or ruling of the Board on the question is final and conclusive and is not subject to appeal, review, or challenge in any court.
> (emphasis added)

[115] At this point, it will be helpful to provide an overview of the process for award and review of compensation. An injured worker files a claim for compensation supported by an attending physician's report (s. 82). The Board, acting through staff, makes an initial determination. Prior to the 1999 amendments to the **Act**, this determination would be reconsidered on written request of the worker (s. 196), but this process ended with

the repeal of s. 196 of the **Act** in 1999. Since the 1999 amendments, the next step available for review is an appeal to a Board hearing officer: s. 197. An oral hearing may be held and evidence and submissions presented (s. 197(5) and (6)). A decision is to be given within sixty (60) days. The next step in the review process is an appeal to the Tribunal which, prior to 1999, required leave of the Tribunal, but since the 1999 amendments, may be taken as of right: s. 243. As before the hearing officer, an oral hearing with evidence and submissions may be held. From the Tribunal, an appeal lies, by leave, to this Court on "any question as to the jurisdiction of the Appeals Tribunal, or on any question of law but on no question of fact." (ss. 256(1) and (2)).

[116] As noted, Board policies are binding on a hearing officer who has no authority to consider whether they are consistent with the **Act** or the regulations: s. 183(5) and (7). An appeal lies from the hearing officer to the Court of Appeal (with leave) on the ground that a policy is not consistent with the **Act** or Regulations, but on no other question of law or fact (s. 183(8)). Similarly, Board policies are binding on the Tribunal (s.183(5)). However, as a result of the 1999 amendments to the **Act**, it is open to the Tribunal to refuse to apply a policy if of the view that it is not consistent with the **Act** or Regulations (s. 185(5A))**.**

[117] The Chair of the Board exercises important "steering" functions with respect to appeals before a hearing officer. The Chair may direct that an appeal be postponed or adjourned for up to a year and, among other things, that it be reviewed by the Board

of Directors:

> **Postponement by Chair**
>
> **200 (1)** Where an appeal is brought pursuant to Section 197 [i.e., appeal to a hearing officer], the Chair may postpone or adjourn the appeal and direct that the appeal be
>
> (a) reviewed by the Board of Directors, where the Chair is of the opinion that an appeal raises an issue of law and general policy that should be reviewed by the Board of Directors pursuant to Section 183; or
>
> (b) heard and decided by the Appeals Tribunal, where the Chair is of the opinion that the appeal raises important or novel questions or issues of general significance that should be decided by the Appeals Tribunal pursuant to Part II.
>
> **Postponement or adjournment of appeal**
>
> **(2)** All appeals that, in the opinion of the Chair, raise the same issue or issues as an appeal postponed or adjourned pursuant to this Section are deemed to be postponed or adjourned for the same period with respect to those issues.
>
> **Disposition of postponed appeal**
>
> **(3)** Subject to Section 202, where the Chair postpones or adjourns a hearing pursuant to clause (1)(a), the Chair shall ensure that the final disposition of the appeal is left solely to the independent judgement of the hearing officer.
>
> ...
>
> **Board may adopt policy**
>
> **201 (1)** The Board of Directors may adopt and issue a policy pursuant to Section 183 in consequence of any determination made pursuant to Sections 199 or 200.
>
> **Effect of policy**
>
> **(2)** A policy adopted pursuant to subsection (1) is
>
> (a) effective immediately; and
>
> (b) applicable to appeals that have already been commenced including any appeal adjourned pursuant to Section 199 or 200. 1994-95, c. 10, s. 201.

(emphasis added)

[118] Part II of the **Act** establishes the Workers' Compensation Appeals Tribunal (s.

238). The Chief Appeal Commissioner is required to be a practising member of the Nova Scotia Barristers' Society (s. 238(5)), but there is no similar requirement for the other members of the Tribunal.

[119] Section 246(1) sets out the basis for deciding an appeal. It reads:

> The Appeals Tribunal shall decide an appeal according to the provisions of this Act, the regulations and the policies of the Board,
> (emphasis added)

[120] Under s. 252(1) the authority of WCAT is to confirm, vary or reverse the decision of the hearing office. In doing so, the Tribunal is to state "the reasons for the decision as briefly as possible without undue elaboration": see s. 252A. The decision is to be given within 60 days: s. 246(3).

[121] If the appeal raises a question of law and general policy that the Chief Appeal Commissioner considers should be reviewed by the Board of Directors under s. 183 (which deals with policies of the Board), the appeal may be postponed or adjourned and referred to the Chair of the Board of Directors under ss. 247 and 248.

[122] The Chair of the Board exercises the same "steering" functions with respect to appeals before the Tribunal as those noted in relation to appeals before a hearing officer:

> **Postponement of adjournment by Chair**

> **248 (1)** Where an appeal is brought pursuant to Section 243, the Chair may postpone or adjourn the appeal at any time before a decision is rendered by the Appeals Tribunal, and direct that the appeal be reviewed by the Board of Directors, where the Chair is of the opinion that an appeal raises an issue of law and general policy that should be reviewed by the Board of Directors pursuant to Section 183.
>
> .....
>
> **Board may adopt policies**
>
> **249 (1)** The Board of Directors may adopt and issue a policy pursuant to Section 183 in consequence of any determination made pursuant to Sections 247 or 248.
>
> **Effective of policy**
>
> **(2)** A policy adopted pursuant to subsection (1) is
>
> (a) effective immediately; and
>
> (b) applicable to appeals that have already been commenced, including any appeal adjourned pursuant to Section 247 or 248. 1994-95, c. 10, s. 249.
>
> **Duration of postponement**
>
> **250** Where an appeal has been postponed or adjourned pursuant to Sections 245, 247 or 248, the postponement or adjournment shall not last longer than the earliest of
>
> (a) three months or, where the Board determines that exceptional circumstances exist, not longer than twelve months;
>
> (b) the day the Board issues a policy pursuant to Section 249; or
>
> (c) the day the Board of Directors notifies the Appeals Tribunal that the Board will not be issuing a policy pursuant to Section 249. 1994-95, c. 10, s. 250.
>
> (emphasis added)

[123] It is also helpful to recount briefly the context in which the substantial changes to the **Workers' Compensation Act** in the period 1994 to 1996 and again in 1999 came into effect. The background to the 1994 - 1996 changes was succinctly detailed by Bateman, J.A. in **Workers' Compensation Board of Nova Scotia v. Muise** (1998), 170 N.S.R. (2d) 253:

> **[34]** It is appropriate, therefore, to consider the circumstances surrounding the implementation of the current **Act** together with its wording, in determining the

legislature's intent. At the hearing of **Doward** the court was provided with some background information which is summarized by Chipman, J.A., at p. 25:

> "On March 23, 1990, this court rendered its decision in **Hayden v. Workers' Compensation Appeal Board (N.S.) (No. 2)** (1990), 96 N.S.R. (2d) 108. The majority of the Court disapproved of the Workers' Compensation Appeal Board's formula for calculating a percentage award for permanent partial disability - the way the Board had been calculating it since the legislation was first enacted in 1911.
>
> . . . . .
>
> During the period March 23, 1990 to February 1, 1996, the Workers' Compensation regime was in a state of transition as a result of the decision in **Hayden,** supra. By Chapter 35 of the Acts of 1992, amendments to the former **Act** gave the Minister of Labour a right to be heard in any court proceeding where 'a question arises with respect to anything' in Part I of the Act, and reconstituted the Board and the Workers' Compensation Appeal Board. The Board, we are told, made all decisions regarding workers' compensation on the basis of an interim wage loss policy pending a complete revision of the legislation. We are told that **Hayden,** supra, created a situation with which the Board could not deal, and which required the enactment of the new legislative regime with transitional provisions and regulations designed specifically to deal with the backlog of cases which had built up.
>
> "Counsel for the Board advises this court that no worker has ever received benefits [for permanent injury] in this Province under the former **Act** based on the interpretation given to the former **Act** by this Court in **Hayden,** supra. (Emphasis added)

[35]] In the profusion of workers' compensation cases that have come before this Court since **Doward**, we have been provided with further relevant information concerning the state of affairs leading up to the new legislation.

[36] Within months of the **Hayden** decision the government introduced a bill in the legislature to reform the workers' compensation system. The bill did not pass. In October of 1992 the Workers' Compensation Board was restructured to provide that the Board would be governed by a Board of Directors comprised of an equal number of employer and worker representatives. The Board of Directors set about devising a new system to pay compensation for permanent disability (s.45 of the former **Act**), commissioning a discussion paper which was issued to the public in February of 1993. The Board of Directors approved a compensation system to deal with permanently injured workers on an interim basis. Notwithstanding substantial efforts to devise a new s.45 compensation system, in a memorandum dated March 9, 1994, the Chair of the Board of Directors advised the Minister of Labour that the Board was unable to create a new system and recommended new legislation. In a paper dated October 6, 1994 entitled "Proposals for Reform" and released by the Minister of Labour, the Nova Scotia Worker's Compensation system was said to be in a state of crisis with a backlog of 1,800 cases. The unfunded liability of the fund was $379 million on December 31, 1994.

> **[37]** Bill 122, to reform the workers' compensation system, was introduced into the legislature on November 9, 1994. The current **Workers' Compensation Act** received Royal Assent on February 6, 1995 after extensive debate and amendment in the House of Assembly. The **Act** was not immediately proclaimed to allow time for the development of new policies and procedures and for staff training. On June 1, 1995 some portions of the current **Act** were proclaimed in force, with the remainder of the **Act**, subject to minor exceptions, proclaimed on February 1, 1996.

[124] With respect to the 1999 amendments, the following excerpts from Nova Scotia House of Assembly, *Report of the Nova Scotia Select Committee on the Workers Compensation Act* (November, 1998), provide helpful background:

> The current Workers' Compensation system in Nova Scotia has many problems. There is a backlog of appeals at the Workers' Compensation Appeals Tribunal of more than 2,500. Both the select committee and the auditor general agree extraordinary methods must be undertaken to reduce the current backlog.
>
> The Appeals Tribunal has introduced a plan to reduce the backlog by July 2000. The committee feels this is a promising first step but must go farther. In some cases, there are individuals with appeals in the system for more than 10 years. This is totally unacceptable. These people deserve some answers. They need to bring closure to their cases and be free to move on with their lives.
>
> .....
>
> A streamlined appeals process with legislated timelines would ensure a backlog of this magnitude would never occur again. Removal of the Reconsideration stage of the appeal process and Leave to Appeal at WCAT would shorten the timelines from first appeal to a final decision. From the time an appeal is launched at WCAT through to a final decision the committee suggests legislating a timeline of 90 days. Following this process, an individual or organization would be free to appeal to the Nova Scotia Court of Appeal.
>
> The workers' compensation system has an unfunded liability of more than $360 million. This jeopardizes the long-term viability of workers' compensation in Nova Scotia and undermines the ability of the WCB to do what is right – pay compensation to injured workers. The unfunded liability needs to be reduced in a manageable way. Many employers feel their economic viability is being threatened by excessive assessment premiums. Employers need to do their part to reduce the unfunded liability, but the system must be fair.
>
> .....
>
> The Workers' Compensation Appeals Tribunal was established in June of 1995, under Part II of the new Act which came into effect on Feb. 1, 1996. This tribunal replaced the old Appeal Board as the legal entity for all WCB appeals. WCAT is designed to work as an independent tribunal, although it is funded by the accident fund of the WCB and must operate within the policies established by the WCB

> Board of Directors. WCAT hears appeals from decisions rendered by the WCB.
>
> .....
>
> To file an appeal at WCAT, a case must have received a final decision from the WCB including a review of the original decision by the hearing officer. When WCAT was established, more than 2,000 cases at the Appeal Board were without a hearing officer's decision. These were immediately referred back to the WCB and have since been referred to as *Transitional Appeals*. Some of these Transitional Appeals have already been in the system for eight years or more, which gives a sense of the frustration and despair many of these individuals feel. Of the 2,153 Transitional Appeals, 1,268 (59 per cent) were eventually filed as appeals with WCAT. These appeals have contributed greatly to the current gridlock which plagues the tribunal.
>
> .....
>
> In his report, the Auditor General is critical of WCAT stating:
>
> - the workers' compensation system does not have a system in place to identify and determine why there is a backlog, nor has anyone taken ownership of the backlog;
> - when WCAT was established it appears there was no clear plan in place to deal with the backlog of appeals inherited from the old Appeal Board;
> - WCAT is legalistic in nature and design and might not be appropriate for a mass appeals system where disputes often arise over questions of judgement rather than points of law;
>
> *The Auditor General also questions whether WCAT's plan for eliminating the backlog has been thoroughly analysed to determine its cost and possibility of success. The committee supports this opinion as it agrees that WCAT's plan to reduce the backlog does not fully address the urgency of the issue.*

[125] I should add that I understand that the backlog of appeals in the Tribunal has now been virtually eliminated. However, the context of the 1994 -1996 and 1999 legislation is helpful in ascertaining the role which the Legislature envisaged for the Tribunal.

(iv) Application of legal principles to the legislation:

[126] It is common ground on this appeal that there is no express grant of authority to WCAT to consider *Charter* issues, or indeed to determine questions of law. The issue

is whether that authority is granted by implication.

[127] The linchpin of the argument in favour of WCAT's *Charter* jurisdiction is that it derives this authority by virtue of its appellate role in relation to the Board. The argument is that the Board may apply the *Charter* so that it must follow that WCAT, on appeals from the Board, may as well. It is necessary, therefore, to consider whether the Board has the authority to subject its enabling statute to *Charter* scrutiny, because WCAT's authority is said to derive from that conferred on the Board.

[128] I note that this is not an authority which the Board claims. Its position on this appeal, as clarified in oral argument, is that the **Act** does not give the Board authority to refuse to apply its enabling statute on *Charter* grounds.

[129] The only explicit reference to power to determine questions of law is found in s. 185. That section confers on the Board, not on WCAT, jurisdiction to determine "... all questions of fact and law arising pursuant to this part." "This part" refers to Part I of the **Act** which deals with compensation.

[130] The Board is not an adjudicative body. As noted by LaForest, J. in **Cooper**, this, in itself, is a clear indication that the Legislature did not intend the Board to have the authority to decide fundamental constitutional issues: see **Cooper** at pp. 893 - 894. Somewhat like the Commission addressed in **Tétrault-Gadoury**, the Board is charged,

among other things, with processing, monitoring and paying a large number of claims for benefits. It may aptly be said of the Board, as LaForest, J. did of the Commission in **Tétrault-Gadoury**, that "[t]he careful consideration essential to undertaking an adequate assessment of the constitutional issue is fundamentally at odds with the speedy procedure required to allow the Commission to fulfill the functions it was designed to perform": see **Tétrault-Gadoury** at pp. 34 - 35.

[131] It is true that the Board's hearing officers have an adjudicative role in reviewing decisions made by the front line employees of the Board. However, as noted earlier, the hearing officers are specifically denied the authority to determine whether Board policies are consistent with the **Act**: see s. 183(5) and (7). The Legislature chose expressly to withhold from hearing officers this limited power to review the legality of Board policies. Having done so, it is inconceivable to me that there could have been any legislative intention to confer on the Tribunal the much broader authority to assess the constitutionality of the Board's enabling legislation.

[132] In my opinion, the approach taken by the dissenting judges in **Cooper** would not lead to a conclusion in favour of the Board's *Charter* authority in this case. Here, unlike the Human Rights Commission considered in **Cooper**, the Board disavows any such *Charter* authority. Unlike the Commission, the Board has no broad "watch-dog" functions such as reviewing and commenting on relevant legislation or reporting on inconsistencies of legislation with the law which it administers. The dissenting judges in

Cooper found that the fact that the Commission was not an adjudicative body was not conclusive against its *Charter* jurisdiction. However, the limited *Charter* jurisdiction for the Commission envisioned by the dissenting judges was to perform a screening role and not a role as a decision-maker as to whether the statute infringed the *Charter*: see McLachlin, J. in **Cooper** at § 103. There is no such limited role in relation to the *Charter* advanced here. On the contrary, the respondents and the Tribunal in this case say that the Board has the authority to decide that its enabling statute violates the *Charter*, not merely that it may perform a preliminary screening role in relation to cases making that claim. This, in my view, makes the fact that the Board is not an adjudicative body more telling against its *Charter* jurisdiction than was the similar consideration in relation to the Commission in **Cooper**.

[133] The role of the Chair of the Board in the appeal process also negates the suggestion that the Board is to evaluate its enabling **Act** on *Charter* grounds. As noted, the Chair of the Board or a hearing officer may postpone an appeal for review by the Board of Directors where it raises "... an issue of law ... that should be reviewed by the Board of Directors ...": ss. 199 and 200. Clearly, the Board of Directors is not an adjudicative body and questions of law cannot be and are not referred to it for adjudication. If the language of s. 185 conferring authority to determine questions of law arising under this Part is taken as permitting the Board to refuse to apply its enabling statute on *Charter* grounds, it would follow from ss. 199 and 200 that the Chair of the Board or a hearing officer could direct the question to the Board of Directors and

postpone a decision on a *Charter* claim for up to twelve (12) months by administrative fiat: see s. 202. I cannot think that any such administrative interference with *Charter* claims could have been intended by the Legislature. It seems to me that the more plausible inference is that the power to refer questions of law was not intended to include claims that the benefit provisions of the **Act** were unconstitutional, but rather to address issues of the application of the **Act** through policy directives. This is further underlined by the direction in s. 186 that the Board's decisions be in accordance with the **Act**.

[134] I conclude, therefore, that the Board does not have authority to refuse to apply benefits provisions in its enabling **Act** on *Charter* grounds. I emphasize that this does not mean that the Board or the **Act** itself are excused from conforming to the *Charter*. It is simply to say that it is not the role of the Board to refuse to comply with the **Act** if it is of the view that the **Act** violates the *Charter*. That determination is to be made elsewhere. The role of the Board is to interpret, administer and apply the **Act**, not to assess its constitutionality.

[135] I have dwelt on the position of the Board in relation to *Charter* matters because the position of the Tribunal derives from it. The **Act** gives no specific authority in relation to legal questions to the Tribunal. The **Act** provides simply that the Tribunal may "confirm, vary or reverse" the decision of a hearing officer: s. 252(1). As noted, the linchpin of the argument in favour of the Tribunal's *Charter* jurisdiction is that the Board

must apply the *Charter* so that the Tribunal's power to confirm, vary or reverse a decision of the hearing officer must, as a matter of logic, include the same authority. Having found that the Board has no such authority, the underpinning of this submission falls away.

[136] The Tribunal, unlike the Board, is an adjudicative body, albeit one not confined by the strict rules of evidence or the adversary process: see for example, s. 246(1). But even though it has an adjudicative function, there are, in my view, clear indications in the statute that the Tribunal's role in *Charter* issues is no greater than the Board's.

[137] Unlike the Labour Relations Board in **Cuddy Chicks**, the arbitrator in **Douglas College** and **Weber** or the umpire in **Tétrault-Gadoury**, there is no express grant of authority to WCAT to decide general questions of law or indeed <u>any</u> question of law. WCAT must interpret and apply its enabling statute and address other legal principles necessary for the cases before it. As it does so, it exercises specialized functions and acquires expertise as a result. The Tribunal does not exercise policy-making authority in relation to a highly specialized area and is not, therefore, an expert tribunal in the sense that Labour Boards have been held to be (see LaForest, J. in **Cuddy Chicks** at p. 16 and in **Cooper** at pp. 893 - 4); nor does it consist of members required to have legal training as was the case with the umpires in **Tétrault-Gadoury**. The Tribunal is required to decide an appeal "... <u>according to the provisions of this **Act**</u>

[and] the Regulations and the policies of the Board ...” (s. 246(1)) and is to do so within sixty (60) days (s. 246(3)) in written reasons which are to be as brief as possible, “without undue elaboration ...” (s. 252A).

[138] The provisions relating to the Board’s “steering” function with respect to appeals imply that no *Charter* authority for WCAT is contemplated by the legislation. As noted, the provisions relating to the Board’s steering function with respect to cases before hearing officers are repeated in very similar terms in relation to cases before WCAT. The Chair of the Board may “postpone or adjourn” an appeal before the Tribunal and direct that it be “... reviewed by the Board of Directors, where the Chair is of the opinion that an appeal raises an issue of law and general policy ...” (s. 248(1)). Such adjournment or postponement may be up to twelve (12) months (s. 250). I cannot attribute to the Legislature the intent to permit the Board that sort of steering function with respect to constitutional issues; once again, the more likely implication is that the sorts of legal issues contemplated by these provisions are the same as the legal issues entrusted to the Board — the interpretation and application of its enabling statute, not questions of its constitutional validity.

[139] Section 200, which confers a similar steering function for the Board in relation to matters before a hearing officer, reinforces this conclusion. I note the contrast in ss. 200(1)(a) and (b) between the sorts of matters which the Chair may refer to the Board and those which may be referred to the Tribunal. The Chair may refer to the Board cases which raise “an issue of law and general policy ...” (s. 200(1)(a)) while the Chair

may refer to the Tribunal appeals which raise “important or novel questions or issues of general significance ...”. The reference to questions of law in cases to be referred to the Board coupled with the absence of any mention of questions of law with respect to cases to be referred to the Tribunal seems to me to negate any inference that the Tribunal is to have authority with respect to general questions of law, including the *Charter*.

[140] There are two aspects of the statute’s recent legislative history which, to my mind, strongly negate any intention to confer *Charter* jurisdiction on the Tribunal.

[141] Before the 1999 amendments to the **Act**, the Tribunal was, like every officer and employee of the Board, bound by Board policies. It was expressly stated to be beyond the jurisdiction of the Tribunal to refuse to apply Board policies on the ground that they were inconsistent with the **Act** or the Regulations: see s. 183(7). In other words, prior to the 1999 amendments, the Tribunal, by express legislative provision, had no authority to determine whether Board policies were *ultra vires* the Board. It is inconceivable to me that, having excluded the Tribunal from assessing whether Board policies were consistent with the **Act**, the Legislature could have intended that the Tribunal would have jurisdiction to subject the benefits provisions of the **Act** itself to *Charter* scrutiny. The 1999 amendment to s. 183(7) permits the Tribunal to consider whether policies are consistent with the **Act**, but that is the only change made by the amendment. Specific legislative amendment was required to grant this limited “*ultra*

vires" jurisdiction to the Tribunal. The fact that the amendment was limited to conferring that authority confirms the Legislature's intent that the Tribunal was not to have the much broader *Charter* jurisdiction claimed for it on these appeals.

[142] I find one further series of provisions in the **Act** inconsistent with the Tribunal's *Charter* jurisdiction. Until the 1999 amendments, appeals from the Tribunal to this Court were restricted to questions of jurisdiction (see former **Act**, § 256(1)). This makes it clear that, prior to the amendments, there was no intention to authorize the Tribunal to refuse to apply its enabling statute on *Charter* grounds. To assert the contrary position amounts to saying that the Tribunal's decision on *Charter* issues was reviewable in this Court only on jurisdictional grounds, a result that was surely not intended. When the **Act** was amended in 1999, no change was made in relation to the authority of the Board with respect to legal questions (s. 185) or in the authority of the Tribunal to "confirm, vary or reverse" the Board's decisions. The expansion of the grounds of appeal to this Court to include questions of law in the 1999 amendments (see s. 256(1)) does not change the intention of the **Act** prior to 1999 that the Tribunal did not have authority to refuse to apply the **Act** on *Charter* grounds.

[143] In my opinion, it is clear as a matter of statutory interpretation that the Legislature did not intend that WCAT have jurisdiction to refuse to apply provisions of the **Act** conferring or limiting benefits on *Charter* grounds.

[144] I add a word about how the practical considerations identified by the Supreme Court of Canada apply to this case. These, in my view, do not all go one way. Finding *Charter* authority in the Tribunal would avoid bi-furcation of proceedings and, no doubt, facilitate access to *Charter* adjudication. As was pointed out in **Cooper**, the *Charter* belongs to the people. But so, I would add, does the **Workers' Compensation Act**. Increased access to *Charter* adjudication through the Tribunal would come at a price. There would be a cost of increased delay to be borne by other, non-*Charter*, appeals if the Tribunal were obliged to address issues of the complexity and broad importance of *Charter* cases as part of its workload.

[145] The context in which the Tribunal was created only strengthens the inference I draw from the words of the legislation that no such authority was intended for the Tribunal. In 1996, when the Tribunal was created, the workers' compensation system was in crisis. There was an enormous unfunded liability and the appeals process had virtually broken down. The Tribunal inherited a backlog of 2000 cases. There is nothing in this to lend support to the view that the Tribunal was intended to deal with complex and broadly significant points of constitutional law. The 1999 amendments to the **Act** sent a further clear message from the Legislature that proceedings before the Tribunal should be faster and less legalistic. Finding that WCAT had *Charter* jurisdiction would certainly not help attain these objectives and, in fact, would likely do the opposite.

[146] We were referred to two decisions upholding the *Charter* jurisdiction of

workers' compensation appeals tribunals.

[147] The first is **Northwest Territories (Workers' Compensation Board) v. Nolan**, [1999] N.W.T.J. No. 12; 45 C.C.E.L. (2d) 215 (S.C.). The legislation in issue there led Schuler, J. to conclude that the Appeals Tribunal under the **Workers' Compensation Act**, R.S.N.W.T. 1988, c. W-6, as amended, was implicitly granted the authority to decide questions of law and the constitutionality of legislation. The statutory scheme was, however, significantly different than the Nova Scotia **Act** in at least two respects. First, the Northwest Territories **Act** gave the Appeals Tribunal the authority "... to examine, inquire into, hear and determine all matters arising in respect of an appeal from a decision of a review committee ... " (s. 7.3). Second, the N.W.T. Tribunal was conceived as an "expert" tribunal as it was protected by a strongly worded privative clause: see Schuler, J. at § 24. This may be contrasted with the absence of any privative clause for the Nova Scotia Tribunal as well as a statutory appeal to this Court on questions of law and jurisdiction. Given these differences in the statutes, I do not find the conclusions of Schuler, J. applicable to the Nova Scotia legislation.

[148] We were also referred to Ontario's WCAT decision No. 34/9213 upholding the tribunal's authority to subject its enabling statute to *Charter* scrutiny. That case was decided before **Cooper** and does not take account of the distinction stressed in **Cooper** between a tribunal's authority to interpret its enabling statute and a broader authority to determine general questions of law including *Charter* issues. I, therefore, have not

found the decision helpful in my attempt to apply the reasoning in **Cooper** to the present appeal.

[149] It was argued that the decision of this Court in **Geldart v. Workers' Compensation Board (N.S.)** (1996), 155 N.S.R. (2d) 47 (C.A.) upheld the jurisdiction of WCAT to address *Charter* arguments. In my view, **Geldart** held simply that there was no appeal directly to this Court from a hearing officer's decision other than on the ground that a Board policy is inconsistent with the **Act**. It followed that Ms. Geldart's *Charter* argument could not come to the Court directly on appeal from a hearing officer. No question as to WCAT's jurisdiction to address *Charter* arguments arose in that case which, I note, was decided prior to the Supreme Court's decision in **Cooper**.

[150] I conclude, therefore, that WCAT does not have the authority to refuse on *Charter* grounds to apply provisions of its enabling statute which confer or limit benefits.

III.3 Substantive *Charter* Issue:

[151] My conclusion on the jurisdictional point would require that the appeals be allowed. None of the parties, however, suggested that the Court should stop at the jurisdictional issue and not address the substance of WCAT's *Charter* rulings. It is common ground that the record is adequate for consideration of the substantive *Charter* issue and it has been fully argued in this Court. We are advised that there are numerous other appeals pending in this Court which raise the same or related issues. The Court

should, therefore, decide the substantive *Charter* issue.

(i) WCAT's *Charter* decisions:

(a) Laseur:

[152] The Tribunal concluded that section 10B imposes differential treatment between the appellant and other injured workers on the basis of a personal characteristic and that this differential treatment is discriminatory within the meaning of s. 15(1) of the *Charter*.

[153] With respect to the issue of differential treatment, the Tribunal found first, that s. 10A (the section which defines chronic pain) in effect draws a formal distinction between injured workers with chronic pain and injured workers who do not have chronic pain. Second, s. 10B either restricts or precludes this distinct and easily identified group of injured workers from receiving compensation for the work injury. As the Tribunal put it, " ... a comparison of the Board's treatment of injured workers demonstrates differential treatment on the basis of a personal characteristic: namely chronic pain."

[154] On the issue of discrimination, the Tribunal reached two conclusions. First, it held that the differential treatment is on the basis of the enumerated ground of disability, namely, disability caused by chronic pain. Second, WCAT decided that the differential treatment imposes a burden or withholds a benefit. In its view, the **Act** distinguishes between injured workers based on chronic pain and that chronic pain is generally a permanent condition. Sections 10B(b) and (c) explicitly deny compensation benefits to

workers with chronic pain who were injured before March 23, 1990 without evaluation of their individual claims. As the Tribunal put it, "... they are simply denied benefits on the basis of their injury date" and without consideration of their individual circumstances. This, it decided, stereotypes workers with chronic pain and thereby harms the dignity of individual injured workers who have chronic pain.

[155] Summarizing these conclusions, the Tribunal stated:

> ... the Panel concludes that ss. 10B(b) and (c) create differential treatment of injured workers suffering chronic pain. This treatment is discriminatory, in that it creates a distinction between injured workers who have chronic pain and injured workers who do not have chronic pain and deny (sic) equal benefit of the law in relation to workers' compensation benefits on the basis of the determination that a worker suffers a mental or physical disability. The Panel is satisfied that ss. 10B(b) and (c), as they pertain to workers injured prior to March 23, 1990 who develop chronic pain, violate s. 15(1) of the *Charter*.

[156] The Tribunal also found that this limitation on s. 15(1) *Charter* rights did not constitute a program to ameliorate the conditions of those disadvantaged because of physical disability within the meaning of s. 15(2) and that it was not demonstrably justified within the meaning of s. 1. Although accepting that the objective of ss.10B(b) and (c) are pressing and substantial, it rejected the contention that the complete denial of benefits to the appellant minimally impaired the rights in issue.

(b) Martin

[157] The Tribunal found that the FRP Regulations referred to in s. 10B(c) violate s. 15(1) of the *Charter* and that they are not saved by s. 15(2) or s. 1.

[158] On the question of differential treatment, the Tribunal noted that s. 3 of the FRP Regulations excludes chronic pain from the operation of Part I of the **Act** and provides that no compensation for chronic pain is payable except in accordance with the Regulation. This, the Tribunal found, created a distinct and easily identifiable group of individuals, based on the legal definition of chronic pain, who are excluded from receiving any other type of compensation for the work injury. Thus, the FRP Regulations create a distinction between injured workers whose disability is caused by chronic pain and those whose disability is not caused by chronic pain. The differential treatment in the FRP Regulations identified by the Tribunal consists of its restrictions which limit the duration or in some cases eliminate the benefits to which an injured worker may be entitled. Specifically, the Regulations deny benefits if more than twelve months have elapsed since the injury and limits benefits for eligible workers to four weeks. The Tribunal observed that “[n]o such restrictions are applicable to injured workers whose disability is not caused by chronic pain.”

[159] With respect to discrimination, the Tribunal found that the differential treatment mandated by the FRP Regulations is founded on disability caused by chronic pain and therefore constitutes differential treatment on the basis of the enumerated ground of physical or mental disability. The Tribunal also concluded that the FRP Regulations operate to stereotype workers with chronic pain and to determine their cases without reference to their individual circumstances. The FRP Regulations, it thought, implies that the worker’s claim for benefits lacks legitimacy or is somehow less valid than the claim of an injured worker without chronic pain.

[160] The Tribunal concluded that the FRP Regulations are not the sort of program contemplated by s. 15(2) of the *Charter*. It referred to a report prepared for the Board in January of 1995 by Dr. T.J. Murray on the medical aspects of chronic pain and found that the FRP Regulations do not address any of the elements of Dr. Murray's recommended approach. The Tribunal stated:

> The Panel is not satisfied that the FRP Regulations address all or even a part of the elements identified by Dr. Murray. By way of illustration, there is no evidence before us that would allow us to conclude that benefits limited to a four week time period are capable of ameliorating a chronic pain sufferer's condition. This time period appears to reflect the minimum time period referred to in Dr. Murray's report for an individual's return to work, provided the work is of a sedentary nature, and the worker has only sustained a soft tissue injury without nerve root involvement. Given that not all chronic pain sufferers are returning to work of a sedentary nature, by limiting benefits to four weeks, the FRP Regulations are not ameliorating the condition of chronic pain sufferers who fall outside of this type of injury.

[161] With respect to s. 1 of the *Charter*, the Tribunal accepted that the FRP Regulations address a pressing and substantial objective, but found that they do not meet the minimum impairment test. The Tribunal reasoned that chronic pain is generally a permanent condition and that the FRP Regulations and the benefits provided do not in any way reflect this potential for permanency. In its view, the benefits will, generally, terminate long before a chronic pain sufferer's wage loss has ended or the pain has resolved. Benefits such as permanent medical impairment awards, vocational rehabilitation and continuing medical aid are denied.

[162] Having found the FRP Regulations to be unconstitutional, the Tribunal turned its attention to the impact of the legislative amendments (i.e. ss. 10A through 10I) which incorporated them by reference: see s. 10B(c). Noting that the definition of chronic pain

in s. 10A mirrors that in the FRP Regulations, and that s. 10B(c) provides that workers injured on and after February 1, 1996 may only receive compensation in accordance with the FRP Regulations, the Tribunal found s. 10B(c) was also unconstitutional.

(ii) Chronic Pain and Workers' Compensation:

[163] What is chronic pain? For the purposes of these appeals, it is a defined term in s. 10A of the **Act** and s. 2(b) of the FRP Regulations:

> 10A In this Act, "chronic pain" means pain
> (a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or
> (b) disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain,
> and includes chronic pain syndrome, fibromyalgia, myofacial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury was not healed.
> (emphasis added)

[164] It is fair to say that, prior to the enactment of the challenged provisions, claims for permanent impairment and extended earnings loss based on chronic pain were (and, absent those provisions, would remain) problematic under the general provisions of the **Act**. There are several reasons for this.

[165] First, there is the general requirement under the **Act** that compensation is payable for "personal injury by accident arising out of and in the course of employment ..." (**Act**, s. 10) and, in respect of compensation for permanent impairment, there is the requirement that the permanent impairment results from an injury (**Act**, s. 34(1)). In short, and as the decisions of the Board and various review officers in **Doward** show,

there may be significant issues in chronic pain cases relating to the required causal link between the work place injury and the chronic pain.

[166] As mentioned, the medical aspects of chronic pain are the subject of a report commissioned by the Board and authored by Dr. T.J. Murray in January of 1995. The report is in the record and no party has challenged its findings. It provides, therefore, a comprehensive basis for the consideration of the medical and rehabilitative aspects of chronic pain.

[167] Dr. Murray's report underlines the difficulty of defining the link between the injury and chronic pain:

> It is not practical or reasonable to apportion cause between injury and other causes of chronic pain syndrome in a specific case. Only a third of patients with chronic pain relate the onset to trauma or injury and the differences between those with and without compensation or litigation may be due to those processes rather than trauma or other contributing causes.
>
> Patients with chronic pain related to injury may have associated factors (job dissatisfaction, high pressure - low control jobs, marital problems, increased concern about body symptoms, etc.) that may be required as "causes" in others who do not relate trauma to the onset of their syndrome. But to assign percentages of cause to these complex inconsistent variables, some of which may result from the chronic pain syndrome, is not practical or reliable.
> (emphasis added)

[168] The difficulty is not simply that establishing a causal link between chronic pain and the work place injury may be problematic in many cases. The difficulty is much deeper than that. It is that it may be simply unrealistic to speak of a causal connection between chronic pain and work place injury because the inquiry is not meaningful.

[169] A second difficulty arises from the fact that chronic pain sufferers (as chronic pain is defined in the provision) have no ascertainable organic cause or objective findings to support their claim for compensation. As Dr. Murray put it, (at p. 12): "Chronic pain often has no obvious specific underlying local pathological cause that can be identified or eradicated, does not respond to the usual treatments for acute pain, and is associated with complex psychological, behavioral and social factors."

[170] The facts of the **Laseur** appeal demonstrate how this aspect will often present a formidable obstacle to compensation under the general provisions of the **Act** for disability resulting from chronic pain. For example, permanent impairment benefits under the **Act** depend on the application of a permanent impairment rating schedule established by the Board. That method of rating injuries is not challenged in these appeals. In many instances, the rating schedule requires objective abnormalities on examination before a permanent impairment will be recognized. So in the **Laseur** appeal, Ms. Laseur's percentage of permanent impairment was found to be '0' because she had no significant objective abnormalities on examination.

[171] Thus, while disability resulting from chronic pain has, in some cases, been compensated under the general provisions of the **Act**, the fit between that type of disability and the general compensation scheme is frequently problematic. There is the question of how meaningful it is to assess the causal link between the chronic pain and the work place injury and the fact that, as a result of the absence of objective

abnormalities on examination, no permanent impairment rating will be made. There are additional features of chronic pain, however, that make it a special challenge for the workers' compensation system and which Dr. Murray discussed in his Report.

[172] Chronic pain does not respond to treatment which is based on the principles developed for treatment of acute pain. Chronic pain is not "protective" and further injury will not result from continued activity. In fact, pain will generally worsen if activity is reduced. Once chronic pain has been present for a prolonged period, it is more difficult to manage and reverse. The more time that passes, the less likely the individual will be able to return to work. Dr. Murray stressed that early intervention is key and that early return to work despite the pain is essential as the likelihood of return to work and a full, active life become less likely as the months go by. Dr. Murray described those suffering from chronic pain in these terms:

> Patients with chronic pain may have localized or widespread pain and tenderness, some with tender points in predictable spots, but with few other physical findings. They often complain of fatigue, sleep disturbance, and limited function. They may have evidence of depressive mood, and exhibit behaviors of chronically ill people. They often search for a single cause of the problem and become frustrated with the medical profession when tests do not reveal a cause and multiple treatment approaches fail to give relief. As time goes on and the symptoms continue, the condition becomes more complex and other factors influence the manifestations, attitudes and symptoms, the chronic pain patient can often be noted to adopt features and behaviors that are referred to as "pain behaviors", and may adopt the sick role and become more limited than one would expect from the physical findings and tests of their function. The approach of medical investigation and treatment, the attitude of family and supporters, and the mechanisms of Workers' Compensation Board and social agencies may become important factors by providing "rewards" for remaining unwell, and accentuating the illness behavior. The person may be quite unconscious of this, but it can be a process that worsens the condition even though the aim of these processes was to help the person.
> (emphasis added)

[173] Dr. Murray also pointed out that the complexities of the compensation mechanisms themselves work against achieving better outcomes with chronic pain patients. He recommended that, in relation to chronic pain cases, the workers' compensation process be simplified and reoriented to recognize the important therapeutic benefits of increasing activity and early return to work.

[174] These aspects of chronic pain, particularly the unsuitability of approaching it by use of the acute model of treatment, give rise to problems of consistency in the application to chronic pain sufferers of the general provisions of the workers' compensation scheme. WCAT recognized this in its reasons in **Martin** and **Laseur**. The Tribunal held that the need for a consistent and well-defined approach to workers' compensation claims based on chronic pain was a pressing and substantial objective of the FRP Regulations and the chronic pain provisions of the **Act**.

[175] With that introduction to chronic pain and the challenges it poses to workers' compensation, it will be helpful to provide an overview of the legislative provisions dealing with chronic pain.

[176] The FRP Regulations were made in 1996 and specifically address chronic pain in relation to workers' compensation. The FRP Regulations were incorporated by reference into the **Act** by the 1999 amendments (see s. 10(B)(c)).

[177] Underlying the approach that has been taken to chronic pain as it relates to workers' compensation, are five principles, or assumptions, that are derived from Dr. Murray's Report:

> 1) Workers with chronic pain should be strongly urged to return to work almost immediately if there are no objective signs found by the clinician who only needs a good history and physical examination to classify the type of problem and decide on its management.
>
> 2) Pain alone is an insufficient cause to delay resumption of work.
>
> 3) The few patients failing to respond to conservative management should be followed up progressively with standardized diagnostic packages and forceful treatment programs that minimize absenteeism.
>
> 4) Our current health system and employer attitudes which encourage a drift towards sick leave for workers with chronic pain should have their strategies radically altered to prevent chronicity.
>
> 5) Everything we do as clinicians for patients with chronic pain should be evaluated, or re-evaluated, by well designed and properly executed controlled trials that carefully assess the results of our treatments. The study subjects should be patients and the priority outcome should be return to work.

[178] Section 10B of the **Act** specifies the place of chronic pain in the compensation provisions of the **Act**. Briefly put, it stipulates that no compensation is payable for chronic pain except in accordance with ss. 10B, 10E and 10G and as provided under the FRP Regulations. Section 10B (along with s. 10D through to 10I) also addresses transitional issues. The key section is s. 10B(c) which provides:

> 10B Notwithstanding this Act, Chapter 508 of the Revised Statutes, 1989, or any of its predecessors, the *Interpretation Act* or any other enactment
> .....
> (c) no compensation is payable to a worker in connection with chronic pain, except as provided in this Section or in Section 10E or 10G or, in the case of a worker injured on or after February 1, 1996, as provided in the Functional Restoration (Multi-Faceted Pain Services) Program Regulations contained in Order in Council 96-207 made on March 26, 1996, as amended from time to time and, for greater certainty, those regulations are deemed to have been validly made pursuant to this Act and to have been in full force and effect on and after February 1, 1996.

(emphasis added)

[179] It is important to place these provisions in the context of the overall scheme of workers' compensation benefits. Speaking broadly, the **Act** provides compensation to workers employed in industries to which it applies who have suffered personal injury by accident arising out of and in the course of employment (Section 10(1)). Where earnings loss results from an injury, an earnings-replacement benefit is payable (section 37 *ff.*); if a permanent impairment results from an injury, a permanent impairment benefit may be payable (section 34 *ff*.). As noted, this benefit is calculated by applying the Board's permanent impairment rating schedule, which results in a determination of the percentage of impairment (s. 34(2) and (3)).

[180] It follows from this that causation is a key consideration at two stages. First, the injury itself must arise by accident out of and in the course of employment (s. 10(1)) and, second, the permanent impairment and loss of earnings must result from the injury. Eligibility for benefits is excluded, permitted or facilitated by the various provisions of the **Act** relating to these two key causal relationships.

[181] Consider the following examples. Stress is excluded from the definition of accident (s. 2(a)), thereby effectively excluding benefits. By contrast, in the case of certain industrial diseases, proof that injury arose in the course of employment is facilitated by a presumption to that effect which has the result of granting benefits

unless the contrary can be proved: see s. 12(3). The necessary causal element is also affected by provisions relating to apportionment and the passage of time. Where loss of earnings or permanent impairment are due in part to the injury and in part to other causes, compensation is payable for the portion of them "that may reasonably be attributed to the injury" (s. 10(5)), effectively requiring apportionment of benefits provided that some portion of the earnings loss or permanent impairment reasonably may be attributed to the injury. Moreover, even if a loss of earnings is found initially to be attributable to an accident, the **Act** provides that such benefits are payable until the loss of earnings "... no longer results from the injury." (s. 37(9)).

[182] I pause here to note a point stressed by the Board in its submissions. It is that the causes of chronic pain can, at best, be connected only tenuously to injury by accident, a point confirmed by Dr. Murray's report to which I have already referred. While chronic pain is frequently compensated in tort cases following common law principles of causation, the chronic pain provisions of the **Act** may be taken as a legislative judgment, supported by medical judgment in the form of Dr. Murray's report, that for workers' compensation purposes, the loss of earnings or permanent impairment flowing from chronic pain are not reasonably attributed to the injury.

[183] As noted earlier, the scheme of benefits for permanent impairment is based on a rating schedule established by the Board (s. 34(3)), which is not challenged in these appeals. This schedule limits various parts of the body and certain conditions.

With respect to the spine, in virtually every case, the absence of significant objective abnormalities on examination will result in a 0% rating of an impairment. So, for example, soft tissue injuries to the cervical or lumbar spine with no significant objective findings are 0-rated, effectively precluding permanent impairment benefits.

[184] I mention all of this to underline the nature of the workers' compensation scheme. It provides defined benefits for workplace injury; it does not replicate in this no-fault system the compensation payable when a plaintiff succeeds in a personal injury tort claim. The extent of benefits is defined by legislative judgments about causation and types of impairment. These judgments favour compensation in certain types of workplace related disabilities such as those resulting from particular industrial diseases. They curtail or eliminate compensation for others such as stress or soft tissue injuries with no significant abnormalities on examination. The **Act** and the policies made by the Board are filled with judgments about appropriate compensation for various sorts of conditions and disabilities.

[185] It is also helpful to review how this scheme applies to an injured worker who ultimately develops chronic pain. Mr. Martin's case may be used as an example.

[186] As noted, he was injured on February 6th, 1996. A report of accident was filed and, in the supporting medical report, the diagnosis was lumbo sacral sprain. He returned to work on February 22, 1996, but stopped due to pain on February 27, 1996. After physiotherapy and work-conditioning with working "ease-back" hours and modified

duties, he returned to full duties on April 15, 1996. Pain continued and by May 1st his physician advised him to remain off work. A work hardening program was pursued as well as stress management sessions. Consultations with a physical medicine specialist and physiotherapy followed. Through this period, Mr. Martin received earnings-replacement benefits and the various services mentioned through workers' compensation. I note as well that the provision of psychological services under Part I of the Functional Restoration Program was recommended by the Board in May of 1996 and that stress management sessions were included among the services provided. By July 16, 1996, the Board decided that, due to lack of objective medical evidence, Mr. Martin should resume employment on an ease-back program starting July 22, 1996, for two weeks with workers' compensation benefits to terminate on August 5th, 1996. It was the Board's refusal to extend earnings-replacement benefits and medical aid beyond that time which gave rise to his appeal.

[187] From this, one can see that the challenged provisions typically come into play after an injured worker has been receiving benefits, such as earnings-replacement and medical aid, for a period of time following the injury. As counsel for the respondents noted, the chronic pain provisions will generally come into play only once the worker's condition has become permanent. Up to that point, the general provisions of the **Act** will have provided benefits. In other words, it is only at the point that the worker has pain disproportionate to the underlying injury that persists beyond the normal recovery period and is not supported by significant objective physical findings at the site of the injury that the challenged provisions take effect.

[188] In this respect, Mr. Martin's situation is atypical in that he was found by WCAT to have chronic pain within the meaning of the provisions prior to his condition becoming permanent.

[189] The FRP Regulations in issue in these appeals do not constitute the whole response to the situations of workers who appear to be on the path to developing chronic pain. While we have not been given any detailed information about what is referred to in the record as "Phase I" of the Functional Restoration Program, it is apparent from the treatment of Mr. Martin that services aimed at avoiding the onset of chronic pain and preventing it becoming disabling were available prior to his being diagnosed with chronic pain.

(iii) The Charter Claims:

[190] It will helpful to set out, in detail, the s. 15 claims advanced on behalf of the respondents.

(a) Martin:

[191] There are two important factual elements of Mr. Martin's case to be kept in mind. First, although the Tribunal found that chronic pain is generally a permanent condition, this case, atypically, addresses a denial of temporary benefits as a result of the FRP Regulations. Second, although difficulties of establishing the necessary causal link between the work injury and chronic pain are acknowledged, this is a case in which that causal link was established under the general provisions of the **Act**, at least for the

purposes of temporary benefits.

[192] Mr. Martin's position is that he belongs to a particular group of disabled persons, namely, those disabled persons, coming under the **Workers' Compensation Act** with chronic pain, who do not qualify for benefits under s. 10E. It is submitted that, for the purposes of the s. 15 analysis, he may be compared with three other groups: (1) people with tortious injuries who do not come under the **Act**; (2) workers subject to the **Act** who do not have chronic pain; and (3) workers subject to the **Act** who have chronic pain but who come under s. 10E of the **Act**.

[193] For reasons which I will develop shortly, I do not find the first of these comparison groups appropriate and I will not deal with it further at this point in the judgment.

[194] With respect to the second group (workers subject to the **Act** without chronic pain), the submission is that Mr. Martin is disadvantaged because the impugned provisions prevent him from showing a causal link between his initial injury and secondary chronic pain. Thus, in the absence of the impugned provisions, Mr. Martin may have been able to show that his chronic pain is a condition that resulted wholly or partly from his work-related injury and so could have received compensation for any resulting permanent impairment or loss of earnings. It is noted that those who do not have chronic pain are not prohibited under the **Act** from obtaining compensation where

their work-related condition leads to a permanent impairment or a loss of earnings. Unlike workers with chronic pain, they may also benefit from apportionment between work and non-work related causes of their injuries.

[195] Compared to those with chronic pain but falling under s. 10E, Mr. Martin is disadvantaged because those falling under s. 10E receive a portion of the compensation relating to permanent impairment and loss of earnings on an ongoing basis while those falling outside it receive either the four weeks of benefits available under the FRP Regulations or, if not eligible under the Regulations, nothing. Mr. Martin does not challenge the constitutionality of s. 10E.

(b) Laseur:

[196] There are important factual differences between the Martin and the Laseur appeals. In **Laseur**, the condition has been found to be permanent although, as in **Martin**, it has been causally connected to the work injury. However, the determination of benefits falls under s. 227 of the **Act** (see **Lowe v. Nova Scotia (Workers' Compensation Appeals Tribunal)** (1998), 166 N.S.R. (2d) 321 (C.A.)) Entitlement to a permanent impairment benefit, therefore, depends on the existence of significant objective abnormalities on examination. Noting that the constitutionality of the *PMI Guidelines* was not in issue in these proceedings, the Tribunal found that Ms. Laseur

has a PMI rating of zero and is accordingly not entitled to permanent benefits. In other words, quite apart from the FRP Regulations, Ms. Laseur is not entitled to permanent benefits because she does not have the required significant objective abnormalities on examination.

[197] As noted, WCAT's finding in this regard is challenged on Ms. Laseur's cross appeal. However, for reasons given earlier, in my view the cross-appeal fails and the *Charter* issue must be approached accordingly.

[198] The denial of benefits on the basis of the lack of objective findings results in the focus of the *Charter* argument in **Laseur** being different than in **Martin**. In **Laseur**, the question is whether denial of access to the general scheme of the **Act** constitutes discrimination quite apart from the question of whether she would ultimately succeed on the merits of her claim for particular benefits. In other words, the differential treatment in the **Laseur** case is not the denial of benefits, but the denial of access to the general scheme pursuant to which benefits may (or may not) be granted.

(iv) Section 15 Equality Analysis:

[199] Section 15(1) of the *Charter* guarantees, subject to justifiable limitations, the equality of every individual before and under the law and the right to the equal protection and equal benefit of the law without discrimination.

[200] A claim that an individual's s. 15(1) rights have been limited is to be evaluated in light of three broad inquiries. These three broad inquiries do not constitute a strict test but rather serve as points of reference for the analysis. The three inquiries are these. First, does the challenged law impose differential treatment between the claimant and others? Second, if so, is this differential treatment based on one or more enumerated or analogous grounds, i.e., on the basis of grounds specifically prohibited by the *Charter* (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability) or similar to them? Third, is the scheme discriminatory in the sense that it conflicts with the fundamental purpose of s. 15(1): see, for example, **Lovelace v. Ontario,** [2000] S.C.J. No. 36 at § 53. The answer to the first question identifies differential treatment. The answers to the second and third questions identify whether the differential treatment is discriminatory.

[201] The essence of a claim under s. 15 of the *Charter* is that the impugned law violates essential human dignity: see **M. v. H.,** [1999] 2 S.C.R. 3 per Cory, J. at § 47. As Iacobucci, J. put it for the Court in **Lovelace v. Ontario**, **supra** at § 54:

> The main focus of the [section 15] inquiry is to establish whether a conflict exists between the purpose or effect of an impugned law and the purpose of section 15(1). The central purpose of the guarantee in section 15(1) is to protect against the violation of essential human dignity

[202] It is not suggested that the *Charter* requires the Legislature to establish a workers' compensation system. However, once it does, the system must conform to the equality rights guaranteed in the *Charter*. To demonstrate that the scheme denies equality, one must do more than show that the scheme denies benefits to some which it

grants to others. A finding of discrimination requires there to be a conflict between the denial of the benefit and the purpose of s. 15 of the *Charter*. Put simply, the denial will be found to be discriminatory if it promotes the view that those to whom the benefit is denied are "...less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect and consideration." : **Egan v. Canada**, [1995] 2 S.C.R. 513 at § 39; **Granovsky v. Canada (Minister of Employment and Immigration)**, [2000] 1 S.C.R. 703 at § 58.

[203] Equality is a comparative concept. Each of the three inquiries to which I have referred requires a comparison between the claimants and another relevant group or groups: see **Lovelace, supra** at § 62. As Iacobucci, J. stated for the Court in **Law v. Minister of Employment and Immigration**, [1999] 1 S.C.R. 497 at § 24 and 56:

> It is impossible to evaluate a s. 15(1) claim without identifying specific personal characteristics or circumstances of the individual or group bringing the claim and comparing the treatment of that person or group to the treatment accorded to a relevant comparator ... Ultimately, a court must identify differential treatment as compared to one or more other persons or groups.
> (emphasis added)

[204] As noted, an appropriate point of comparison must underlie each of the three steps of the equality analysis. It will be convenient, therefore, to address that aspect first and then turn to each of the three broad inquiries.

(a) Comparators

[205] One can be equal only in relation to another. For this reason, the identification

of an appropriate comparison is central to the equality analysis. Iacobucci, J. for the Court in **Law, supra**, summarized the principles governing the identification of the appropriate point of comparison as follows:

> The equality guarantee is a comparative concept, which ultimately requires a court to establish one or more relevant comparators. The claimant generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry. However, where the claimant's characterization of the comparison is insufficient, a court may, within the scope of the ground or grounds pleaded, refine the comparison presented by the claimant where warranted. Locating the relevant comparison group requires an examination of the subject-matter of the legislation and its effects, as well as a full appreciation of context.

[206] Claimants are given "considerable scope" to identify the appropriate group for comparison, but their choice is not unfettered. There must be an appropriate relationship between the selected comparator group and the benefit which is the subject of the complaint, having regard to the subject matter, the purpose and the effect of the legislation in issue: see **Granovsky, supra** at § 47 - 48.

[207] The respondents have identified three comparator groups. First, it is submitted that the respondents may be compared with "...people with tortious injuries who do not come under the **Act**." Second, it is suggested that the respondents may be compared with other injured workers under the **Act** who do not have chronic pain and, third, with other injured workers with chronic pain but who come under section 10E of the **Act**.

[208] The purpose of the **Workers Compensation Act** is to provide secure compensation for loss of earnings and permanent physical impairment to workers

injured in work place accidents, or suffering from industrial disease, without regard to fault and without court proceedings. Having regard to that purpose and the basis of the equality challenge advanced here, I think it apparent that the first of the proposed comparative groups advanced by the respondents is inappropriate.

[209] In essence, the first group advanced by the respondents invites comparison of injured persons whose compensation is governed by the workers' compensation scheme with those whose compensation is governed by tort principles as applied by the courts. There are three insuperable problems with this approach.

[210] The first is that selection of this comparator amounts to an equality challenge to the whole scheme of workers' compensation, a challenge which was rejected by the Supreme Court of Canada in **Reference Re Workers' Compensation Act, 1983 (Nfld.)**, [1989] 1 S.C.R. 922. Second, compensation under the tort system generally requires the injured party to prove that the injury resulted from the fault of another. There is no evidence, nor any allegation, of such fault in either of the cases before us. This means that there is no evidence that the respondents would, but for the workers' compensation scheme, have access to the tort system of compensation thus making it impossible for them to show, on the basis of this comparison, that any deprivation has occurred through the operation of the workers' compensation scheme. Third, and most fundamentally, this appeal relates only to the constitutionality of ss. 10B(b) and (c) and the relevant sections of the FRP Regulations. These provisions do not bar access to the

tort system, but rather specify the compensation available under the workers' compensation scheme for injured workers with chronic pain. The necessary link between the deprivation that forms the subject of the complaint and this comparator group is, accordingly, absent. I therefore find that the first proposed comparator group is inappropriate.

[211] The second comparator group advanced is the group of workers whose compensation falls within the workers' compensation scheme but who do not have chronic pain. As the respondents put it, they (the respondents), in relation to this group, are "... disadvantaged because the impugned provisions prevent [them] from showing a causal link between [the] initial injury and secondary chronic pain. In the absence of the impugned provisions, the [respondents] may have been able to show that [their] chronic pain is a condition that resulted wholly or partly from [their] work-related injury and so [they] could have received compensation for any resulting permanent impairment or loss of earnings. Other workers under the Act without chronic pain are not prohibited from obtaining compensation where their work-related condition leads to a permanent impairment or a loss of earnings." (emphasis added)

[212] The last sentence quoted shows that this comparator group requires some refinement. Generally, injured workers are entitled to workers' compensation benefits only if a loss of earnings or permanent impairment results from a work injury by accident: ss. 34 and 37. In other words, the **Act**, in general, applies to those who suffer personal injury by accident arising out of and in the course of employment and who

experience wage loss or permanent impairment as a result. (I put aside special provisions that ease the requirement to establish causation, such as with respect to the death of coal miners (s. 11) and the cause of certain industrial diseases (s. 12(3))). It will also generally be true that there will be entitlement to benefits only if some functional limitation results from the injury.

[213] The respondents' complaint is that they are excluded from aspects of this benefits scheme because they have chronic pain. It is not suggested that the requirement of a causal link between the work-place injury and the lost earnings or physical impairment is discriminatory. The provisions requiring causation are not in issue in these appeals. In my view, therefore, the more appropriate comparison is between workers injured in work-place accidents with resulting functional limitations, permanent physical impairment and/or wage loss, who do not suffer from chronic pain and workers injured in work-place accidents which result in chronic pain giving rise to functional limitation, permanent physical impairment and/or wage loss. In short, the comparison ought to be between those who meet the threshold requirements of the **Act** because they have suffered wage loss or physical impairment as a result of a work injury and those who would or might do so but for their exclusion under the impugned provisions. I would add the requirement of functional limitation to make it clear that it is not necessary in these appeals to decide whether chronic pain, in all cases, includes some functional limitation.

[214] With that refinement, I think that the second comparator group advanced by

the respondents provides an appropriate point of comparison for both appeals. Mr. Martin and Ms. Laseur have been found to have chronic pain resulting, at least in part, from work place injuries, to have functional limitations, and to have experienced wage loss or physical impairment as a result.

[215] The third comparator group put forward consists of workers subject to the **Act** who have chronic pain but who, unlike the respondents, fall under s. 10E. As noted, s. 10E provides partial earnings loss and permanent impairment benefits to those with chronic pain injured between March 23, 1990 and February 1, 1996 if, as of November 25, 1998, they were receiving temporary earnings replacement benefits or had a claim under appeal.

[216] Section 10E does not necessarily apply only to those who established a causal link between their chronic pain and their work-place injury. This is clear from s. 10E(b) which requires only that the chronic pain "...commenced following the injury..." and from s. 10E(d) which does not require that there has been a decision in the worker's favour on the causation issue. It follows that even workers who would not be able to establish the normally required causal link between the chronic pain and the work-place injury are entitled to benefits under s. 10E. Those falling within s. 10B either receive nothing or are limited to the four weeks provided for in the FRP Regulations. I conclude, therefore, that those falling under s. 10E make up a possible comparator group in relation to those with chronic pain and falling under s. 10B(c) or (d). I do, however, have a significant reservation about the utility of this point of comparison

which I shall set out later in my reasons.

[217] In summary, I find that there are two appropriate comparator groups. The first consists of workers without chronic pain injured in work-place accidents with resulting functional limitations, permanent physical impairment and/or wage loss who meet the threshold requirements of the **Act**. The second consists of injured workers with chronic pain who fall within the provisions of s. 10E of the **Act**.

[218] Having determined the appropriate groups for the purposes of comparison, I turn to the three remaining stages of the equality analysis.

(b) The three broad inquiries:

1. differential treatment:

[219] The relevant question is whether the impugned law, in purpose or effect, imposes differential treatment between the claimants and others. We are here concerned with the law's purpose, not merely its effect, because the challenged provisions were enacted to establish different benefits for injured workers with chronic pain. The nature of the inquiry was described by Iacobucci, J. in **Law, supra**, as follows:

> Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

[220] The respondents claim differential treatment in two respects. First, they say

they are denied access to the general scheme of compensation for work place injuries established under the **Act** by virtue of having chronic pain resulting from their injuries. Second, they say that, in relation to those falling within s. 10E of the **Act**, they are denied the benefits available under that section because of the dates of their injuries. (Recall that eligibility under s. 10E relates to injuries in the period March 23, 1990 to February 1, 1996; Mr. Martin was injured on February 6, 1996 and Ms. Laseur on November 13, 1987.)

[221] In my view, the differential treatment of Mr. Martin is clear. If he did not have chronic pain, he would have been entitled, at least, to a continuation of temporary earnings replacement benefits from August 6 to October 15, 1996. In addition, had he been injured on January 31 instead of February 6, (he had a claim under appeal as of November 25, 1998), he would have been eligible for the benefits under s. 10E of the **Act**. It follows that, in relation to workers with work place injuries giving rise to earnings loss but who do not have chronic pain, Mr. Martin is treated differently on the basis of having a work place injury resulting in chronic pain. In relation to those falling under s. 10E of the **Act**, he is denied benefits on the basis of the date of his injury.

[222] I conclude, therefore, that in relation to both of the appropriate comparator groups, Mr. Martin is treated differently because he is denied benefits that would be available to him under the workers' compensation scheme in the event that his work place injury had not resulted in chronic pain or had he been injured prior to, instead of

after, February 1, 1996.

[223] I reach the same conclusion with respect to Ms. Laseur, although for different reasons. Ms. Laseur has not established that the challenged provisions deprived her of any specific financial benefit to which she would otherwise have been entitled. As noted, the application of the Board's *PMI Guidelines* resulted in a permanent impairment rating of 0%. In other words, quite apart from the impugned provisions, she has been found ineligible for further workers' compensation benefits because she does not have a permanent medical impairment as defined by the Board.

[224] Ms. Laseur submits that it is not necessary for her to establish that, but for her chronic pain, she would have been entitled to a specific payment. Her claim is that she has been denied access to the general scheme of benefits available under the **Act**. In other words, the submission is that differential treatment may exist in relation to benefits other than economic benefits. This submission is, in my view, well founded.

[225] As Cory and Iacobucci, JJ. pointed out in their dissenting reasons in **Egan, supra** at §158, the right to equal benefit of the law, which is protected by s. 15(1) of the *Charter,* is not phrased as guaranteeing simply an equal right to a benefit, but as guaranteeing equal benefit of the law. This is not restricted to a calculation of economic gain.

[226] Similar views were expressed by all the members of the of the Court in **M. v. H., supra**. There, the issue was whether the exclusion of same sex couples from the support obligations for non-married persons under the Ontario **Family Law Act** denied a benefit to the claimant on the basis of sexual orientation. It was argued that the exclusion from the **Act's** support obligations did not deny an economic benefit but simply the opportunity to gain access to a court-enforced process (at § 66). Cory and Iacobucci, JJ. (Lamer C.J.C., L'Heureux-Dubé, McLachlin and Binnie, JJ. concurring) stated at § 66 that " [s]uch an analysis takes too narrow a view of 'benefit' under the law ... The type of benefit salient to the section 15(1) analysis cannot encompass only a the conferral of an economic benefit. It must also include access to a process that could confer an economic or other benefit." (emphasis added) Similarly, Bastarache, J. at § 290 and Major, J. at § 280 described the differential treatment in that case as being the denial of the right to make an application for support, not the denial of support. Gonthier, J., although in dissent as to the result, adopted the same approach on this issue, stating at § 218 that denial of access to a spousal support regime is itself a disadvantage quite apart from the merit of the particular claim to support.

[227] I also refer to **Vriend v. Alberta**, [1998] 1 S.C.R. 493 in which the issue was exclusion of sexual orientation as a protected ground under the Alberta **Individual Rights Protection Act**, R.S.A. 1980, c. I-2. Cory and Iacobucci, JJ. (Lamer, C.J.C., Gonthier, McLachlin and Bastarache, JJ. concurring) held that this exclusion constituted a denial of equal benefit and equal protection of the law, in part because there was a

denial of access to the remedial procedures established by that **Act**: at § 87.

[228] Finally, I refer to **Eldridge v. British Columbia (Attorney General)**, [1997] 3 S.C.R. 624 in which LaForest, J., for the Court, noted that it is sufficient if a s.15(1) claimant shows that the equality rights of members of the group to which the claimant belongs have been infringed and that it is not necessary to show a violation of his or her own particular rights: at § 83.

[229] In the present case, the record shows that, absent the challenged provisions, some persons with chronic pain have been found to qualify for workers' compensation benefits. That being so, Ms. Laseur's ineligibility, based on the specific facts of her situation, is not fatal to her claim of inequality. I conclude, therefore, that Ms. Laseur is denied access to part of the scheme of benefits provided under the **Workers' Compensation Act** on the basis that her work-related injury resulted in chronic pain and that she was injured prior to the period addressed by s. 10E. This constitutes differential treatment within the meaning of the first broad inquiry of the equality analysis.

2. Is the differential treatment based on an enumerated or analogous ground?

[230] As Iacobucci, J. pointed out in **Law, supra** at § 88, the second and third of the three broad inquiries are concerned with whether the differential treatment constitutes discrimination. The second inquiry is whether the differential treatment is

based on an enumerated or analogous ground. WCAT decided, and the respondents submit, that the differential treatment in these cases is based on the enumerated ground of physical or mental disability.

[231] Both respondents have been shown to have suffered functional limitations as a result of the chronic pain resulting from their work place injuries. In the **Martin** case, WCAT found that, subsequent to the diagnosis of chronic pain in August of 1996, Mr. Martin remained temporarily disabled. In the **Laseur** case, the evidence was that her chronic pain did not permit Ms. Laseur to return to her employment as a bus driver. Given these findings of functional limitations flowing from the respondents' chronic pain, I do not think it necessary to determine whether all persons suffering from chronic pain are physically or mentally disabled within the meaning of s. 15(1) of the *Charter*. These respondents are chronic pain sufferers who experience functional limitations as a result and they are, therefore, within a subset of the disabled within the meaning of s. 15(1).

[232] Is their differential treatment based on disability? It is necessary to consider the differential treatment in relation to each of the comparator groups.

[233] With respect to the second of the two appropriate comparator groups - that is, those qualifying for benefits under s. 10E, the differential treatment is not based on disability resulting from chronic pain. Those receiving benefits under s. 10E may equally suffer from chronic pain as do the respondents in these appeals. The differential

treatment as between these two groups, both of whom have chronic pain, arises from the date of their injuries, not from the nature of their disabilities. No other enumerated or analogous ground has been put forward on behalf of the respondents. I, therefore, conclude that the s. 15(1) claim in relation to those receiving benefits under s. 10E fails because the differential treatment of the respondents in comparison to those receiving benefits under s. 10E has not been shown to arise on the basis of an enumerated or analogous ground. Of course, this conclusion does not relate to whether those under s. 10E experience differential treatment on the basis of disability as compared to others without chronic pain. That question does not arise on this appeal.

[234] Even if I am wrong in my conclusion that the differential treatment of the respondents in comparison to those governed by s. 10E is not on the basis of an enumerated or analogous ground, consideration of this comparison does not advance the fundamental argument made by the respondents. Their argument is that, because they have chronic pain, they are excluded from permanent and other benefits available under the **Act** to others without chronic pain. That argument is, in my respectful view, best considered having regard to the situation of the respondents in relation to others without chronic pain who meet the threshold requirements of the **Act**.

[235] I turn to consider the first of the two appropriate comparator groups. That group consists of persons without chronic pain suffering functional limitation, earnings loss and/or permanent medical impairment as a result of work place injury who meet the

threshold requirements of the **Act**. By definition, persons in this group have been unable, as a result of their injury, to earn up to their pre-accident level and/or have been found to have suffered a permanent medical impairment which is, in general, defined as the loss of, loss of use of or derangement of any body part, system or function: see *PMI Guidelines*, *"Introduction"*. An injury resulting in wage loss or permanent impairment would seem to me to constitute disability by any definition. Thus everyone in the first comparator group is disabled within the meaning of the *Charter*. This gives rise to the question of how to determine whether the differential treatment is based on an enumerated ground when both the claimants and the members of the comparator group are part of a larger group (here the disabled) which is specifically protected from discrimination.

[236] I think that the short answer is that differential treatment may exist on the basis of an enumerated ground even where the appropriate comparator group consists of persons who are also described by that enumerated ground. For example, in **Granovsky, supra**, the Court accepted that there was differential treatment on the basis of an enumerated ground where the claimant, who was temporarily disabled, did not receive a benefit conferred on others who were permanently disabled: at § 53. Similarly, in the human rights case of **Battleford and District Co-operative Ltd. v. Gibbs**, [1996] 3 S.C.R. 566, the Court concluded that, in a claim that an insurance plan was discriminatory because it provided more disability benefits to the physically than to the mentally disabled, it was appropriate to compare the benefits provided to the

mentally disabled with those available to the physically disabled. As Sopinka, J. put it at § 27 "... it is not necessary that all disabled persons be mistreated equally... it is not fatal to a finding of discrimination based on a prohibited ground that not all persons bearing the relevant characteristic have been discriminated against." Similarly, I would conclude in the present appeals that the impugned legislation mandates differential treatment on the basis of disability because it treats persons disabled by chronic pain resulting from a work place injury differently than others disabled by some other causes as a result of a work place injury.

3. Does the impugned provision demean the respondents' human dignity?

[237] Not every example of differential treatment based on one of the enumerated grounds constitutes discrimination. A further element must also be present. The impugned provision must be discriminatory in a substantive sense; the differential treatment must conflict with the purpose of s. 15(1) of the *Charter*.

[238] That purpose has been described in many ways. For example, in **Law, supra** at § 51 Iacobucci, J., for the Court, said that the purpose of s. 15(1) is:

> ... to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice and to promote a society in which all persons enjoy equal recognition as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

In **Eldridge**, **supra** at § 54 LaForest, J. stated that s. 15(1) of the *Charter* expresses a

deeply ingrained commitment to the equal worth and human dignity of all persons and desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society.

[239] The essence of the inquiry is whether the differential treatment promotes the view that the claimants, and those in their situation, are less capable or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect and consideration: see **Granovsky, supra** at § 58. In short, does the differential treatment demean the claimants' human dignity?

[240] Claims of discrimination are both subjective and objective and must be evaluated accordingly. They are subjective because the right to equal treatment is an individual right and its infringement is asserted by particular individuals with particular traits and in particular circumstances. Discrimination claims are also objective in the sense that they must be evaluated in light of the broader context of the law, society in general and the situation of others in circumstances similar to the claimants: see **Law, supra** at § 59. The Court has identified the relevant point of view as that of:

> ... a reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant ... .[A] court must be satisfied that the claimant's assertion that differential treatment imposed by legislation demeans his or her dignity is supported by an objective assessment of the situation (Law, at § 60)

[241] Taking into account this appropriate point of view, the essential question can be stated as it was by Iacobucci, J. in **Law, supra** at § 75:

> An infringement of section 15(1) of the Charter exists if it can be demonstrated that, from the perspective of a reasonable person in circumstances similar to those of the claimant who takes into account the contextual factors relevant to the claim, the legislative imposition of differential treatment has the effect of demeaning his or her dignity.

[242] The Court has noted that there are at least four contextual factors relevant to the question of whether a law has the effect of demeaning the claimant's dignity and is, therefore, discriminatory. While there is no closed list of relevant contextual factors and each of the four identified by the Court may not be relevant in every case, I have found it helpful to address each of the four in considering the claims of discrimination advanced by Mr. Martin and Ms. Laseur.

[243] The first contextual factor is whether there is pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by the individual or group. The second concerns the relationship between the ground upon which the claim is based and the nature of the differential treatment; legislation that takes into account the actual needs, capacity or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings will be less likely to demean the claimant's dignity: **Law** at § 69 and 70. The third is concerned with the ameliorative purpose or effects of the challenged law — an ameliorative purpose or effect which is consistent with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged persons largely corresponds to the greater need or the different circumstances of those who benefit from the legislation: see **Law** at § 72. The fourth factor requires the court to

consider the economic, constitutional and societal significance of the interests adversely affected by the legislation: **Law** at § 74.

[244] There are three features of the discrimination claim advanced here that are particularly relevant to this final step of the analysis. It will be helpful to mention them before turning to consider the four contextual factors in more detail.

[245] Iacobucci, J. noted in **Law, supra** that some enumerated grounds, disability among them, have the potential to correspond to need, capacity or circumstances: at § 69. With respect to disability, the avoidance of discrimination "... will frequently require distinctions to be made that take into account the actual personal characteristics of disabled persons ..." (§ 69). In disability based discrimination claims, therefore, the focus must be on the impugned legislation's response to an individual's physical impairment or associated functional limitations. As Binnie, J. said in **Granovsky**:

> [26] The true focus of the s. 15(1) disability analysis is not on the impairment as such, nor even any associated functional limitations, but is on the problematic response of the state to either or both of these circumstances. It is the state action that stigmatizes the impairment, or which attributes false or exaggerated importance to the functional limitations (if any), or which fails to take into account the "large remedial component" (**Andrews v. Law Society of British Columbia**, [1989] 1 S.C.R. 143, at p. 171) or "ameliorative purpose" of s. 15(1) (**Eaton v. Brant County Board of Education**, [1997] 1 S.C.R. 241, at para. 66; **Eldridge v. British Columbia (Attorney General)**, [1997] 3 S.C.R. 624, at para. 65; **Law, supra**, at para. 72), that creates the legally relevant human rights dimension to what might otherwise be a straightforward biomedical condition.
> (emphasis added)

[246] As Sopinka, J. pointed out in **Eaton v. Brant County Board of Education**, [1997] 1 S.C.R. 241, in cases of alleged discrimination on the basis of disability, the

analysis must not only address “... the attribution of untrue characteristics based on stereotypical attitudes ...” (at §67), but must also take account of legislative attempts to respond to and to accommodate “... the true characteristics ...” of disabled persons:

> ...It is the failure to make reasonable accommodation, ... which results in discrimination against the disabled. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning is simply inappropriate here. It is recognition of the actual characteristics and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability. (para. 67)
> (emphasis added)

[247] In these cases, the claimants and the members of the relevant comparator group all fall within the enumerated ground of physical disability. This aspect may affect the discrimination analysis in at least two ways.

[248] First, care must be taken not to adopt a “comparative disadvantage” approach which, in essence, pits one disadvantaged group against another: see **Lovelace, supra** at § 59.

[249] Second, there needs to be close attention to the treatment of the claimant group in relation to the comparator group. For example, in **Corbiere v. Canada (Minister of Indian and Northern Affairs)**, [1999] 2 S.C.R. 203, the claimant group of off-reserve members of an Indian band alleged discrimination because they were denied the right to vote in band elections exercised by on-reserve band members. L’Heureux-Dubé, J., at § 67 notes that where a claim involves possibly conflicting interests of minority groups, one must be especially sensitive to “... their realities and

experiences and to their values, history and identity": § 6. By the same token, however, since equality is a comparative concept, the focus of the analysis must be on the alleged differential treatment in relation to the comparator group: § 69. In conducting the discrimination analysis in that case, L'Heureux-Dubé, J. considered whether the claimant group, in relation to the comparator group, formed a "discrete and insular minority" and whether there were particular stereotypes and disadvantages suffered by the claimant group distinct from those experienced by all aboriginal people: see § 71.

[250] In a somewhat similar way, the Court in the human rights case of **Battlefords and District Co-operative Ltd. v. Gibbs**, **supra** found it appropriate to compare the benefits available to the mentally disabled with those available to the physically disabled. The Court noted that this comparison was justified by legislative and constitutional recognition that mental disability is a distinct prohibited ground of discrimination and further, that particular historical disadvantage has been faced by the mentally disabled. In making the latter point, the Court found that this treatment set the mentally disabled apart from the disabled generally:

> ... there is abundant support for the view that the mentally disabled have suffered from historical disadvantage and negative stereotyping. I have referred above to the evidence supporting this conclusion. Although the physically disabled also have a claim in this regard, the treatment to which the mentally disabled were subjected sets them apart from disabled persons generally. (para. 37) (emphasis added)

[251] The third feature of these claims is that they relate to a targeted ameliorative program (i.e., the workers' compensation scheme) and the alleged discrimination is said

to arise from it being under-inclusive. While the “ameliorative purpose” analysis, as described in **Law** applies to such claims, it is less likely that a targeted ameliorative program “... will be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in society.”: **Lovelace, supra** at § 85. In this way, the purpose of the legislative scheme is a relevant consideration. Where the purpose of the targeted ameliorative scheme is consistent with s. 15 and the challenged exclusion is not premised on a misconception of the actual needs, capacities and circumstances of the excluded, the exclusion will not be discriminatory: **Lovelace** at § 87.

[252] I turn now to an analysis of the four contextual factors.

(i) Pre-existing disadvantage:

[253] It is not necessary for a s. 15(1) claimant to show membership in an historically disadvantaged group. But the fact that a law draws a distinction on the basis of membership in such a group is a strong indication of discrimination: see, e.g. **Eldridge, supra** at § 54, **Miron v. Trudel**, [1995] 2 S.C.R. 418 at § 148 - 149; **Law, supra** at § 65 - 68. This is particularly the case where the basis of the distinction is an enumerated (that is, a specifically prohibited) ground of discrimination under the *Charter*.

[254] As Iacobucci, J. stated in **Law, supra** at § 63, pre-existing disadvantage,

vulnerability, stereotyping or prejudice experienced by the individual or group are relevant because they tend to show that persons like the claimants have often not been given equal concern, respect and consideration; “[i]t is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization and will have a more severe impact upon them, since they are already vulnerable”: Iacobucci, J. at § 63.

[255] There can be no doubt that the disabled have historically suffered disadvantage, vulnerability, stereotyping and prejudice. LaForest, J. said the following in **Eldridge** at § 56:

> ¶ 56 It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions; ..... This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the Charter demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms; ..... One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled. Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed .....

[256] In the present appeals, however, <u>both</u> the claimants and the members of the comparator group fall within the category of the disabled; the gist of the respondents’ claims is that a benefit scheme targeting injured workers who are temporarily or permanently disabled is under-inclusive. In deciding whether this amounts to discrimination in relation to the comparator group which is made up of other disabled

injured workers, it is not particularly telling, in my view, that disabled persons generally have suffered pre-existing disadvantage. As L'Heureux-Dubé, J. pointed out in **Corbiere**, prime attention, in a case like this one, must be directed to whether the claimant group has been the victim of stereotyping in relation to the comparator group: see § 69.

[257] I recognize, of course, that the s. 15(1) analysis does not mandate a "race to the bottom". Claimants are not obliged to show that they are historically more disadvantaged than the comparator group: see **Lovelace** at § 69. However, it is relevant to the consideration of a discrimination claim that the claimants specifically have experienced prejudice or stereotyping distinct from that which they may have suffered in common with members of the comparator group. In other words, it is relevant to the analysis of this contextual factor whether or not persons with chronic pain have experienced prejudice or stereotyping which is distinct from that experienced by injured workers who are disabled as a result of work place injuries but who do not have chronic pain.

[258] The respondents submit that the chronic pain provisions "perpetuate old stereotypes." A stereotype may be defined as a particular sort of frequently occurring misconception — a misconception that unfairly and inaccurately attributes to groups certain undesirable traits which the group or at least some of its members do not, in fact, possess: see Iacobucci, J. in **Law, supra** at § 64. As McLachlin, J. put it in **Miron,**

supra, at p. 496, the essence of stereotyping is the attribution of group characteristics other than on the basis of individual capacity, worth or circumstance. In **Winko v. British Columbia (Forensic Psychiatric Unit)**, [1999] 2 S.C.R. 625 at § 88, it was put this way:

> The essence of stereotyping, ... lies in making distinctions against an individual on the basis of personal characteristics attributed to that person not on the basis of his or her true situation, but on the basis of association with a group ...

[259] Stereotyping acquires a human rights dimension when stereotypical attitudes become a basis for imposing disadvantage. When this occurs, as McLachlin, J. said in **Miron** at § 146, the individual as a member of a group "... is deemed to be less able or meritorious than others".

[260] The submission on behalf of the claimants here is that injured workers with chronic pain are subject to stereotypical views that chronic pain is associated with ongoing litigation or so-called secondary gain or that some people are unusually prone to developing chronic pain or that it results from job dissatisfaction.

[261] In support of this proposition, we were referred to passages in Dr. Murray's report which indicate that the association of pain aggravation and persistence with claims for compensation has been over-emphasized as has the notion that some people are particularly prone to pain. There is also some reference to the fact that disability claims which are not supported by significant objective findings tend to be viewed with suspicion. But Dr. Murray also points out that claims for compensation by injured

workers generally are often viewed with scepticism and suspicion.

[262] I do not doubt that chronic pain is a phenomenon which is not yet well understood and that the absence of objective, verifiable abnormalities may give rise to suspicion of the claims. But there is nothing in the record to persuade me that chronic pain sufferers have been victims of historical disadvantage or stereotyping distinct from that experienced by other disabled workers seeking compensation.

[263] While a court may often be able to find pre-existing stereotyping or prejudice on the basis of judicial notice or logical reasoning, courts must be careful, in the absence of evidence, not "... to invent stereotypes or other social phenomena which may not or do not truly exist.": **Law, supra** at § 79. In my view, the record in this case does not show widespread attribution of traits that do not exist (i.e., stereotyping) or the historic disadvantage and prejudice in relation to chronic pain sufferers. Nor does it show any such treatment distinct from that experienced by other injured workers seeking compensation.

[264] Moreover, in a disability based discrimination claim, particularly where the comparator group consists of disabled persons, an analysis based on stereotypes is not particularly appropriate. As Sopinka, J. noted in **Eaton, supra,** at § 67, the more appropriate emphasis of the analysis is on whether the challenged legislation recognizes the actual characteristics of the claimants and makes reasonable

accommodation for them. I will consider this aspect of the analysis in the discussion of the second and third contextual factors.

[265] I conclude that the first contextual factor does not tend to support a finding of discrimination in this case.

(ii) & (iii) Relationship between the grounds and the claimant's characteristics or circumstances and the ameliorative purpose or effects of the impugned law:

[266] The position of the appellant Board is that many distinctions must be made in a workers' compensation scheme and that those made with respect to chronic pain are supported by the best available medical thinking. WCAT concluded and the respondents argue that the chronic pain provisions are prejudicial to many workers, inconsistent with the purpose of the **Act** and fail to take account of the actual needs and circumstances of injured workers with chronic pain. It is apparent, therefore, that the second and third contextual factors are closely related; the correspondence between the basis of the claim and the actual needs and circumstances of the claimants is closely related to the ameliorative purpose or effects of the challenged law. I have found it helpful, for that reason, to address these two contextual factors together.

[267] The main question in relation to correspondence between the grounds of the claim and the claimant's circumstances is whether the challenged provisions take into account the claimant's actual situation in a manner that respects his or her value as a

human being: see **Law, supra**, § 88. This consideration is particularly important in cases like this one of allegedly under-inclusive benefit schemes targeted at particular groups of disabled persons. As was pointed out in **Law, supra**; **Eaton, supra** and **Eldridge, supra**, appropriate response to disability will often require distinctions to be made that take account of the actual personal characteristics of disabled persons: see e.g., **Law, supra** at § 69. As stated in **Andrews v. Law Society of British Columbia**, [1989] 1 S.C.R. 143, and **Eaton, supra** and repeated in **Law** at § 70,

> ... legislation which takes into account the actual needs, capacity or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings and members of Canadian society will be less likely to have a negative effect on human dignity.

[268] As noted earlier, the purpose of a targeted ameliorative scheme is also pertinent to this contextual factor. Where that purpose is consistent with s. 15 and the challenged exclusion is not premised on a misconception of the actual needs, capacities and circumstances of those excluded, the exclusion will not be discriminatory: see **Lovelace, supra** at § 87.

[269] On the other hand, it is a strong indication of discrimination if legislation ignores the actual needs and capacities of the claimants, especially if the provisions serve none of the ameliorative objectives of the scheme. For example in **Vriend, supra**, the exclusion of sexual orientation as a protected ground under Alberta's **Individual Rights Protection Act** not only failed to take account of the circumstances of the excluded group but was exactly contrary to the legislation's stated purpose to recognize and protect the rights of all persons: see Major, J. at § 190 - 192. In short, the legislation

did not address the actual circumstances or needs of the claimants and their exclusion did nothing to further its ameliorative purpose.

[270] Moreover, where both the comparator group and the claimants are described by an enumerated (or analogous) ground of discrimination, the issue of correspondence is intricate. Benefit schemes, in particular, will rarely be perfectly aligned with both the circumstances and needs of potential beneficiaries or with the overall purpose of the scheme. This is particularly so in no-fault, large scale compensation schemes like workers' compensation in which achieving simplicity, efficiency and consistency in determining entitlement will often require less than full attention to individual needs and circumstances. It follows, when considering a claim of discrimination in such a context, that to insist upon perfect correspondence between the benefits and the claimants' circumstances would be unrealistic.

[271] This was recognized by the Court in **Law, supra**. Iacobucci, J. at § 105 was clear that legislation need not always correspond perfectly with social reality in order to comply with s. 15(1) of the *Charter*. Particularly where there are no other *indicia* of discrimination, the legislature is "... entitled ... to premise remedial legislation upon informed generalizations without running afoul of s. 15(1) of the *Charter*." Moreover, correspondence will not necessarily to be found lacking simply because the claimants have needs similar to those of the comparator group. As Iacobucci, J. said in **Lovelace** at § 75 :

> ... the correspondence consideration requires more than establishing a common need. If only a common need were the norm, governments would be placed in the untenable position of having to rank populations without paying attention to the unique circumstances and capabilities of potential program beneficiaries.
> (emphasis added)

[272] The workers' compensation scheme does not respond either fully or precisely to the needs of all injured workers. The claimants, Mr. Martin and Ms. Laseur, have needs equally as compelling as those of persons in the comparator group. However, neither of these facts necessarily supports the conclusion that the impugned provisions are discriminatory. A benefits scheme is not constitutionally required to treat all in need identically or perfectly. It must not, however, demean the human dignity of those excluded from its operation. The crux of the inquiry was succinctly stated by Iacobucci, J. in **Lovelace**: does the legislative scheme have an ameliorative purpose which is consistent with s. 15(1) and does the exclusion of the claimants from it undermine that purpose by being premised on a misunderstanding of the claimants actual needs, capacities and circumstances? at § 87.

[273] There can be no dispute that workers' compensation legislation has an ameliorative purpose which is consistent with s. 15(1) of the *Charter*. Such legislation was put in place early in the twentieth century to relieve injured workers from the many obstacles that stood in the way of achieving just compensation for work place injuries. The key question, in my view, is whether the limitations on recovery for chronic pain are premised on a misunderstanding of the claimants' actual needs, capacities and circumstances.

[274] The process that resulted in the 1999 legislation tends to negate the suggestion that it is based on stereotypical views or attitudes. The Board sought and received medical advice in the form of Dr. Murray's report, the contents of which are unchallenged on these appeals.

[275] As noted above, chronic pain presents a difficult challenge to the workers' compensation system. In his report prepared for the Board, Dr. Murray pointed out that chronic pain is a complex of physical, psychological, emotional, social and cultural factors that interplay to produce and continue this syndrome. The chronic pain provisions in issue here attempt to respond to this reality in several ways. First, they relax the general requirement of causation by providing that the Functional Restoration Program will be available to a worker suffering chronic pain and who has identified pain as the reason for a loss of earnings subsequent to a compensable injury: see FRP Regulations s. 5. Early return to work is fostered by Part I of the FRP Regulations and by denying permanent benefits, restricting the availability of temporary benefits and by limiting participation in the FRP to those injured within the previous 12 months.

[276] It follows from this, in my view, that the analysis in relation to correspondence and ameliorative effect cannot look simply at the payments available under the provisions as contrasted with the payments available to other injured workers. A major point of Dr. Murray's report, and one that is reflected to at least some degree in the provisions, is that early return to work, even while the pain is ongoing, is the best approach for the patient. The potential of these provisions to improve the chances of

return to work is relevant to the question of whether they correspond to the circumstances and needs of the claimants and whether they have an ameliorative purpose or effect, quite apart from the nature of the financial benefits or treatments they provide.

[277] On the record before us, it would be naive to conclude that the purpose of these provisions was only to ameliorate the situation of workers with chronic pain. The enactment was also motivated by the need to contain costs and bring needed consistency to the large number of claims coming to the Board. We were referred to various excerpts from **Hansard Debates**, Nova Scotia Legislature, December 1, 1998 which make this very clear (see, for example, the comments of the Minister of Labour at page 4733 and of Members of the Select Committee on the **Workers' Compensation Act**, Mr. Corbett, at page 4738, Mr. Baker at page 4749 and Mr. Parker at page 4754).

[278] However, the fact that the amelioration of the position of those with chronic pain was not the only purpose of the legislation does not fully answer the questions of whether it has an ameliorative effect or of whether it corresponds to the circumstances of the claimants. For example, the limitation of the "drop-out" provision in **Granovsky, supra** to those with permanent disability was, no doubt, motivated in part by cost. This did not detract from the ameliorative purpose of the provision or from the conclusion that it corresponded to the circumstances of the claimants.

[279] WCAT was dismissive of the submission that the challenged provisions addressed the circumstances of injured workers with chronic pain. In its analysis (in the **Martin** case) of whether the provisions fall under s. 15(2) of the *Charter* WCAT said:

> The Panel is not satisfied that the FRP Regulations address all or even a part of the elements identified by Dr. Murray. By way of illustration, there is no evidence before us that would allow us to conclude that benefits limited to a four week time period are capable of ameliorating a chronic pain sufferer's condition. This time period appears to reflect the minimum time period referred to in Dr. Murray's report for an individual's return to work, provided the work is of a sedentary nature, and the worker has only sustained a soft tissue injury without nerve root involvement. Given that not all chronic pain sufferers are returning to work of a sedentary nature, by limiting benefits to four weeks, the FRP Regulations are not ameliorating the condition of chronic pain sufferers who fall outside of this type of injury. (ab, tab 8, p.8)
> (emphasis added)

[280] This is, in my view, a wholly erroneous assessment of the provisions in light of Dr. Murray's report. There is a serious error of fact and logic in WCAT's comparison of the recovery periods for return to work referred to in Dr. Murray's Report and the four week duration of the FRP Program established under the challenged provisions. It will be helpful to reproduce the relevant portion of Dr. Murray's Report:

> Guidelines developed for "usual recovery times" or "duration times" (the term used by the Alberta Workers' Compensation Board) give an estimate of the average time required for workers to return to work after various work related injuries and treatment. They list a number of conditions and give the minimum and maximum time for return to work. The maximum time is not necessarily a definite return to work date, but rather the time when questions should be asked as to why the worker has not returned to work (RTW). The questions can be answered by medical reporting or by independent examination. As example is as follows:
>
> Cervical Sprain or Strain
> (Whiplash or Non-Whiplash Soft Tissue Injury Without Nerve Root Involvement)
>
> | ICD-9 CODE | JOB CLASSIFICATION | RTW MIN/MAX |
> |---|---|---|
> | 723.1 | Sedentary Work | 0 - 4 weeks |
> | | Light Work | 0 - 5 weeks |
> | | Medium Work | 0 - 6 weeks |
> | | Heavy/Very Heavy Work | MA opinion based on medical reporting if layoff exceeds 6 weeks |

[281] The recovery times referred to in Dr. Murray's Report are measured from the time of injury not from the time of diagnosis of chronic pain. The four week duration of the FRP is not related to the sorts of usual recovery periods referred to in Dr. Murray's Report. The four week program established under the FRP Regulations comes into play only following the diagnosis of chronic pain. This, by definition, can occur only after the normal recovery time for the type of personal injury that precipitated, triggered or pre-dated the chronic pain. It is, therefore, wrong to compare, as the Tribunal did in the quoted passage, the usual recovery periods set out in Dr. Murray's report with the four week duration of the FRP. As the history of benefits and the medical evidence in these appeals shows, a chronic pain diagnosis and the applicability of the challenged provisions do not arise until after, and perhaps long after, the usual periods of recovery have passed. The four week FRP may come into play up to twelve months after the initial injury.

[282] WCAT's dismissal in these cases of the FRP as failing to address any of the elements identified by Dr. Murray is in sharp contrast to the Tribunal's reasons in the **Doward** case: **Workers' Compensation Appeals Tribunal of Nova Scotia Decision No. 96-010D** dated May 21, 1996. In that decision, the Tribunal sets out a summary of Dr. Murray's testimony and recounts that Dr. Murray was in general agreement with the approach taken by the impugned provisions:

> Dr. Murray agreed with the manner in which the Board is approaching chronic pain. Although he was not personally involved in formulating the particulars of the

> program, Dr. Murray stated that he was pleased to see that a chronic pain program had been initiated by the Board. He advised that the program is proactive and employs a multidisciplinary approach.
>
> Dr. Murray was questioned about the FRP Regulations which came into force on March 3, 1996. He advised that he was not directly involved in the formulation of the FRP Regulations. With respect to the multifaceted pain services noted in s. 7(1) of the FRP Regulations, Dr. Murray stated that he was uncertain as to the amount of time he would have chosen for the provision of the services discussed in the FRP Regulations; however, he advised that if the program is organized, four weeks would be sufficient for this type of program in order to improve functioning through exercise. ..... (p. 6)
> (emphasis added)

[283] While the correspondence between the provisions and the circumstances of the claimants is far from precise and the amelioration of their position is not its only purpose, I think WCAT unreasonably dismissed these aspects of the provisions. For all their limitations, the chronic pain provisions respond to Dr. Murray's recommendations. They de-emphasize the need for a causal connection between the injury and the chronic pain. The improbability of chronic pain sufferers receiving a permanent impairment rating under the general provisions of the **Act** must also be borne in mind. The provisions also tend to promote early intervention and early return to work. They simplify, clarify and make more consistent the approach to be followed by the Board once chronic pain is recognized.

[284] To conclude on this point, my consideration of these two related contextual factors does not lend support to the claim of discrimination by Mr. Martin and Ms. Laseur. The overall purpose of the workers' compensation scheme is unquestionably ameliorative. There is considerable correspondence between the provisions and the circumstances, capacities and needs of injured workers with chronic pain as identified by

Dr. Murray.

(iv) nature of the affected interest:

[285] In **Lovelace, supra**, the Court adopted the following passage from L'Heureux-Dubé, J. in **Egan** in relation to this fourth contextual factor at § 88:

> Although a search for economic prejudice may be a convenient means to begin a s. 15 inquiry, a conscientious inquiry must not stop here. The discriminatory calibre of a particular distinction cannot be fully appreciated without also evaluating the constitutional and societal significance of the interest(s) adversely affected. Other important considerations involve determining whether the distinction somehow restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society (e.g. voting, mobility). Finally, does the distinction constitute a complete non-recognition of a particular group? It stands to reason that a group's interests will be more adversely affected in cases involving complete exclusion or non-recognition than in cases where the legislative distinction does recognize or accommodate the group, but does so in a manner that is simply more restrictive than some would like.
> (emphasis added)

[286] Economic prejudice following from the provisions has been established in the **Martin** appeal: absent these provisions, Mr. Martin would have been entitled to a short additional period of earnings loss benefits. No economic prejudice has been shown with respect to Ms. Laseur; her condition was found to be permanent, but not to have given rise to a permanent medical impairment. Moreover, it is a fair inference that the economic prejudice flowing from these provisions over the run of cases is quite limited. The causal connection between the injury and the chronic pain will often be problematic. Even where causation is established, the absence of significant, objective, physical findings at the site of injury will be a formidable obstacle in many cases. I say this to emphasize that the general provisions of the workers' compensation scheme which

apply to disabled workers in the comparator group do not, for those like the claimants, with chronic pain, automatically lead to permanent, or even long-term compensation.

[287] I also emphasize that this is not a case of complete exclusion or non-recognition of the interests of injured workers with chronic pain. No doubt, the recognition and accommodation are more restrictive than anyone would like. But for all its limitations, the provisions are based on expert medical advice and attempt to address this multi-faceted and complex condition.

(v) Conclusion

[288] I return to the key inquiry: would a reasonable person, in circumstances similar to those of the claimants and taking account of the various contextual factors, consider that the chronic pain provisions demean their human dignity? To paraphrase Iacobucci, J. in **Law** at § 99, do these provisions in purpose or effect, violate essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice? Do the provisions perpetuate the view that injured workers with chronic pain are less capable or less worthy of recognition or value as human beings or as members of Canadian society?

[289] In my view, the answer to these questions is no. While the provisions effectively bar access for workers with chronic pain to permanent or even long-term benefits under the general workers' compensation scheme, availability of such benefits, even apart from the chronic pain provisions, is highly problematic for injured workers with

chronic pain in any event. Moreover, the best available medical advice favours getting away from the traditional, acute pain approaches to chronic pain and instead, putting the emphasis on early intervention and early return to work. I am not satisfied that injured workers with chronic pain have been victims of stereotyping or prejudice distinct from that of other disabled workers seeking compensation. The needs of all injured workers, including the claimants, cannot be doubted. I do not think, however, that the chronic pain provisions, viewed in the context of a targeted, ameliorative scheme like workers' compensation and of the problematic place of chronic pain in that scheme would be seen as demeaning. Instead, these provisions would be seen as one of many examples of the workers' compensation scheme being unable to fully meet the legitimate needs of all.

[290] I conclude that the chronic pain provisions challenged in these appeals do not infringe the equality rights guaranteed under s. 15 of the *Charter*. It is not necessary to address arguments relating to s. 15(2) or s. 1.

IV. DISPOSITION:

[291] I would allow the appeals and set aside the decisions of WCAT. I would dismiss the cross-appeals. I would make no order as to costs.

Cromwell, J.A.

Concurred in:

Freeman, J.A.

Flinn, J.A.

Appendix I

Functional Restoration (Multi-Faceted Pain Services) Program Regulations

made under subsections 10(6) & (7) and Section 184 of the
Workers' Compensation Act
S.N.S. 1994-95, c. 10
O.I.C. 96-213 (March 29, 1996), N.S. Reg. 57/96

Citation

1 These regulations may be cited as the Functional Restoration (Multi-Faceted Pain Services) Program Regulations.

Definitions

2 In these regulations,

(a) "Appeal Board" means the Appeal Board constituted pursuant to the former Act or the Workers' Compensation Transitional Appeal Regulations made by Order in Council 95-411 on May 23, 1995;

(b) "chronic pain" means pain

(i) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered, or otherwise predated the pain, or

(ii) disproportionate to the type of personal injury that precipitated, triggered, or otherwise predated the pain;

and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed;

(c) "compensation" includes earnings-replacement benefits, permanent-impairment benefits, annuities, medical aid, and rehabilitation programs and services;

(d) "former Act" means Chapter 508 of the Revised Statutes of Nova Scotia, 1989;

(e) "Functional Restoration (Multi-Faceted Pain Services) Program" means the Functional Restoration (Multi-Faceted Pain Services) Program of the Board established pursuant to these regulations for the purpose of preventing and managing chronic pain through early intervention; and

(f) "normal recovery time" means the estimate by the Board of the normal time required for workers with a specific type of personal injury to return to work after the injury.

Inclusion of chronic pain in operation of Act

3 (1) Chronic pain is included in the operation of Part I of the Act, subject to the terms

and conditions set out in these regulations.

(2) For greater certainty, except as provided in these regulations, chronic pain is and is deemed always to have been excluded from the operation of Part I of the Act, and no compensation is payable in connection with chronic pain except in accordance with these regulations.

Functional Restoration (Multi-Faceted Pain Services) Program

4 There is hereby established a program of the Board known as the Functional Restoration (Multi-Faceted Pain Services) Program.

5 A worker may be designated by the Board as a participant in the Functional Restoration (Multi-Faceted Pain Services) Program if

(a) the worker is suffering from chronic pain; and

(b) the worker has, at the time of designation, a loss of earnings subsequent to a compensable injury and identifies pain and pain-related symptoms as the reason for the loss of earnings.

6 No worker may be designated as a participant in the Functional Restoration (Multi-Faceted Pain Services) Program if more than twelve months have elapsed since the worker's date of injury.

7 (1) Participation in the Functional Restoration (Multi-Faceted Pain Services) Program is limited to four weeks.

(2) During a worker's participation in the Functional Restoration (Multi-Faceted Pain Services) Program, the worker is eligible to receive a benefit equal to the amount of temporary earnings-replacement benefits the worker would have received if the worker were eligible for temporary earnings-replacement benefits.

Application

8 (1) These regulations apply to all decisions, orders or rulings made pursuant to the Act on or after February 1, 1996.

(2) For greater certainty, these regulations apply to any decision, order or ruling made on or after February 1, 1996, concerning eligibility for compensation or the calculation or re-calculation of an amount of compensation.

(3) Despite subsections (1) and (2), where a decision, order or ruling was made by the Board or the Appeal Board before February 1, 1996, finding that a worker has a permanent impairment in connection with chronic pain but not fixing the worker's permanent-impairment rating, a rating shall be awarded pursuant to Section 34 and compensation may be paid accordingly pursuant to Sections 226, 227 or 228 of the Act, as the case may be.

(4) Despite subsections (1) and (2), where a decision, order or ruling was made by the Board or the Appeal Board before February 1, 1996, fixing a worker's permanent-

impairment rating, the rating is deemed to be the rating to which the worker is entitled and compensation shall be paid accordingly pursuant to Sections 226, 227 or 228 of the Act, as the case may be.

Appendix II

10A In this Act, "chronic pain" means pain

(a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or

(b) disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain,

and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed.

10B Notwithstanding this Act, Chapter 508 of the Revised Statutes, 1989, or any of its predecessors, the *Interpretation Act* or any other enactment,

(a) except for the purpose of Section 28, a personal injury by accident that occurred on or after March 23, 1990, and before February 1, 1996, is deemed never to have included chronic pain;

(b) a personal injury by accident that occurred before February 1, 1996, is deemed never to have created a vested right to receive compensation for chronic pain;

(c) no compensation is payable to a worker in connection with chronic pain, except as provided in this Section or in Section 10E or 10G or, in the case of a worker injured on or after February 1, 1996, as provided in the Functional Restoration (Multi-Faceted Pain Services) Program Regulations contained in Order in Council 96-207 made on March 26, 1996, as amended from time to time and, for greater certainty, those regulations are deemed to have been validly made pursuant to this Act and to have been in full force and effect on and after February 1, 1996.

10C In Sections 10D and 10E, "former Act" means Chapter 508 of the Revised Statutes.

10D (1) Subject to subsection (2), where a worker

(a) was injured before March 23, 1990;

(b) was granted a permanent partial disability or a permanent total disability benefit under Section 43 or 45 of the former Act as a result of the injury referred to in clause (a); and

(c) was granted an amended interim earnings loss benefit pursuant to the Amended Interim Earnings Loss Policy adopted by the Board on November 24, 1993, pursuant to the former Act and the worker's benefit was reduced on or before the coming into force of this Act,

the Board shall pay to the worker the benefit the worker was receiving pursuant to the Amended Interim Earnings Loss Policy adopted by the Board on November 24, 1993, pursuant to the former Act and, for greater certainty, this benefit is in substitution for any permanent partial disability or permanent total disability the worker was receiving with respect to the claim on which the amended interim earnings loss benefit was paid where it is a greater benefit on the coming into force of this Section.

(2) Where a worker referred to in subsection (1) has an appeal pending before the Workers' Compensation Appeals Tribunal on the coming into force of this Section, the worker is entitled to the benefit referred to in subsection (1) only if the worker abandons the appeal before the Appeals Tribunal.

(3) For greater certainty, where a worker abandons an appeal pursuant to subsection (2), the appeal is null and void and no further appeal may be taken with respect to the matter.

(4) For greater certainty, the benefit referred to in subsection (1) shall be paid to the worker until the worker attains the age of sixty-five years.

(5) For the purpose of this Section, an appeal does not include an appeal seeking medical aid.

10E Where a worker

(a) was injured on or after March 23, 1990, and before February 1, 1996;

(b) has chronic pain that commenced following the injury referred to in clause (a); and

(c) as of November 25, 1998, was in receipt of temporary earnings-replacement benefits; or

(d) as of November 25, 1998, had a claim under appeal

(i) for reconsideration,

(ii) to a hearing officer,

(iii) to the Appeals Tribunal, or

(iv) to the Nova Scotia Court of Appeal,

or whose appeal period with respect to an appeal referred to in subclauses (i) to (iv) had not expired,

the Board shall pay to the worker a permanent-impairment benefit based on a permanent medical impairment award of twenty-five per cent multiplied by fifty per cent, and an extended earnings replacement benefit, if payable pursuant to Sections 37 to 49, multiplied by fifty per cent and any appeal referred to in clause (d) is null and void regardless of the issue or issues on appeal.

10F A decision of the Appeals Tribunal on a matter referred to in Section 10E is

not subject to appeal, review or challenge in any court.

10G A worker who is entitled to receive a benefit pursuant to Section 10E may also be entitled to receive medical aid and Sections 102 to 111 apply *mutatis mutandis*.

10H (1) The Governor in Council may make regulations to implement the benefits referred to in Sections 10D to 10G.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the *Regulations Act*.

10I (1) The benefits referred to in Sections 10D and 10E shall be paid effective January 1, 1999.

(2) For greater certainty, a worker referred to in Sections 10D or 10E is not entitled to a benefit pursuant to those Sections for a period of time prior to January 1, 1999.