Nova Scotia (Workers' Compensation Board) *v.* Martin; Nova Scotia (Workers' Compensation Board) *v.* Laseur, [2003] 2 S.C.R. 504, 2003 SCC 54

Donald Martin *Appellant*

v.

Workers' Compensation Board of Nova Scotia and Attorney General of Nova Scotia *Respondents*

and

Nova Scotia Workers' Compensation Appeals Tribunal, Ontario Network of Injured Workers Groups, Canadian Labour Congress, Attorney General of Ontario, Attorney General of British Columbia and Workers' Compensation Board of Alberta *Interveners*

and between

Ruth A. Laseur *Appellant*

v.

Workers' Compensation Board of Nova Scotia and Attorney General of Nova Scotia *Respondents*

and

Nova Scotia Workers' Compensation Appeals Tribunal, Ontario Network of Injured Workers Groups,

Canadian Labour Congress,
Attorney General of Ontario,
Attorney General of British Columbia and
Workers' Compensation Board of Alberta *Interveners*

Indexed as: Nova Scotia (Workers' Compensation Board) *v.* Martin; Nova Scotia (Workers' Compensation Board) *v.* Laseur

Neutral citation: 2003 SCC 54.

File Nos.: 28372, 28370.

2002: December 9; 2003: October 3.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for nova scotia

Administrative law — Workers' Compensation Appeals Tribunal — Jurisdiction — Charter issues — Constitutional validity of provisions of Appeals Tribunal's enabling statute — Whether Appeals Tribunal has jurisdiction to apply Canadian Charter of Rights and Freedoms — Workers' Compensation Act, S.N.S. 1994-95, c. 10, s. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Constitutional law — Charter of Rights — Equality rights — Workers' compensation legislation excluding chronic pain from purview of regular workers' compensation system and providing in lieu of benefits normally available to injured

workers four-week functional restoration program beyond which no further benefits are available — Whether legislation infringes s. 15(1) of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter — Workers' Compensation Act, S.N.S. 1994-95, c. 10, s. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Administrative law — Boards and tribunals — Jurisdiction — Constitutional issues — Powers of administrative tribunals to determine questions of constitutional law — Appropriate test.

The appellants, L and M, both suffer from the disability of chronic pain attributable to a work-related injury. M worked as a foreman and sustained a lumbar sprain. In the following months, he returned to work several times, but recurring pain required him to stop. He attended a work conditioning and hardening program. During this period, the Workers' Compensation Board of Nova Scotia provided him with temporary disability benefits and rehabilitation services. When his temporary benefits were discontinued, M sought review of this decision, but his claim was denied by the Board. L was employed as a bus driver and injured her back and her right hand when she slipped and fell from the bumper of her bus. She received temporary disability benefits. Although L attempted to return to work on several occasions, she found that performing her duties aggravated her condition. She was denied a permanent partial disability award and vocational rehabilitation assistance. M and L appealed the Board's decisions to the Workers' Compensation Appeals Tribunal on the ground that the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations* and portions of s. 10B of the *Workers' Compensation Act* infringed s. 15(1) of the *Canadian Charter of Rights and Freedoms*. These provisions exclude chronic pain from the purview of the regular workers' compensation system and

provide, in lieu of the benefits normally available to injured workers, a four-week Functional Restoration Program beyond which no further benefits are available. The Board challenged the Appeals Tribunal's jurisdiction to hear the *Charter* argument.

The Appeals Tribunal affirmed its jurisdiction to apply the *Charter* and allowed M's appeal on the merits, holding that the Regulations and s. 10B(c) of the Act violated s. 15 of the *Charter* and that these violations were not justified under s. 1. M was awarded temporary benefits from August 6 to October 15, 1996. In L's appeal, the Appeals Tribunal concluded, based on the reasons given in M's appeal, that s. 10A and s. 10B(b) and (c) of the Act also violated s. 15(1) of the *Charter* and were not saved by s. 15(2) or s. 1; however, the Appeals Tribunal found that while L suffered from chronic pain attributable to her work injury, her permanent medical impairment rating under the applicable guidelines was 0 percent, thus barring her from obtaining permanent impairment or vocational rehabilitation. The Board appealed the Appeals Tribunal's *Charter* conclusions, M cross-appealed the cut-off of benefits as of October 15, 1996, and L cross-appealed the refusal to award benefits. The Court of Appeal allowed the Board's appeals and dismissed the cross-appeals. The court found that the Appeals Tribunal did not have jurisdiction to consider the constitutional validity of the Act and that, in any event, the chronic pain provisions did not demean the human dignity of the claimants and thus did not violate s. 15(1) of the *Charter*.

Held: The appeals should be allowed. Section 10B of the Act and the Regulations in their entirety infringe s. 15(1) of the *Charter* and the infringement is not justified under s. 1. The challenged provisions are of no force or effect by operation of s. 52(1) of the *Constitution Act, 1982*. The general declaration of invalidity is postponed for six months from the date of this judgment. In M's case, the

decision rendered by the Appeals Tribunal is reinstated. L's case is returned to the Board.

The Constitution is the supreme law of Canada and, by virtue of s. 52(1) of the *Constitution Act, 1982,* the question of constitutional validity inheres in every legislative enactment. From this principle of constitutional supremacy flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts. To allow an administrative tribunal to decide *Charter* issues does not undermine the role of the courts as final arbiters of constitutionality in Canada. Administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard. In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision-makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases.

The Court of Appeal erred in concluding that the Appeals Tribunal did not have jurisdiction to consider the constitutionality of the challenged provisions of the Act and the Regulations. Administrative tribunals which have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. In applying this approach, there is no need to draw any distinction between "general" and "limited" questions of law. Explicit jurisdiction must be found in the terms of the statutory grant of authority. Implied jurisdiction must be discerned by looking at the

statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself. The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption by pointing to an explicit withdrawal of authority to consider the *Charter*; or by convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* (or a category of questions that would include the *Charter*, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations. To the extent that *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, is inconsistent with this approach, it should no longer be relied upon.

The Appeals Tribunal could properly consider and decide the *Charter* issue raised in this case. The legislature expressly conferred on the Appeals Tribunal the authority to decide questions of law by providing, in s. 252(1) of the Act, that it "may confirm, vary or reverse the decision of a hearing officer" exercising the authority conferred upon the Board by s. 185(1) of the Act to "determine all questions of fact and law arising pursuant to this Part". Other provisions of the Act also confirm the legislature's intention that the Appeals Tribunal decide questions of law, including s. 256(1), which provides for a further appeal to the Court of Appeal "on any question of law". This suggests that the Appeals Tribunal may deal initially with such questions. The Appeals Tribunal thus has explicit jurisdiction to decide questions of

law arising under the challenged provisions, a jurisdiction which is presumed to include the authority to consider their constitutional validity. This presumption is not rebutted in this case, as there is no clear implication arising from the Act that the legislature intended to exclude the *Charter* from the scope of the Appeals Tribunal's authority. Even if there had been no express provision endowing the Appeals Tribunal with authority to consider and decide questions of law arising under the Act, an examination of the statutory scheme set out by the Act would lead to the conclusion that it has implied authority to do so.

The Court of Appeal also erred in concluding that the challenged provisions of the Act and the Regulations did not infringe s. 15(1) of the *Charter*. The appropriate comparator group for the s. 15(1) analysis in this case is the group of workers subject to the Act who do not have chronic pain and are eligible for compensation for their employment-related injuries. By entirely excluding chronic pain from the application of the general compensation provisions of the Act and limiting the applicable benefits to a four-week Functional Restoration Program for workers injured after February 1, 1996, the Act and the Regulations clearly impose differential treatment upon injured workers suffering from chronic pain on the basis of the nature of their physical disability, an enumerated ground under s. 15(1) of the *Charter*. The view that since both the claimants and the comparator group suffer from physical disabilities, differential treatment of chronic pain within the workers' compensation scheme is not based on physical disability must be rejected. Differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated. Distinguishing injured workers with chronic pain from those without is still a disability-based distinction. Although, under the current guidelines, L would be found to have a 0 percent impairment rating and would thus be denied benefits anyway, deprivation of access to

an institution available to others, even though the individual bringing the claim would not necessarily derive immediate benefits from such access, constitutes differential treatment. In the context of the Act, and given the nature of chronic pain, the differential treatment is discriminatory. It is discriminatory because it does not correspond to the actual needs and circumstances of injured workers suffering from chronic pain, who are deprived of any individual assessment of their needs and circumstances. Such workers are, instead, subject to uniform, limited benefits based on their presumed characteristics as a group. The scheme also ignores the needs of those workers who, despite treatment, remain permanently disabled by chronic pain. Nothing indicates that the scheme is aimed at improving the circumstances of a more disadvantaged group, or that the interests affected are merely economic or otherwise minor. On the contrary, the denial of the reality of the pain suffered by the affected workers reinforces widespread negative assumptions held by employers, compensation officials and some members of the medical profession. A reasonable person in circumstances similar to those of L and M, fully apprised of all the relevant circumstances and taking into account the relevant contextual factors, would conclude that the challenged provisions have the effect of demeaning the dignity of chronic pain sufferers.

The infringement of L's and M's equality rights cannot be justified under s. 1 of the *Charter*. The first objective of maintaining the financial viability of the Accident Fund is not pressing and substantial. Budgetary considerations in and of themselves cannot justify violating a *Charter* right, although they may be relevant in determining the appropriate degree of deference to governmental choices based on a non-financial objective. Likewise, the second objective of developing a consistent legislative response to chronic pain claims cannot stand on its own. Mere administrative expediency or conceptual elegance cannot be sufficiently pressing and

substantial to override a *Charter* right. This objective only becomes meaningful when examined with the third objective of avoiding fraudulent claims based on chronic pain. Developing a consistent legislative response to the special issues raised by chronic pain claims — such as determining whether the pain is actually caused by the work-related accident and assessing the relevant degree of impairment — in order to avoid fraudulent claims is a pressing and substantial objective. The challenged provisions of the Act and the Regulations are rationally connected to this objective. It is obvious, however, that the blanket exclusion of chronic pain from the workers' compensation system does not minimally impair the rights of chronic pain sufferers. The challenged provisions make no attempt whatsoever to determine who is genuinely suffering and needs compensation, and who may be abusing the system. They ignore the very real needs of the many workers who are in fact impaired by chronic pain and whose condition is not appropriately remedied by the four-week Functional Restoration Program. The fourth objective is to implement early medical intervention and return to work as the optimal treatment for chronic pain. Assuming that this objective is pressing and substantial and that the challenged provisions are rationally connected to it, they do not minimally impair the rights of chronic pain sufferers. No evidence indicates that an automatic cut-off of benefits regardless of individual needs is necessary to achieve that goal. This is particularly true with respect to ameliorative benefits which would actually facilitate return to work, such as vocational rehabilitation, medical aid and the rights to re-employment and accommodation. Moreover, the legislation deprives workers whose chronic pain does not improve as a result of early medical intervention and who return to work from receiving any benefits beyond the four-week Functional Restoration Program. Others, like L, are not even admissible to this program because of the date of their injuries. The deleterious effects of the challenged provisions on these workers clearly outweigh their potential beneficial effects.

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Overruled: *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; **discussed:** *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; **referred to:** *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3; *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Bell Canada v. Canada (Human Rights Commission)*, [2001] 2 F.C. 392, rev'd [2001] 3 F.C. 481; *Canada (Minister of Citizenship and Immigration) v. Reynolds* (1997), 139 F.T.R. 315; *McLeod v. Egan*, [1975] 1 S.C.R. 517; *David Taylor & Son, Ltd. v. Barnett*, [1953] 1 All E.R. 843; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Lavoie v. Canada*, [2002] 1 S.C.R. 769, 2002 SCC 23; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37; *R. v. Swain*, [1991] 1 S.C.R. 933; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *Gosselin v.*

Quebec (Attorney General), [2002] 4 S.C.R. 429, 2002 SCC 84; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *White v. Slawter* (1996), 149 N.S.R. (2d) 321; *Marinelli v. Keigan* (1999), 173 N.S.R. (2d) 56.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 15, 24(1).

Constitution Act, 1982, s. 52(1).

Constitutional Questions Act, R.S.N.S. 1989, c. 89.

Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96, ss. 2(b), 3, 4, 5, 6, 7, 8.

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APPEALS from judgments of the Nova Scotia Court of Appeal (2000), 192 D.L.R. (4th) 611, 188 N.S.R. (2d) 330, 587 A.P.R. 330, 26 Admin L.R. (3d) 90, 84 C.R.R. (2d) 246, [2000] N.S.J. No. 353 (QL), 2000 NSCA 126, allowing the appeals and dismissing the cross-appeals from the decisions of the Workers' Compensation Appeals Tribunal. Appeals allowed.

Kenneth H. LeBlanc, Anne S. Clark, Anne Derrick, Q.C., and *Patricia J. Wilson,* for the appellants.

Brian A. Crane, Q.C., *David P. S. Farrar* and *Janet Curry*, for the respondent the Workers' Compensation Board of Nova Scotia.

Catherine J. Lunn, for the respondent the Attorney General of Nova Scotia.

John P. Merrick, Q.C., and *Louanne Labelle*, for the intervener the Nova Scotia Workers' Compensation Appeals Tribunal.

Ena Chadha and *William Holder*, for the intervener the Ontario Network of Injured Workers Groups.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Robert Earl Charney, for the intervener the Attorney General of Ontario.

Kathryn L. Kickbush, for the intervener the Attorney General of British Columbia.

Written submissions only by *Curtis Craig*, for the intervener the Workers' Compensation Board of Alberta.

The judgment of the Court was delivered by

GONTHIER J. —

I. Introduction

1 Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal

recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians. Ruth Laseur and Donald Martin are the appellants in this case. Both suffer from the disability of chronic pain.

2 Courts are not the appropriate forum for an evaluation of the available medical evidence concerning chronic pain for general scientific purposes. Nevertheless, because disability is an enumerated ground in s. 15(1) of the *Canadian Charter of Rights and Freedoms*, the question whether the way in which a government handles chronic pain in providing services amounts to discrimination is a proper subject of judicial review. More specifically, these appeals concern the constitutional validity of s. 10B of the Nova Scotia *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended by S.N.S. 1999, c. 1 (the "Act"), and of the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96 (the "FRP Regulations"), adopted under that Act. These provisions exclude chronic pain from the purview of the regular workers' compensation system and provide, in lieu of the benefits normally available to injured workers, a four-week Functional Restoration (Multi-Faceted Pain Services) Program (the "Functional Restoration Program") beyond which no further benefits are available. A preliminary issue is whether the Nova Scotia Workers' Compensation Appeals Tribunal (the "Appeals Tribunal"), an administrative tribunal set up to hear appeals from decisions of the Workers' Compensation Board of Nova Scotia (the "Board"), had jurisdiction to decline to apply the challenged provisions to the appellants on the ground that these provisions violate the *Charter*.

3 In my view, the Nova Scotia Court of Appeal erred in concluding that the Appeals Tribunal did not have jurisdiction to consider the constitutionality of the challenged provisions of the Act and the FRP Regulations. I am of the view that the rules concerning the jurisdiction of administrative tribunals to apply the *Charter* established by this Court in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, ought to be reappraised and restated as a clear set of guidelines. Administrative tribunals which have jurisdiction — whether explicit or implied — to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. This presumption may only be rebutted by showing that the legislature clearly intended to exclude *Charter* issues from the tribunal's authority over questions of law. To the extent that the majority reasons in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, are inconsistent with this approach, I am of the view that they should no longer be relied upon.

4 Here, the Nova Scotia legislature expressly conferred on the Appeals Tribunal the authority to decide questions of law by providing, in s. 252(1) of the Act, that it "may confirm, vary or reverse the decision of a hearing officer" exercising the authority conferred upon the Board by s. 185(1) of the Act to "determine all questions of fact and law arising pursuant to this Part". Other provisions of the Act also confirm the legislature's intention that the Appeals Tribunal decide questions of law, for instance by allowing the Chair, under certain circumstances, to direct cases involving "important or novel questions or issues of general significance" or issues of "law and general policy" to the Appeals Tribunal for consideration (s. 199(1) and (2)), and by providing for a further appeal to the Nova Scotia Court of Appeal "on any question of

law" (s. 256(1)). The Appeals Tribunal thus has explicit jurisdiction to decide questions of law arising under the challenged provisions, a jurisdiction which is presumed to include the authority to consider their constitutional validity. This presumption is not rebutted in this case, as there is no clear implication arising from the Act that the legislature intended to exclude the *Charter* from the scope of the Appeals Tribunal's authority.

5 In my view, the Nova Scotia Court of Appeal also erred in concluding that the challenged provisions of the Act and the FRP Regulations did not violate s. 15(1) of the *Charter*. By entirely excluding chronic pain from the application of the general compensation provisions of the Act and limiting the applicable benefits to a four-week Functional Restoration Program for workers injured after February 1, 1996, the Act and the FRP Regulations clearly impose differential treatment upon injured workers suffering from chronic pain on the basis of the nature of their physical disability, an enumerated ground under s. 15(1) of the *Charter*. In the context of the Act, and given the nature of chronic pain, this differential treatment is discriminatory. It is discriminatory because it does not correspond to the actual needs and circumstances of injured workers suffering from chronic pain, who are deprived of any individual assessment of their needs and circumstances. Such workers are, instead, subject to uniform, limited benefits based on their presumed characteristics as a group. The scheme also ignores the needs of those workers who, despite treatment, remain permanently disabled by chronic pain. Nothing indicates that the scheme is aimed at improving the circumstances of a more disadvantaged group, or that the interests affected are merely economic or otherwise minor. On the contrary, the denial of the reality of the pain suffered by the affected workers reinforces widespread negative assumptions held by employers, compensation officials and some members of the

medical profession, and demeans the essential human dignity of chronic pain sufferers. The challenged provisions clearly violate s. 15(1) of the *Charter*.

6 Finally, I am of the view that this violation cannot be justified under s. 1 of the *Charter*. On the one hand, budgetary considerations in and of themselves cannot justify violating a *Charter* right, although they may be relevant in determining the appropriate degree of deference to governmental choices based on a non-financial objective. On the other hand, developing a consistent legislative response to the special issues raised by chronic pain claims — such as determining whether the pain is actually caused by the work-related accident and assessing the relevant degree of impairment — in order to avoid fraudulent claims is a pressing and substantial objective. However, it is obvious that the blanket exclusion of chronic pain from the workers' compensation system does not minimally impair the rights of chronic pain sufferers. The challenged provisions make no attempt whatsoever to determine who is genuinely suffering and needs compensation and who may be abusing the system. They ignore the very real needs of the many workers who are in fact impaired by chronic pain and whose condition is not appropriately remedied by the four-week Functional Restoration Program. A last alleged objective of the legislation is to implement early medical intervention and return to work as the optimal treatment for chronic pain. Assuming that this objective is pressing and substantial and that the challenged provisions are rationally connected to it, however, they do not minimally impair the rights or chronic pain sufferers. No evidence indicates that an automatic cut-off of benefits regardless of individual needs is necessary to achieve that goal. This is particularly true with respect to ameliorative benefits which would actually facilitate return to work, such as vocational rehabilitation, medical aid and the rights to re-employment and accommodation.

7 I thus conclude that the challenged provisions violate the *Charter* and should be struck down.

II. Facts

A. *The Laseur Appeal*

8 The appellant Ruth A. Laseur was employed as a bus driver by the Metropolitan Authority (Metro Transit Division) in Halifax, Nova Scotia. On November 13, 1987, she injured her back and her right hand when she slipped and fell from the bumper of her bus while attempting to clean the windshield. The accident was reported to the Board and she continued to work until February 16, 1988, with occasional days off due to back pain. She received temporary disability benefits for various periods between February 16, 1988, and October 30, 1989, when the benefits were terminated. Although Ms. Laseur attempted to return to work on several occasions, she found that performing her duties aggravated her condition.

9 Ms. Laseur continued to pursue her workers' compensation claim and returned to work part-time on February 23, 1990. A summary report by the Board on February 21, 1990, noted that she had "fallen into the usual chronic pain picture" and considered that there was "no objective evidence to justify a PMI (permanent medical impairment) examination". She worked part-time until April 10, 1990, when her employer required her to return to full-time hours. This aggravated her back pain. She stopped work on April 18, then shortly returned on a part-time basis until July 30. Later, after numerous treatments for her back pain remained ineffective, her family physician ordered her to stop working again.

10 Ms. Laseur appealed the Board's decision to terminate her temporary disability benefits to the Workers' Compensation Appeal Board (as it was then called). In October 1990, the Board awarded her further temporary disability benefits until July 30, 1990, which were to be continued beyond that date until an assessment could be carried out for permanent partial disability benefits. On January 17, 1991, Ms. Laseur attended for an estimation of her permanent medical impairment. The medical services administrator noted that "[t]his 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.

11 After being denied accommodation by her employer and permanent benefits by the Board, Ms. Laseur resigned from her position. She took courses in accounting and business computer programming, which she self-financed, notably by borrowing money from her mother-in-law. She did well and, upon graduating from her last course in 1994, found employment with a software firm in Edmonton. As she continued to suffer from chronic back pain, her work schedule was modified and she was allowed occasionally to work from home. She continued to pursue her claim in Nova Scotia for permanent partial disability benefits retroactive to January 1991. On August 12, 1994, after further medical reports, a case manager determined that Ms. Laseur was not entitled to such benefits or to vocational rehabilitation assistance. The case manager stated 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". This decision was affirmed by a review officer on March 21, 1996, and by a hearing officer on November 19, 1996.

12 Ms. Laseur appealed the Board's decision to the Appeals Tribunal on the ground that portions of s. 10B of the Act, which prevents chronic pain sufferers from obtaining workers' compensation benefits, infringed s. 15 of the *Charter*. The Appeals Tribunal allowed the appeal in part, but held that, even disregarding the effect of s. 10B of the Act, Ms. Laseur was not entitled to permanent impairment benefits or vocational rehabilitation assistance. The Board appealed the Appeals Tribunal's *Charter* conclusions, and Ms. Laseur cross-appealed the refusal to award benefits. The Nova Scotia Court of Appeal allowed the Board's appeal and dismissed Ms. Laseur's cross-appeal.

B. *The Martin Appeal*

13 The appellant Donald Martin worked as a foreman at Suzuki Dartmouth. On February 6, 1996, he lifted a tow dolly and towed it backward about 15 feet. He experienced a sudden and severe pain in his lumbar spine and, although he remained at work that day, he later visited his family physician, who on February 8 diagnosed a lumbar sprain. In the following months, Mr. Martin returned to work several times, but recurring pain required him to stop. He attended a work conditioning and hardening program. During this period, the Board provided him with temporary disability benefits and rehabilitation services. However, his temporary benefits were discontinued on August 6, 1996. Mr. Martin sought review of this decision, but his claim was denied. The review officer noted that there was no demonstrated pathology to support Mr. Martin's complaint of pain, that he was developing early signs of chronic pain and that under the FRP Regulations, chronic pain is generally excluded from the operation of the Act. A further appeal to a hearing officer was also denied.

14 Mr. Martin appealed the Board's decision to the Appeals Tribunal on the ground that the FRP Regulations and s. 10B(c) of the Act infringed s. 15 of the *Charter*. The Board challenged the Appeal Tribunal's jurisdiction to hear the *Charter* argument. The Appeals Tribunal affirmed its jurisdiction to apply the *Charter* and allowed the appeal on the merits, holding that the FRP Regulations and s. 10B(c) of the Act violated s. 15 of the *Charter* and that these violations are not justified under s. 1. Mr. Martin was awarded temporary benefits from August 6 to October 15, 1996. The Board appealed the Appeals Tribunal's *Charter* conclusions, and Mr. Martin cross-appealed the cut-off of benefits as of October 15, 1996. The Nova Scotia Court of Appeal allowed the Board's appeal and dismissed Mr. Martin's cross-appeal.

III. Judgments Below

A. *Nova Scotia Workers' Compensation Appeals Tribunal*

15 In its preliminary decision on jurisdiction in the *Martin* appeal, rendered on August 27, 1999, the Appeals Tribunal held that it had jurisdiction to make determinations of all questions of law, including whether the Act or the FRP Regulations violated the *Charter*. It did so on the basis of s. 185(1) of the Act, which granted the Board "exclusive jurisdiction to inquire into, hear and determine all questions of fact and law arising pursuant to this Part", "[s]ubject to the rights of appeal provided in this Act" and of s. 243, which provided a right of appeal from the Board to the Appeals Tribunal. The Appeals Tribunal applied this decision in the *Laseur* appeal.

16 In the *Martin* appeal, decided on January 31, 2000, the Appeals Tribunal concluded that the FRP Regulations violated s. 15(1) of the *Charter*. It found that

workers suffering from chronic pain were subjected to differential treatment, in that the benefits to which they were entitled were significantly restricted and their cases were not determined having regard to their individual circumstances. The Appeals Tribunal also found that such differential treatment was founded on disability caused by chronic pain, and that that disability constitutes either a physical or a mental disability under s. 15(1). Finally, it held that the operation of the FRP Regulations was discriminatory in that it stereotyped workers with chronic pain and determined their cases without reference to their individual circumstances, thus impacting their dignity by implying that their claims were less valid than those of injured workers without chronic pain.

17 The Appeals Tribunal further found that this infringement was not justified under s. 15(2) or s. 1 of the *Charter*. In its view, the blanket exclusion of chronic pain from the operation of the Act illustrated that the objective of the FRP Regulations was not to ameliorate the condition of workers affected by chronic pain, but rather to provide them with very limited, structured benefits. Turning to s. 1, the Appeals Tribunal found that the objective of the FRP Regulations was pressing and substantial, as they attempted to provide a compensation scheme to individuals whose disability presented a challenge to the normal system. The Appeals Tribunal found, however, that the FRP Regulations did not pass the minimal impairment test, as they effectively precluded chronic pain sufferers from receiving any benefits whatsoever in relation to the frequent permanency of their condition. For the same reasons, the Appeals Tribunal also found that s. 10B(c) of the Act was unconstitutional and that Mr. Martin was entitled to temporary loss of earnings benefits and medical aid up to October 15, 1996.

18 In the *Laseur* appeal, also decided on January 31, 2000, the Appeals Tribunal concluded, based on the reasons given in the *Martin* appeal, that s. 10A and s. 10B(b) and (c) of the Act also violated s. 15(1) of the *Charter* and were not saved by s. 15(2) or s. 1. Even ignoring these provisions, however, the Appeals Tribunal found that while Ms. Laseur suffered from chronic pain attributable to her work injury, her permanent medical impairment rating under the applicable guidelines was 0 percent, thus barring her from obtaining permanent impairment or vocational rehabilitation benefits. While the Appeals Tribunal recognized that this conclusion was inconsistent with its findings on the *Charter* issue, it held that, since the constitutionality of the guidelines had not been raised or argued, it lacked jurisdiction to decide the issue.

B. *Nova Scotia Court of Appeal* (2000), 192 D.L.R. (4th) 611, 2000 NSCA 126

1. Jurisdiction of the Appeals Tribunal to Apply the *Charter*

19 Cromwell J.A. found that the Appeals Tribunal did not have jurisdiction to consider the constitutional validity of the Act. He stated that the relevant inquiry was whether the legislature intended to confer on the tribunal the power to interpret and apply the *Charter*, an intention that should generally not be inferred from the tribunal's authority simply to interpret and apply its own enabling statute. What was needed, in his view, was a grant of authority to the tribunal to interpret or apply "any law necessary to [reaching] its findings", to address "general questions of law", or to "apply the law of the land to the disputes before them" (para. 93). In the absence of an express grant, one may be implied from the statutory scheme and the role of the tribunal. A key consideration is whether the tribunal performs an adjudicative function.

20 Turning to the applicable legislation, Cromwell J.A. stated, at para. 126, that "[t]he linchpin of the argument in favour of [the Appeals Tribunal]'s *Charter* jurisdiction is that it derives this authority by virtue of its appellate role in relation to the Board." Thus, it was necessary first to consider the authority of the Board to subject its enabling statute to *Charter* scrutiny. Cromwell J.A. held that, while s. 185 of the Act conferred on the Board jurisdiction to determine "all questions of fact and law arising pursuant to this Part", other factors indicated that the legislature did not intend it to decide fundamental constitutional issues. The Board was not an adjudicative body, hearing officers could not refuse to apply the Board's policies on grounds of inconsistency with the Act, and the Chair of the Board of Directors could postpone an appeal raising "an issue of law and general policy" for up to 12 months to allow the Board to exercise its policy-making power (s. 200(1)(a)). Thus, Cromwell J.A. concluded, the Board lacked the authority to refuse to apply a provision of the Act on *Charter* grounds.

21 Cromwell J.A. found that, since the Appeals Tribunal's jurisdiction was to "confirm, vary or reverse" the decision of the Board, the latter's lack of jurisdiction to apply the *Charter* destroyed the underpinning of the submission that the former was empowered to do so. In addition, even though the Appeals Tribunal, unlike the Board, was an adjudicative body, there were clear indications of its lack of jurisdiction to apply the *Charter*. It had no express grant of authority to decide general questions of law, but merely to interpret and apply the Act itself; it was not an expert tribunal, since it did not exercise policy-making functions; its members (apart from the Chief Appeal Commissioner) were not required to be members of the bar; and it was required to decide appeals within 60 days, in brief written reasons. Moreover, the Chair could refer "an issue of law and general policy" arising on an appeal to the Board of Directors. Finally, allowing the Appeals Tribunal to decide constitutional questions

could increase its workload and cause delays which parties to other cases would have to bear. This would contradict the objective of eliminating the previous backlog of cases, the objective propelling the 1999 chronic pain amendments.

2. Section 15(1) of the *Charter*

22 Cromwell J.A. first noted that prior to the enactment of the challenged provisions, claims based on chronic pain were problematic under the Act. This had been due to the difficulties in establishing causality, the absence of ascertainable organic cause or objective findings and the lack of response to traditional treatment. To respond to these problems, the legislature enacted the challenged provisions, which "may be taken as a legislative judgment . . . that for workers' compensation purposes, the loss of earnings or permanent impairment flowing from chronic pain are not reasonably attributed to the injury" (para. 181). Turning to the formal s. 15(1) analysis, Cromwell J.A. held that in each case, the appropriate comparison was between workers subject to the Act who have chronic pain and have suffered functional limitation, wage loss or permanent impairment and workers subject to the Act who do not have chronic pain and have suffered functional limitation, wage loss or permanent impairment.

23 Cromwell J.A. went on to find that there was clear differential treatment in Mr. Martin's case. Since Ms. Laseur would not have been entitled to benefits under the guidelines even without the challenged provisions, Cromwell J.A. held that the differential treatment in her case consisted of denial of access to the general scheme of benefits under the Act: *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3. He further found that the differential treatment of the respondents was based on the enumerated ground of "physical or

mental disability". Even though injured workers without chronic pain also suffered from disabilities, differential treatment could exist even where the appropriate comparator group consists of persons who are also described by the same enumerated ground: *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28.

24 Turning to the substantive discrimination analysis, Cromwell J.A. first held that nothing in the record indicated that chronic pain sufferers have been victims of historical disadvantage or stereotyping distinct from that experienced by other disabled workers seeking compensation. As to the relationship between the benefits, the claimants' circumstances and the ameliorative purpose of the impugned law, he found that in the context of a large-scale no-fault compensation scheme, it would be unrealistic to insist upon perfect correspondence. The scheme as a whole had an ameliorative purpose; the question was whether the limitations on recovery were premised on a misunderstanding of the claimants' actual needs, capacities and circumstances. He found that chronic pain was a complex of physical, psychological, emotional, social and cultural factors, and the chronic pain provisions in issue attempted to respond to this reality by providing short-term benefits in the form of participation in the Functional Restoration Program and encouraging early return to work by denying further benefits. Although the need to contain costs and to bring consistency to the large number of claims before the Board also motivated the enactment, this did not negate its ameliorative effects. Cromwell J.A. also found the interest affected by the denial of benefits to be merely economic in nature.

25 Based on these findings, he concluded that the chronic pain provisions did not demean the human dignity of the claimants and thus did not violate s. 15(1). Consequently, it was not necessary to address arguments relating to s. 15(2) or s. 1.

IV. Issues

26 Does the Nova Scotia Workers' Compensation Appeals Tribunal have the authority to refuse to apply, on *Charter* grounds, benefits provisions of its enabling statute?

In addition, the following constitutional questions have been stated by this Court:

1. Do s. 10B of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended, and the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96, infringe the equality rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to question # 1 is yes, does such infringement constitute a reasonable limit prescribed by law and demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

V. Analysis

A. *Jurisdiction of the Appeals Tribunal to Apply the Charter*

1. The Policy Adopted by This Court in the Trilogy

27 This Court has examined the jurisdiction of administrative tribunals to consider the constitutional validity of a provision of their enabling statute in *Douglas College*, *supra*, *Cuddy Chicks*, *supra*, and *Tétreault-Gadoury*, *supra* (together, the

"trilogy"). On each occasion, the Court emphasized the strong reasons, of principle as well as policy, for allowing administrative tribunals to make such determinations and to refuse to apply a challenged provision found to violate the Constitution.

28 First, and most importantly, the Constitution is, under s. 52(1) of the *Constitution Act, 1982*, "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". The invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1). Thus, in principle, such a provision is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects. In that sense, by virtue of s. 52(1), the question of constitutional validity inheres in every legislative enactment. Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state. Obviously, it cannot be the case that every government official has to consider and decide for herself the constitutional validity of every provision she is called upon to apply. If, however, she is endowed with the power to consider questions of law relating to a provision, that power will normally extend to assessing the constitutional validity of that provision. This is because the consistency of a provision with the Constitution is a question of law arising under that provision. It is, indeed, the most fundamental question of law one could conceive, as it will determine whether the enactment is in fact valid law, and thus whether it ought to be interpreted and applied as such or disregarded.

29 From this principle of constitutional supremacy also flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without

the need for parallel proceedings before the courts: see *Douglas College*, *supra*, at pp. 603-4. In La Forest J.'s words, "there cannot be a Constitution for arbitrators and another for the courts" (*Douglas College*, *supra*, at p. 597). This accessibility concern is particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling legislation, so that forcing litigants to refer *Charter* issues to the courts would result in costly and time-consuming bifurcation of proceedings. As McLachlin J. (as she then was) stated in her dissent in *Cooper*, *supra*, at para. 70:

> 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.

Similar views had been expressed by the majority in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.

30 Second, *Charter* disputes do not take place in a vacuum. They require a thorough understanding of the objectives of the legislative scheme being challenged, as well as of the practical constraints it faces and the consequences of proposed constitutional remedies. This need is heightened when, as is often the case, it becomes necessary to determine whether a *prima facie* violation of a *Charter* right is justified under s. 1. In this respect, the factual findings and record compiled by an administrative tribunal, as well as its informed and expert view of the various issues raised by a constitutional challenge, will often be invaluable to a reviewing court: see *Douglas College*, *supra*, at pp. 604-5. As La Forest J. correctly observed in *Cuddy Chicks*, *supra*, at pp. 16-17:

> It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. 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. . . . The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance.

31 Third, administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard: see *Cuddy Chicks, supra*, at p. 17. An error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court. In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases. Therefore, allowing administrative tribunals to decide *Charter* issues does not undermine the role of the courts as final arbiters of constitutionality in Canada.

32 In *Douglas College, supra*, La Forest J. expressly considered and rejected several general arguments made against recognizing that administrative tribunals that have jurisdiction to decide questions of law possess a concomitant jurisdiction to apply the *Charter*. He noted that some authors had pointed to practical concerns with respect to the desirability of such adjudication, such as the lack of legal expertise of some administrative tribunals, the differences between their rules of procedure and evidence and those followed by courts, and the need to maintain the accessibility and timeliness of their procedures. Nevertheless, La Forest J. concluded, at p. 603, that these

considerations, "though not without weight, should [not] dissuade this Court from adopting what has now become the clearly dominant view in the courts of this country". Nor, in my view, should such practical considerations surreptitiously find their way back into the courts' analysis of a particular tribunal's jurisdiction despite a clear expression of legislative intent to endow it with authority to decide questions of law, including constitutional issues. I now turn to the rules governing this analysis.

2. The Applicable Law

33 In view of the policy considerations outlined above, this Court has adopted a general approach for the determination of whether a particular administrative tribunal or agency can decline to apply a provision of its enabling statute on the ground that the provision violates the *Charter*. This approach rests on the principle that, since administrative tribunals are creatures of Parliament and the legislatures, their jurisdiction must in every case "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": *Douglas College*, *supra,* at p. 595; see also *Cuddy Chicks, supra*, at pp. 14-15. When a case brought before an administrative tribunal involves a challenge to the constitutionality of a provision of its enabling statute, the tribunal is asked to interpret the relevant *Charter* right, apply it to the impugned provision, and if it finds a breach and concludes that the provision is not saved under s. 1, to disregard the provision on constitutional grounds and rule on the applicant's claim as if the impugned provision were not in force.

34 Since the subject matter and the remedy in such a case are premised on the application of the *Charter*, the question becomes whether the tribunal's mandate includes jurisdiction to rule on the constitutionality of the challenged provision: see

Douglas College, *supra*, at p. 596; *Cuddy Chicks*, *supra*, at p. 15. This question is answered by applying a presumption, based on the principle of constitutional supremacy outlined above, that all legal decisions will take into account the supreme law of the land. Thus, as a rule, "an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid": *Cuddy Chicks*, *supra*, at p. 13; or, as stated in *Cooper*, *supra*, at para. 46:

> 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.

While the general principles outlined above have been consistently reaffirmed by this Court and remain sound, their application has been fraught with difficulties, as evidenced by the disagreements that arose in *Cooper*, *supra*. I am of the view that it is now time to reappraise the case law and to provide a single set of rules concerning the jurisdiction of administrative tribunals to consider *Charter* challenges to a legislative provision.

35 In each case, the first question to be addressed is whether the administrative tribunal at issue has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision. While, as stated in the trilogy and *Cooper*, *supra*, this question is one of legislative intent, it is crucial that the relevant intent be clearly defined. The question is not whether Parliament or the legislature intended the tribunal to apply the *Charter*. As has often been pointed out, such an attribution of intent would be artificial, given that many of the relevant enabling provisions pre-date the *Charter*: see, e.g., A. J. Roman, "Case Comment: *Cooper v.*

Canada (Human Rights Commission)" (1997), 43 Admin. L.R. (2d) 243, at p. 244; D. M. McAllister, "Administrative Tribunals and the *Charter*: A Tale of Form Conquering Substance", in *L.S.U.C. Special Lectures 1992 — Administrative Law: Principles, Practice and Pluralism* (1993), 131, at p. 150. That attribution of intent would also be incompatible with the principle stated above that the question of constitutional validity inheres in every legislative enactment by virtue of s. 52(1) of the *Constitution Act, 1982*. Therefore, in my view, to the extent that passages in the trilogy and *Cooper*, *supra*, suggest that the relevant legislative intention to be sought is one that the tribunal apply the *Charter* itself, those passages should be disregarded.

36 Rather, one must ask whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide <u>any</u> question of law. If it does, then the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of the *Charter*, unless the legislator has removed that power from the tribunal. Thus, an administrative tribunal that has the power to decide questions of law arising under a particular legislative provision will be presumed to have the power to determine the constitutional validity of that provision. In other words, the power to decide a question of law is the power to decide by applying only valid laws.

37 Often the statute will expressly confer on the tribunal jurisdiction to decide certain questions of law. Thus, in *Cuddy Chicks*, *supra*, the Ontario *Labour Relations Act* granted the Labour Relations Board jurisdiction "to determine all questions of fact or law that arise in any matter before it". This provision was held to provide a clear jurisdictional basis for the Labour Relations Board to consider the constitutional validity of a provision of the *Labour Relations Act* excluding agricultural employees from its purview. Yet, while obviously adequate, such a broad grant of jurisdiction is

not necessary to confer on an administrative tribunal the power to apply the *Charter*. It suffices that the legislator endow the tribunal with power to decide questions of law arising under the challenged provision, and that the constitutional question relate to that provision.

38 This nuance was sometimes overlooked in the trilogy. Thus, in *Douglas College, supra*, La Forest J. held that an arbitration board had jurisdiction to apply the *Charter* to a provision in the collective agreement that the board was empowered to interpret and apply. While that conclusion was certainly correct, courts should use some care in relying on the reasoning used to support it. The British Columbia *Labour Code* provided that the arbitration board had authority to "interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement". La Forest J. found that the *Charter* was intended to be included within the meaning of the term "Act" in that section. With respect, I believe the better view is that, since the board had undisputed jurisdiction to decide questions of law arising under the collective agreement, and the agreement constituted "law" within the meaning of s. 52(1) of the *Constitution Act, 1982*, the board could consider the constitutional validity of the agreement's provisions. This conclusion would have been true regardless of whether the *Charter* is truly an "Act intended to regulate the employment relationship of the persons bound by a collective agreement".

39 In other words, the relevant question in each case is not whether the terms of the express grant of jurisdiction are sufficiently broad to encompass the *Charter* itself, but rather whether the express grant of jurisdiction confers upon the tribunal the power to decide questions of law arising under the challenged provision, in which case the tribunal will be presumed to have jurisdiction to decide the constitutional validity

of that provision. The *Charter* is not invoked as a separate subject matter; rather, it is a controlling norm in decisions over matters within the tribunal's jurisdiction.

40 In cases where the empowering legislation contains an express grant of jurisdiction to decide questions of law, there is no need to go beyond the language of the statute. An express grant of authority to consider or decide questions of law arising under a legislative provision is presumed to extend to determining the constitutional validity of that provision.

41 Absent an explicit grant, it becomes necessary to consider whether the legislator intended to confer upon the tribunal implied jurisdiction to decide questions of law arising under the challenged provision. Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself, particularly when depriving the tribunal of the power to decide questions of law would impair its capacity to fulfill its intended mandate. As is the case for explicit jurisdiction, if the tribunal is found to have implied jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision.

42 Once this presumption has been raised, either by an explicit or implicit grant of authority to decide questions of law, the second question that arises is whether it has been rebutted. The burden of establishing this lies on the party who alleges that

the administrative body at issue lacks jurisdiction to apply the *Charter*. In general terms, the presumption may only be rebutted by an explicit withdrawal of authority to decide constitutional questions or by a clear implication to the same effect, arising from the statute itself rather than from external considerations. The question to be asked is whether an examination of the statutory provisions clearly leads to the conclusion that the legislature intended to exclude the *Charter*, or more broadly, a category of questions of law encompassing the *Charter*, from the scope of the questions of law to be addressed by the tribunal. For instance, an express conferral of jurisdiction to another administrative body to consider *Charter* issues or certain complex questions of law deemed too difficult or time-consuming for the initial decision maker, along with a procedure allowing such issues to be efficiently redirected to such body, could give rise to a clear implication that the initial decision maker was not intended to decide constitutional questions.

43 As La Forest J. stated in *Tétreault-Gadoury*, *supra*, at p. 33, "the power to interpret law is not one which the legislature has conferred lightly upon administrative tribunals". When a legislature chooses to do so, whether explicitly or by implication, the courts must assume that the administrative body at issue was intended to be an appropriate forum for the resolution of complex legal issues, including the interpretation and application of the *Charter*. Thus, while, as noted above, considerations concerning an administrative body's practical capacity to address such issues may be relevant in determining the scope of a tribunal's implicit authority to decide questions of law, they generally will not suffice on their own to rebut the presumption that arises from such authority, whether explicit or implied, once that presumption has been found to apply. In my view, lower court cases which suggest otherwise, such as *Bell Canada v. Canada (Human Rights Commission)*, [2001] 2 F.C. 392 (T.D.), rev'd on other grounds, [2001] 3 F.C. 481 (C.A.), and *Canada (Minister*

of Citizenship and Immigration) v. Reynolds (1997), 139 F.T.R. 315, as well as the Court of Appeal's decision in the present case, are erroneous in this respect.

44 I refrain, however, from expressing any opinion as to the constitutionality of a provision that would place procedural barriers in the way of claimants seeking to assert their rights in a timely and effective manner, for instance by removing *Charter* jurisdiction from a tribunal without providing an effective alternative administrative route for *Charter* claims.

45 In applying the approach set out above, there is in my view no need to draw any distinction between "general" and "limited" questions of law, as was admittedly done in *Cooper*, *supra*. An administrative body will normally either have or not have the power to decide questions of law. As stated above, administrative bodies that do have that power may presumptively go beyond the bounds of their enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them, subject to judicial review on the appropriate standard: see, e.g., *McLeod v. Egan*, [1975] 1 S.C.R. 517; *David Taylor & Son, Ltd. v. Barnett*, [1953] 1 All E.R. 843 (C.A.); *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157. Absent a clear expression or implication of contrary intent, such administrative bodies will also have jurisdiction to subject the statutory provisions over which they have jurisdiction to *Charter* scrutiny, while those tribunals without power to decide questions of law will not.

46 In *Cooper*, *supra*, this Court considered the jurisdiction of the Canadian Human Rights Commission or a tribunal appointed by it to consider the validity of s. 15(*c*) of the *Canadian Human Rights Act* under s. 15(1) of the *Charter*. The challenged section provided that no discrimination occurred when persons were forced

to retire at the normal age for employees working in similar positions in the same industry. La Forest J. first noted the absence of any explicit grant of jurisdiction to consider questions of law, which raised the need to determine whether such jurisdiction was implied. Turning to an examination of the statutory scheme under the *Canadian Human Rights Act*, he concluded that Parliament did not intend the Commission to decide questions of law arising under s. 15(*c*), but rather to serve as a screening mechanism for a tribunal endowed with broader jurisdiction to decide such questions as well as with greater capacity to do so. In those specific circumstances, he concluded that a series of well-circumscribed provisions allowing the Commission to consider other questions of law necessary to the exercise of its limited statutory functions as a screening body could not endow it with such power.

47 In my view, the result reached in *Cooper* could have been reached under the current restated rules, given La Forest J.'s finding that the Commission had no authority, either explicit or implicit, to decide questions of law arising under s. 15(*c*) of the *Canadian Human Rights Act*. It is thus unnecessary at this time to revisit the holding in that case. To the extent that it is incompatible with the present reasons, however, I am of the view that the *ratio* of the majority judgment in *Cooper* is no longer good law. This is particularly true insofar as it implies that the distinction between general and limited questions of law is generally relevant to the analysis of an administrative tribunal's jurisdiction to apply the *Charter*, or that the adjudicative nature of the administrative body is a necessary (or even preponderant) factor in the search for implicit jurisdiction. Likewise, the views expressed by Lamer C.J. in his concurrence are at odds with the current approach and should not be relied on.

48 The current, restated approach to the jurisdiction of administrative tribunals to subject legislative provisions to *Charter* scrutiny can be summarized as

follows: (1) The first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision. (2)(a) Explicit jurisdiction must be found in the terms of the statutory grant of authority. (b) Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself. (3) If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the *Charter*. (4) The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption by (a) pointing to an explicit withdrawal of authority to consider the *Charter*; or (b) convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* (or a category of questions that would include the *Charter*, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations.

3. Application to the Facts

49 In the case at bar, the jurisdiction of the Board is primarily determined by s. 185(1) of the Act. That provision states that "[s]ubject 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." The right of appeal contemplated by this section is to the Appeals Tribunal, which under s. 243 and s. 252(1) "may confirm, vary or reverse the decision of a hearing officer". It follows, then, that s. 185(1) also confers upon the Appeals Tribunal jurisdiction to "determine all questions of fact and law arising pursuant to this Part". This provision is, of course, almost identical to the one considered by this Court in *Cuddy Chicks*. In addition, s. 256(1) allows for an appeal from the Appeals Tribunal to the Nova Scotia Court of Appeal "on any question of law", which suggests that the Appeals Tribunal may deal initially with such questions.

50 Section 10B is found in Part I of the Act, and the FRP Regulations were adopted under that Part. Thus, it is clear that the Act confers upon the Appeals Tribunal explicit jurisdiction to decide questions of law arising under the challenged provisions.

51 Given this conclusion, it is not strictly necessary to consider other aspects of the statutory scheme or the practical considerations raised by the respondents. Nevertheless, since much of the parties' submissions relate to considerations of this nature, and since I believe that an examination of the statutory scheme as a whole supports the conclusion that the legislature intended the Appeals Tribunal to decide questions of law, I will discuss this question briefly. I repeat, however, that the explicit jurisdiction to determine questions of law would alone have been determinative.

52 First, and most importantly, there can be no doubt that the power to decide questions of law arising under the Act is necessary in order for the Appeals Tribunal effectively to fulfill its mandate. Any conclusion to the contrary would contradict the

legislature's clear intent to create a comprehensive scheme for resolving workers' compensation disputes, notably by barring access to the courts in cases covered by the Act: see *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at paras. 23-29. Moreover, the Appeals Tribunal's implied jurisdiction clearly extends even beyond the Act itself, to other questions of statutory interpretation or common law raised in the course of a dispute arising from the operation of the workers' compensation scheme. This conclusion is supported by the common law presumption, alluded to above, that administrative tribunals can interpret laws other than their enabling statute when necessary to resolve a case over which they otherwise have jurisdiction, subject to judicial review. It is also consistent with the practice of the Appeals Tribunal, which regularly decides questions of law involving the interpretation of common law principles and statutes other than the Act. These questions include the law of contracts, evidence, causation, employment, corporate relationships, conflicts of law, administration of foreign workers' compensation schemes, and motor vehicles, to name but a few. Denying the Appeals Tribunal the authority to decide such questions would seriously impede its work and threaten the access by injured workers to a forum capable of deciding all aspects of their case.

53 Second, the Appeals Tribunal is fully adjudicative in nature. It is independent of the Board and is placed under the supervision of the Minister of Justice, whereas the Board is supervised by the Minister of Labour. The Appeals Tribunal establishes its own rules of procedure (s. 240(1)), can consider all relevant evidence (s. 246(1)), and records any oral evidence for future reference (s. 253(1)). Its members have the powers, privileges and immunities of a commissioner appointed under the *Public Inquiries Act*, R.S.N.S. 1989, c. 372 (s. 178(1)), including the power to summon witnesses, compel testimony, require production of documents, and punish persons guilty of contempt; they also have certain powers of entry (s. 180). Although

the Appeals Tribunal is normally required to render its decision within 60 days of the hearing, or if there is no hearing, of the day on which all submissions have been received (s. 246(3)), it may "at any time, extend any time limit prescribed by this Part or the regulations where, in the opinion of the Appeals Tribunal, an injustice would otherwise result" (s. 240(2)). This extension power allows it to give proper consideration to the more intricate issues raised by a *Charter* appeal, as was done in this case. While only the Chief Appeal Commissioner is required to be a practising lawyer (s. 238(5)), in reality all appeal commissioners have been admitted to the bar. Moreover, this Court has recognized that non-lawyers sitting on specialized tribunals can make important contributions to *Charter* adjudication: *Cuddy Chicks*, *supra*, at pp. 16-17. In my view, there is no reason to doubt that the Appeals Tribunal is an adjudicative body fully capable of deciding *Charter* issues, as demonstrated by its competent reasons on the s. 15(1) issue in the case at bar.

54 I hasten to add, however, that while the presence of an adjudicative process is an important factor in finding an implied power to decide questions of law, its absence would not by itself be determinative. An examination of the statutory scheme as a whole may lead to the conclusion that the legislature intended a non-adjudicative body to consider and decide questions of law.

55 Third, under the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89, and under s. 245(1)(d) of the Act, the Attorney General may be provided with an opportunity to intervene in any proceedings involving a constitutional question, as was done in this case. Such interventions diminish the relative disadvantage of administrative tribunals as compared to courts by relieving private parties or administrative agencies from the burden of defending the validity of legislation: see *Cuddy Chicks*, *supra*, at pp. 17-18.

56 Finally, the Court of Appeal was wrong to take into consideration the backlog of cases that had accumulated at the Appeals Tribunal prior to the 1999 amendments. Practical considerations of this nature, while they may in certain circumstances be helpful to confirm the legislature's intent, are of little weight when faced with clear legislative intent, arising from the statutory scheme as a whole, to confer upon an administrative body the power to consider and decide questions of law. Such considerations "can never supplant the intention of the legislature" (*Cooper*, *supra*, at para. 47). Moreover, as the Appeals Tribunal itself argues in its submissions, the backlog has since been completely eliminated. Counsel for the Appeals Tribunal informed us at the hearing that *Charter* challenges were not the cause of the backlog and would not significantly increase its workload or cause undue delay. Since the Appeals Tribunal itself does not believe that deciding *Charter* cases would aggravate matters, and in the absence of other evidence, I fail to see on what basis the Court of Appeal could have reached such a conclusion. In contrast, allowing the Appeals Tribunal to apply the *Charter* clearly furthers the policy objectives outlined in the trilogy. It allows courts to benefit from a full record established by a specialized tribunal fully apprised of the policy and practical issues relevant to the *Charter* claim, and permits workers to have their *Charter* rights recognized within the relatively fast and inexpensive adjudicative scheme created by the Act, rather than having to take separate proceedings in the courts in addition to their compensation claim before the administrative tribunal.

57 These aspects of the legislative scheme all militate in favour of allowing the Appeals Tribunal to apply the *Charter*, in conformity with the legislature's intent to create a comprehensive scheme for the treatment of workers' compensation claims and related disputes. Thus, even if there had been no express provision endowing the

Appeals Tribunal to consider and decide questions of law arising under the Act, I would have found that it had implied jurisdiction to do so. I have already noted that, in assessing implied jurisdiction, the adjudicative or non-adjudicative character of a tribunal is not dispositive. Given the rich variety of administrative schemes and enabling statutes, I would not wish to suggest either that the other factors present in this case are individually or collectively essential to finding implied jurisdiction to decide questions of law. The question is, in each case, to be decided by looking at the relevant statutory scheme as a whole.

58 The Appeals Tribunal's jurisdiction to decide questions of law arising under the challenged provisions is presumed to include the authority to consider their constitutional validity. Is this presumption rebutted by other provisions of the Act?

59 The respondents argue that the authority conferred upon the Chair of the Board to direct certain issues from the Appeals Tribunal to the Board of Directors is incompatible with the idea that the Appeals Tribunal was itself intended by the legislature to decide *Charter* questions. Surely, it is said, the legislature cannot have intended that *Charter* issues be postponed to a policy-making executive body with no special expertise or powers of ultimate disposition of the issue. I disagree with this description of the procedure allowed by the Act. Section 248(1) provides that the Chair may postpone or adjourn an appeal before the Appeals Tribunal when he or she is of the opinion that the appeal raises "an issue of law and general policy that should be reviewed by the Board of Directors pursuant to Section 183". It is s. 183 that grants the Board of Directors authority to adopt policies. Pursuant to s. 202(a), an adjournment to the Board of Directors lasts no longer than three months or, "where the Board determines that exceptional circumstances exist", twelve months. If the Board of Directors issues a policy with respect to the issue raised in the appeal or notifies the

hearing officer that it will not issue a policy, the postponement also comes to an end. Section 248(3) provides that "where the Chair postpones or adjourns a hearing pursuant to subsection (1), the Chief Appeal Commissioner shall ensure that the final disposition of the appeal is left solely to the independent judgement of the Appeals Tribunal".

60 In my view, these provisions do no more than allow the Board of Directors to respond to the issues of law and general policy raised by an appeal by adopting a policy on the matter, enabling the Workers' Compensation Board to deal consistently with future similar cases on a principled basis. As s. 248(3) attests, this does not mean that the Board of Directors is entitled to take over an appeal raising a *Charter* issue and decide the issue itself. Rather, at most, the Board of Directors can suspend the appeal for up to twelve months in order to adopt a policy that properly responds to the general issues raised. For instance, the Board of Directors may recognize that one of its policies is inconsistent with the *Charter* or the Act and reformulate that policy, rather than litigating the *Charter* issue further. If the Board of Directors declines to do so, or if the policy as reformulated remains inconsistent with the *Charter* or the Act, the Appeals Tribunal will have the authority to refuse to apply that policy when the appeal is resumed. This is the effect of s. 183(5A), which provides that "a policy adopted by the Board is only binding on the Appeals Tribunal where the policy is consistent with this Part or the regulations". In addition, as the Appeals Tribunal correctly pointed out, even taking into consideration the additional delay that may be imposed by the Chair, the cost and length of an appeal before the Appeals Tribunal would still compare favourably to those of a *Charter* challenge before the courts.

61 Consequently, nothing in the Act produces the kind of clear implication capable of rebutting the presumption that the Appeals Tribunal may consider the

constitutionality of the Act that it is called upon to interpret and apply. The Appeals Tribunal could properly consider and decide the *Charter* issue raised in this case because it could properly consider and decide questions of law.

4. The Relationship Between the *Charter* Jurisdictions of the Board and the Appeals Tribunal

62 The reasons outlined in the previous section establish that, even if s. 185(1) of the Act had not provided the Appeals Tribunal with explicit authority to decide questions of law, an examination of the statutory scheme set out by the Act would lead to the conclusion that it has implied authority to do so. The determinative explicit conferral of jurisdiction in this case raises one last question. Section 185(1) of the Act defines the jurisdiction of both the Board and the Appeals Tribunal. Therefore, our holding that this section confers explicit jurisdiction upon the Appeals Tribunal to decide questions of law, including *Charter* issues, appears to lead to the conclusion that such jurisdiction is also vested in the Board, despite the considerably different characteristics of its claims adjudication process. In particular, I note a distinction between the Appeals Tribunal and the Board. In its submissions, the Appeals Tribunal argued confidently for its ability to apply the *Charter*. In contrast, the Board itself argues that it does not possess the resources or expertise to deal with numerous *Charter* cases, and that doing so would compromise its efficiency and timeliness in handling vast numbers of compensation cases.

63 Of course, as a matter of statutory interpretation, the Board's own view is not determinative of its jurisdiction. As La Forest J. noted in *Cuddy Chicks*, referring to the Ontario Labour Relations Board (at p. 18):

> At the end of the day, the legal process will be better served where the Board makes an initial determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the Board not only has the authority but a duty to ascertain the constitutional validity of s. 2(*b*) of the *Labour Relations Act*. [Emphasis added.]

Likewise, in the present appeals, the Act clearly contemplates that the Board will decide questions of law. Practical considerations cannot override the clear expression of legislative intent in s. 185(1). The legislature also seems to have contemplated, however, that it may be preferable, as a matter of administrative convenience, to refer *Charter* questions raised before the Board to the Appeals Tribunal or to the courts. Thus, s. 199(1)(b) provides that when a hearing officer "is of the opinion . . . that an appeal raises important or novel questions or issues of general significance that should be decided by the Appeals Tribunal pursuant to Part II, . . . the hearing officer shall postpone or adjourn the appeal and refer the appeal to the Chair". The Chair may then, under s. 199(2)(b) and (c), refer the appeal to the Appeals Tribunal or return it to the hearing officer. Likewise, under s. 200(1)(b), when an appeal before a hearing officer raises such questions, the Chair "may postpone or adjourn the appeal and direct that the appeal be . . . heard and decided by the Appeals Tribunal".

64 Under these provisions, it seems to be entirely within the Board's discretion to refer complex *Charter* cases to the Appeals Tribunal, either on a case-by-case basis or as a matter of policy. As noted above, since an administrative process which avoids parallel proceedings in the courts is preserved, I believe that the Board would not infringe its duty to consider the constitutionality of the Act by referring such cases to the Appeals Tribunal: see generally *Tétreault-Gadoury*, *supra*, at pp. 35-36. Therefore, I believe that the practical concerns raised by the respondents concerning the Board's capacity to handle complex *Charter* cases do not require a conclusion that either the Board or the Appeals Tribunal lacks jurisdiction to apply the *Charter*. On

the contrary, they explain the choice made by the legislature in providing a procedural mechanism to allow such complex issues to be redirected from the Board to the Appeals Tribunal when the Chair of the Board of Directors deems it appropriate.

5. Conclusion

65 I conclude that the Appeals Tribunal has explicit jurisdiction to decide questions of law arising under the challenged provisions of the Act. It is thus presumed to have jurisdiction to consider the validity of these provisions under s. 15(1) of the *Charter*, and to disregard these provisions if it finds them to be unconstitutional. This presumption is not rebutted by the statute, either explicitly or by necessary implication. Since the remedy requested arises from s. 52(1) of the *Constitution Act, 1982*, it is not necessary to determine whether the Appeals Tribunal is a "court of competent jurisdiction" within the meaning of s. 24(1) of the *Charter*: see *Douglas College*, *supra*, at pp. 594-95 and 605. However, as the Appeals Tribunal's decision on the constitutionality of the challenged provisions is to be reviewed on a correctness standard, I now turn to the substantive *Charter* questions.

B. *Section 15(1) of the Charter*

1. The Chronic Pain Regime Under the Act

66 The FRP Regulations and s. 10A of the Act define "chronic pain" as "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.

67 The challenged provisions then go on to create a separate regime to deal with injured workers suffering from chronic pain under the Act. The combined effect of these provisions is (i) to preclude workers injured before March 23, 1990, from receiving any benefits in connection with chronic pain; (ii) to entitle workers injured between March 23, 1990, and February 1, 1996, and who, on November 25, 1998, were in receipt of temporary benefits or had a claim under appeal, to receive uniform limited benefits for chronic pain as provided by s. 10E; and (iii) to preclude workers injured after February 1, 1996, from receiving any benefits for chronic pain except as provided by the FRP Regulations. The chronic pain provisions also maintain the bar against suing employers under s. 28 of the Act, so that no additional compensation may be obtained through tort actions in the courts.

68 Section 3(2) of the FRP Regulations deems chronic pain always to have been excluded from the operation of Part I of the Act, and provides that no compensation other than that provided by the FRP Regulations is payable for chronic pain with respect to injuries subsequent to February 1, 1996. The benefits available under the FRP Regulations are not determined with regard to the individual circumstances of each worker. Rather, the FRP Regulations establish a limited Functional Restoration Program. No worker may participate in the Functional Restoration Program if more than 12 months have elapsed since his or her date of injury, and participation in the Functional Restoration Program is limited to four weeks. No further benefits are available. Thus, injured workers suffering from chronic

pain cannot receive earning replacement benefits (whether temporary or permanent), permanent impairment benefits, retirement annuities, vocational rehabilitation services or medical aid beyond the four-week Functional Restoration Program. They are also excluded from the duties to re-employ and to accommodate imposed upon employers by ss. 90 and 91 of the Act.

69 Section 10E of the Act is a transitional measure that provides limited permanent benefits to chronic pain sufferers who were receiving temporary benefits or had a claim under appeal on November 25, 1998. These benefits are based on a percentage of the permanent impairment benefits that would be available if the worker were impaired by a condition other than chronic pain. Neither Mr. Martin nor Ms. Laseur is subject to the application of s. 10E and its constitutionality is not at issue in this case.

2. Application of Section 15(1) of the *Charter*

70 In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 39, Iacobucci J. summarized this Court's three-step approach to s. 15(1) of the *Charter* as follows:

> First, 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? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether

> the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1). [Emphasis in original.]

Following this approach, I now turn to an analysis of the appellants' claims based on the three inquiries required by s. 15(1).

(a) *Differential Treatment*

71 I agree with the Court of Appeal that the appropriate comparator group for the s. 15(1) analysis in this case is the group of workers subject to the Act who do not have chronic pain and are eligible for compensation for their employment-related injuries. The appellants are unlike these workers. Mr. Martin was deprived of temporary earnings loss and medical treatment benefits to which he would be entitled were he suffering from a condition other than chronic pain. Ms. Laseur, for her part, was denied access to an evaluation of her permanent impairment rating. Although, under the current guidelines, Ms. Laseur would be found to have a 0 percent impairment rating and would thus be denied benefits anyway, this Court has previously held that deprivation of access to an institution available to others, even though the individual bringing the claim would not necessarily derive immediate benefits from such access, constitutes differential treatment: see *Egan*, *supra*; *Vriend*, *supra*; *M. v. H.*, *supra*. More generally, while the Act prevents all injured workers from obtaining compensation in court, the Act also disentitles injured workers disabled by chronic pain to compensation and other benefits beyond the four-week period, as well as to an individual assessment of their condition and needs. Indeed, the respondents concede that chronic pain sufferers are subject to differential treatment relative to other injured workers subject to the Act.

72 In addition, the appellants argue that another relevant comparator group is the group of persons suffering from chronic pain who are not subject to the Act and can obtain damages for their condition through the application of normal tort principles. I do not believe that this comparison is appropriate. What distinguishes this group from the appellants is not mental or physical disability — both suffer from chronic pain. Rather, the only difference between them is that persons in the comparator group are not subject to the Act and thus have access to the tort system, while the appellants have to rely on the workers' compensation system. In my view, the Court of Appeal correctly held that a s. 15(1) analysis based on this distinction would amount to a challenge to the entire workers' compensation system, a challenge which this Court unanimously rejected in *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922. Moreover, such a comparison would also be inappropriate since compensation under the tort system normally requires the injured party to establish that his or her injury was caused by the negligence of another. Thus, even if the workers' compensation system did not exist, not all injured workers with chronic pain would have access to tort damages. Ms. Laseur and Mr. Martin, for instance, do not allege that anyone's negligence caused their injuries.

73 Finally, the appellants submit that workers suffering from chronic pain and eligible for s. 10E benefits constitute an appropriate comparator group. Assuming without deciding that such workers do constitute an appropriate comparator group, I do not think this approach advances the appellants' argument. As the Court of Appeal indicated, the distinction between this group and the appellants would be the date of their injury and the status of their case before the Board, rather than the nature of their disability. Thus, in any case, the second branch of the test would not be met.

74 Having found a distinction between the claimants and the comparator group, it is necessary next to examine the basis for that distinction.

(b) *Enumerated or Analogous Ground*

75 The relevant potential ground of discrimination in this case is "physical disability", a ground expressly included in s. 15(1). The question here is whether the differential treatment of chronic pain sufferers is truly based on this enumerated ground. While the Attorney General of Nova Scotia concedes that it is, the Board argues that since both the claimants and the comparator group suffer from physical disabilities, differential treatment of chronic pain within the workers' compensation scheme is not based on physical disability. Rather, argues the Board, the differential treatment must derive from some other basis.

76 In my view, this argument is without merit. This Court has long recognized that differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated. This issue first arose in the context of employment discrimination claims under provincial human rights statutes. In *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, Dickson C.J. held that sexual harassment in the workplace constituted sex discrimination. He responded to the argument that, since harassers choose their targets on the basis of physical attractiveness, a personal characteristic, rather than gender, a group characteristic, sexual harassment did not amount to sex discrimination. He stated, at pp. 1288-89, that:

> While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment

> of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value. . . . To deny a finding of discrimination in the circumstances of this appeal is to deny the existence of discrimination in any situation where discriminatory practices are less than perfectly inclusive.

Likewise, in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, the employer argued that the exclusion of pregnancy from a group health insurance policy did not amount to sex discrimination, because it did not affect all women but only those who were pregnant. Dickson C.J. rejected this argument too, holding that, since only women could become pregnant, distinctions based on pregnancy could be nothing other than distinctions based on or related to sex. Thus, he concluded, the exclusion of pregnancy from the list of compensable conditions constituted sex discrimination.

77 The potential discriminatory character of distinctions drawn between different disabilities was addressed in *Gibbs*, *supra*. In that case, an employee became disabled as a result of a mental disorder. The employer subscribed to an insurance policy which provided a replacement income to employees who became unable to work because of a disability. The policy provided, however, that in cases of mental illness, the income replacement benefit would terminate after two years unless the former employee remained in a mental institution. The employee challenged this provision under the *Saskatchewan Human Rights Code*. The employer argued that the insurance plan was not discriminatory, since the proper comparison was not between mentally disabled persons and physically disabled persons, but between disabled persons generally and able-bodied persons. Sopinka J. rejected this argument and held that a comparison could properly be drawn between two groups, each of whose members were affected by a disability. He stated, at paras. 27-28, that:

> In my view, the Court of Appeal was correct, in the circumstances of the present case, in finding discrimination on the basis of a comparison between the insurance benefits offered to those unable to work because of a physical disability and those unable to work because of a mental disability. In concluding that a "mental disability/physical disability" comparison is appropriate, I note first of all that in order to find discrimination on the basis of disability, it is not necessary that all disabled persons be mistreated equally. The case law has consistently held that 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.
>
> . . .
>
> Thus, a finding of discrimination on the basis of disability, even though only a subset of disabled employees is mistreated, is permissible according to the case law. [Emphasis added.]

78 Sopinka J. went on to support the comparison between mental and physical disability by noting that s. 15(1) of the *Charter* expressly contains such a distinction, and that mentally disabled persons are subject to a particular historical disadvantage. Admittedly, the alleged discrimination in this appeal is between different physical disabilities, and therefore these additional justifications may not apply directly. Nevertheless, I believe that the Court of Appeal was correct in concluding that this Court's previous approach to discrimination on the basis of distinction within a protected group, as dealt with by this Court in *Janzen*, *Brooks* and *Gibbs*, while not determinative, indicates that the s. 15(1) claim under consideration should turn on the presence or absence of substantive discrimination rather than on the second branch of the *Law* test.

79 While the issue was not argued at length, Binnie J. in *Granovsky*, *supra*, at para. 53, held that a legislative distinction between temporary and permanent disability was based on the enumerated ground of "physical disability" in s. 15(1) of the *Charter*. Likewise, in *Winko v. British Columbia (Forensic Psychiatric Institute)*,

[1999] 2 S.C.R. 625, at para. 80, McLachlin J. held that the special treatment of the not criminally responsible was founded "on the presence of a particular type of mental disability at the time of commission of the criminal act" (emphasis added). In my view, such reasoning is consistent with the general principles underlying discrimination law and s. 15(1), which prohibits discrimination "based on" certain enumerated grounds, including "mental or physical disability".

80 For instance, there could be no doubt that a legislative distinction favouring persons of Asian origin over those of African origin would be "based on" race, ethnic origin or colour, or that a law imposing a disadvantage on Buddhists relative to Muslims would draw a distinction "based on" religion. It would be no answer for the legislator to say there is no discrimination because both persons born in Asia and persons born in Africa have a non-Canadian national origin, or that Muslims, like Buddhists, belong to a minority religion in Canada. Likewise, in the present case, it is no answer to say that all workers subject to the scheme are disabled. The second step of the *Law* test does not ask whether the claimant and members of the comparator group possess a certain characteristic. Rather, the inquiry is whether the basis of the challenged differential treatment is an enumerated or analogous ground. The distinction between the claimants and the comparator group was made on the basis of the claimants' chronic pain disability, i.e., on the basis of disability. The fact that injured workers without chronic pain have their own disability too is irrelevant. Distinguishing injured workers with chronic pain from those without is still a disability-based distinction. Whether that distinction is in fact discriminatory remains in each case to be determined under the third branch of the *Law* test.

81 This approach to the analysis of distinctions drawn between various disabilities allows the courts to take into account a fundamental and distinctive

characteristic of disabilities when compared to other enumerated grounds of discrimination: their virtually infinite variety and the widely divergent needs, characteristics and circumstances of persons affected by them: see *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, at para. 69; *Granovsky*, *supra*, at para. 27. Due sensitivity to these differences is the key to achieving substantive equality for persons with disabilities. In many cases, drawing a single line between disabled persons and others is all but meaningless, as no single accommodation or adaptation can serve the needs of all. Rather, persons with disabilities encounter additional limits when confronted with systems and social situations which assume or require a different set of abilities than the ones they possess. The equal participation of persons with disabilities will require changing these situations in many different ways, depending on the abilities of the person. The question, in each case, will not be whether the state has excluded all disabled persons or failed to respond to their needs in some general sense, but rather whether it has been sufficiently responsive to the needs and circumstances of each person with a disability. If a government building is not accessible to persons using wheelchairs, it will be no answer to a claim of discrimination to point out a TTY (teletypewriter) telephone for the hearing impaired has been installed in the lobby.

82 Of course, government benefits or services cannot be fully customized. As a practical matter, general solutions will often have to be adopted, solutions which inevitably may not respond perfectly to the needs of every individual. This is particularly true in the context of large-scale compensation systems, such as the workers' compensation scheme under consideration. Such systems often need to classify various injuries and illnesses based on available medical evidence and use the resulting classifications to process the claims made by beneficiaries. This approach is necessary, both for reasons of administrative efficiency and to ensure fairness in

processing large numbers of claims. In addition, the beneficiaries themselves benefit from the reduced transaction costs and speed achieved through such techniques, and without which large-scale compensation might well be impossible. The state should therefore benefit from a certain margin of appreciation in this exercise, but it cannot be exempted from the requirements of s. 15(1) of the *Charter*. The distinction made will not be allowed to stand when it, intentionally or not, violates the essential human dignity of the individuals affected and thus constitutes discrimination.

83 Thus, I now turn to the third branch of the *Law* test, which asks whether the differential treatment based on an enumerated or analogous ground is discriminatory in a substantive sense. The substantive discrimination test, however, is demanding, and the distinction drawn in this case, like many other disability-based distinctions, will stand to survive or fail the s. 15(1) analysis at this stage.

(c) *Substantive Discrimination*

84 A violation of s. 15(1) of the *Charter* will only be established when, beyond the existence of differential treatment based on an enumerated or analogous ground, the claimant proves that such differential treatment is truly discriminatory. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 174-75, McIntyre J. described discrimination as follows:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the

> charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

85 Iacobucci J., writing for a unanimous Court in *Law*, *supra*, stated at para. 51, that the substantive discrimination analysis must be informed by the purpose of s. 15(1), which 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 at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration". Human dignity, in turn,

> is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?
>
> (*Law*, at para. 53)

Iacobucci J. went on to identify four contextual factors which may be referred to in order to determine whether the challenged legislation demeans the essential human dignity of the affected person or group. These factors are: (1) the presence of pre-existing disadvantage, vulnerability, stereotyping or prejudice directed at this person or group; (2) the correspondence, or lack thereof, between the ground upon which the differential treatment is based and the actual needs, characteristics and circumstances of the affected person or group; (3) the ameliorative purpose or effect of the legislation

upon a more disadvantaged group; and (4) the nature of the interest affected by the legislation. This list, of course, is not exhaustive, the goal of the analysis in each case being to determine whether a reasonable and dispassionate person, fully apprised of all the circumstances and possessed of similar attributes to the claimant, would conclude that his or her essential dignity had been adversely affected by the law. For the same reason, not all factors will be relevant in each case. The enquiry always remains a contextual rather than a mechanical one: *Lavoie v. Canada*, [2002] 1 S.C.R. 769, 2002 SCC 23, at para. 46.

(i) Pre-existing Disadvantage

86 The appellants allege that chronic pain sufferers have been subjected to historical disadvantage as a result of stereotypes concerning the nature and causes of their disability. As they describe it, "[t]he stereotypical assumption is that chronic pain is caused by psychosocial factors, litigation or secondary gain as opposed to employment related trauma" (appellants' factum, at para. 108). In other words, in the appellants' submission, the particular characteristics of chronic pain syndrome and related medical conditions, such as their persistence beyond the normal healing time for the underlying injury and the apparent lack of physical manifestations supporting the sufferer's complaint of continuing pain, have led to a common misconception, rising to the level of an invidious social stereotype, that persons affected by chronic pain do not suffer from a legitimate medical condition but are malingering, frequently with a view to financial benefits, or that their pain stems from weakness of character rather than from the injury itself.

87 The respondents, on the contrary, argue that, although chronic pain is a legitimate medical condition, no such widespread invidious stereotypes against chronic

pain sufferers exist in society beyond the stereotypes associated with all injured workers, who are sometimes erroneously suspected of malingering. Thus, the respondents conclude, the appellants have failed to establish their case under this first contextual factor, as it requires them to establish not only that they are affected by the general pre-existing disadvantage or stereotypes applicable to all injured workers, but also that they have been subject to greater historical disadvantage or stereotypes.

88 In my view, this last part of the respondents' argument is without merit. They rely on *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, for the proposition that the appellants must demonstrate prejudice or stereotyping that is distinct from that experienced by the comparator group. In *Corbiere*, this Court considered a s. 15(1) challenge to a provision of the *Indian Act*, R.S.C. 1985, c. I-5, which provided that only band members ordinarily resident on the reserve were entitled to vote in band elections. While both McLachlin and Bastarache JJ., writing for the majority, and L'Heureux-Dubé J., writing for a minority of four, recognized that off-reserve Aboriginal band members had been subject to particular historical disadvantage compared to those living on-reserve, nowhere can the suggestion be found that such relative disadvantage is a necessary condition for the first contextual factor to point towards discrimination. This point was eloquently made by Iacobucci J. in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37, at para. 69, where he stated that "this enquiry does not direct the appellants and respondents to a 'race to the bottom', i.e., the claimants are not required to establish that they are more disadvantaged than the comparator group". See also *Granovsky*, *supra*, at para. 67. Thus, while a finding of relative disadvantage may in certain cases be helpful to the claimant, the absence of relative disadvantage should in my view be seen as neutral when, as is the case here, the claimants belong to a larger group — disabled persons — who have experienced historical disadvantage or stereotypes.

89 But there is more. Sometimes, as in the case at bar, the lack of correspondence between the differential treatment to which the claimants are subject and their actual needs, capacities and circumstances is at the heart of the s. 15(1) claim to such an extent as to make a relative disadvantage analysis largely inappropriate. This is particularly true when distinctions are drawn between various types of mental or physical disabilities, because, as I noted above, the rationale underlying the prohibition of disability-based discrimination is the imperative to recognize the needs, capacities and circumstances of persons suffering from widely different disabilities in a vast range of social contexts. It can be no answer to a charge of discrimination on that basis to allege that the particular disability at issue is not subject to particular historical disadvantage or stereotypes beyond those visited upon other disabled persons. Indeed, the contrary position could potentially relieve the state from its obligation to accommodate or otherwise recognize many disabilities that, despite their severity, are not subject to widespread stereotypes or particular historical disadvantage. Such a result would run contrary to the very meaning of equality in that context and cannot be condoned.

90 For these reasons, I do not find it necessary to determine, based on the limited evidence before us, whether chronic pain sufferers have historically been subject to disadvantage or stereotypes beyond those affecting other injured workers. It will be sufficient to note that many elements seem to point in that direction. Most importantly, the medical reports introduced as evidence often mention the inaccurate negative assumptions towards chronic pain sufferers widely held by employers, compensation officials and the medical profession itself. They identify the correction of negative assumptions and attitudes of this kind as a significant step in improving the treatment of chronic pain. The troubling comments made by some case workers

in the Laseur file appear to betray such negative assumptions. Thus, statements that Ms. Laseur had "fallen into the usual chronic pain picture" and that "[t]his 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" were clearly inappropriate and suggest that Ms. Laseur's claim may have been treated on the basis of presumed group characteristics rather than on its own merits. Finally, the medical experts recognize that chronic pain syndrome is partially psychological in nature, resulting as it does from many factors both physical and mental. This Court has consistently recognized that persons with mental disabilities have suffered considerable historical disadvantage and stereotypes: *Granovsky*, *supra*, at para. 68; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 994; *Winko*, *supra*, at paras. 35 *et seq*. Although the parties have argued the s. 15(1) case on the basis that chronic pain is a "physical disability", the widespread perception that it is primarily, or even entirely, psychosomatic may have played a significant role in reinforcing negative assumptions concerning this condition.

91 While all these indicia point to relative disadvantage, it is not necessary to decide whether the evidence before us is sufficient to establish that the negative assumptions associated with chronic pain are so harmful, widespread or socially embedded as to rise to the level of "historical disadvantage" or "invidious stereotype". This is because, in my view, the gravamen of the appellants' s. 15 claim is the lack of correspondence between the differential treatment imposed by the Act and the true needs and circumstances of chronic pain sufferers: see generally *Law*, *supra*, at paras. 64-65. I therefore turn to this question.

(ii) Correspondence with the Needs, Capacities and Circumstances of the Claimants

92 The second contextual factor to be considered is the relationship between the ground of distinction — here the presence of disability caused by chronic pain — and the actual needs, capacities and circumstances of the group to which the claimants belong. In other words, does the separate regime for chronic pain under the Act and the FRP Regulations take into account the actual needs, capacity or circumstances of workers suffering from chronic pain in a manner that respects their value as human beings and as members of Canadian society?

93 In answering this question, it is vital to keep in mind the rationale underlying the prohibition of discrimination based on disability. As I stated above, this rationale is to allow for the recognition of the special needs and actual capacities of persons affected by a broad variety of different disabilities in many different social contexts. In accordance with this rationale, s. 15(1) requires a considerable degree of reasonable accommodation and adaptation of state action to the circumstances of particular individuals with disabilities. Of course, classification and standardization are in many cases necessary evils, but they should always be implemented in such a way as to preserve the essential human dignity of individuals.

94 Another vital consideration in a case such as this one is the overall purpose of the legislative scheme at issue: see *Gibbs*, *supra*, at para. 34; *Granovsky*, *supra*, at para. 62. A classification that results in depriving a class from access to certain benefits is much more likely to be discriminatory when it is not supported by the larger objectives pursued by the challenged legislation. In the case at bar, the objectives of the workers' compensation scheme are clear. As explained in *Pasiechnyk*, *supra*, the scheme embodies a historical trade-off between employers and workers. While the former are protected by s. 28 of the Act against the possibility of being sued in tort for work-related injuries, the latter are guaranteed a reasonable amount of compensation

for such injuries without being subject to the costs, delays and uncertainties of an action before the courts. In order to obtain compensation, employees must establish that their personal injury was caused by an accident arising "out of and in the course of employment" (s. 10(1)).

95 The challenged provisions, however, while maintaining the bar to tort actions, exclude chronic pain from the purview of the general compensation scheme provided for by the Act. Thus, no earning replacement benefits, permanent impairment benefits, retirement annuities, vocational rehabilitation services or medical aid can be provided with respect to chronic pain. Employers are also exempt from the duties to re-employ them and accommodate their disability, which are normally imposed by the Act. Instead, workers injured on or after February 1, 1996, who suffer from chronic pain are entitled to a four-week Functional Restoration Program, after which no further benefits are available. In addition, if a chronic pain claim is not asserted within a year of the accident taking place, no benefit will be provided at all. Workers injured before March 23, 1990, are excluded from all benefits under the Act with respect to chronic pain. Finally, workers injured in the interim period are subject to transitional provisions whose constitutionality is not at issue before us.

96 The respondents allege that this blanket exclusion of chronic pain claims responds to the actual needs and circumstances of workers suffering from chronic pain. In their submission, the combination of early medical intervention through the Functional Restoration Program and an immediate cut-off of benefits is the optimal strategy to favour early return to work, which has been identified in medical studies as the most promising approach to the treatment of chronic pain.

97 I am unable to agree that the challenged provisions are sufficiently responsive to the needs and circumstances of chronic pain sufferers to satisfy the second contextual factor. Although the medical evidence before us does point to early intervention and return to work as the most promising treatment for chronic pain, it also recognizes that, in many cases, even this approach will fail. It is an unfortunate reality that, despite the best available treatment, chronic pain frequently evolves into a permanent and debilitating condition. Yet, under the Act and the FRP Regulations, injured workers who develop such permanent impairment as a result of chronic pain may be left with nothing: no medical aid, no permanent impairment or income replacement benefits, and no capacity to earn a living on their own. This cannot be consistent with the purpose of the Act or with the essential human dignity of these workers.

98 Others, more fortunate, may only be partially incapacitated by chronic pain, and it is natural that they be encouraged to rejoin the workforce. Beyond simply cutting off all benefits, however, the Act does little to assist their return to work. Workers unable to return to their previous physically strenuous employment because of recurrent chronic pain are not eligible for vocational rehabilitation training under the Act. Ms. Laseur, for instance, had to finance her retraining out of her own savings and by borrowing from her family, resources many injured workers likely will not have. Others, who need some accommodation in the workplace in order to remain productive despite their chronic pain, cannot request such accommodation under the Act, unlike workers affected by virtually any other disability caused by a work-related accident. Their employer will even be exempt from the duty to re-employ them.

99 In my view, it simply cannot be said that the regime as its stands sufficiently corresponds to the needs and circumstances of injured workers suffering

from chronic pain for the second contextual factor to point away from discrimination. The separate regime set up for chronic pain under the Act thus stands in sharp contrast to the one upheld by this Court in *Winko, supra*. In that appeal, this Court held that s. 672.54 of the *Criminal Code*, R.S.C. 1985, c. C-46, which provided that, following a verdict declaring an accused not criminally responsible on account of mental disorder, a court or Review Board could direct that the accused be discharged (with or without conditions) or detained in a hospital, did not infringe the s. 15(1) rights of mentally impaired criminal defendants. In that case, the key to the finding of non-discrimination was the combination of individualized assessment and adequate treatment provided by the *Criminal Code*. As McLachlin J. stated, at paras. 88-89:

> The essence of stereotyping, as mentioned above, 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: *Andrews*, *supra*, at pp. 174-75; *Law*, *supra*, at para. 61. The question is whether Part XX.1 in effect operates against individual NCR accused in this way. In my view, it does not. At every stage, Part XX.1 treats the individual NCR accused on the basis of his or her actual situation, not on the basis of the group to which he or she is assigned. Before a person comes under Part XX.1, there must be an individual assessment by a trial judge based on evidence with full access to counsel and other constitutional safeguards. A person falls under Part XX.1 only if the judge is satisfied that he or she was unable to know the nature of the criminal act or that it was wrong. <u>The assessment is based on the individual's situation. It does not admit of inferences based on group association.</u> More importantly, the disposition of the NCR accused is similarly tailored to his or her individual situation and needs, and is subject to the overriding rule that it must always be the least restrictive avenue appropriate in the circumstances. Finally, the provision for an annual review (at a minimum) of the individual's status ensures that his or her actual situation as it exists from time to time forms the basis of how he or she is to be treated.
>
> <u>This individualized process is the antithesis of the logic of the stereotype, the evil of which lies in prejudging the individual's actual situation and needs on the basis of the group to which he or she is assigned.</u> [Emphasis added.]

See also: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

On the contrary, the treatment of injured workers suffering from chronic pain under the Act is not based on an evaluation of their individual situations, but rather on the indefensible assumption that their needs are identical. In effect, the Act stamps them all with the "chronic pain" label, deprives them of a personalized evaluation of their needs and circumstances, and restricts the benefits they can receive to a uniform and strictly limited program.

100 Finally, the chronic pain provisions of the Act also differ from the welfare scheme that was challenged in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84. The impugned regulations in that case required unemployed youth under 30 years of age to take part in educational or training programmes as a condition for receiving the same level of social assistance payment available to unemployed persons aged 30 or over. The majority held that the requirement that youth participate in programs intended to improve their employment prospects did not communicate stereotypes or demeaning messages about young people. The majority also held that Ms. Gosselin had not satisfied her burden of proof by establishing on a balance of probabilities that she or other class members were effectively prevented from participating in the programmes (see paras. 46-54). Since Ms. Gosselin and class members did not show that they were effectively excluded from the protection against extreme poverty afforded by the social security scheme and since the conditions for receiving the basic social assistance did not force young persons to do something that demeaned their dignity or human worth, the majority concluded that the welfare scheme was not discriminatory (see para. 52).

101 In contrast to the scheme upheld in *Gosselin*, *supra*, the chronic pain regime under the Act not only removes the appellants' ability to seek compensation in civil actions, but also excludes chronic pain sufferers from the protection available to other injured workers. It also ignores the real needs of workers who are permanently disabled by chronic pain by denying them any long-term benefits and by excluding them from the duty imposed upon employers to take back and accommodate injured workers. The Act thus sends a clear message that chronic pain sufferers are not equally valued and deserving of respect as members of Canadian society. In my view, the second contextual factor clearly points towards discrimination.

(iii) Ameliorative Purpose

102 There can be no serious argument here that the differential treatment is aimed at improving the circumstances of some other, more disadvantaged group. While some individuals in the comparator group — injured workers without chronic pain — may be more severely disabled than the appellants, there is no evidence that the comparator group as a class is in a more disadvantaged position than the group of injured workers suffering from chronic pain. In addition, as discussed above, the challenged provisions are inconsistent with the ameliorative purpose of the Act, as they exclude injured workers suffering from chronic pain from the normal compensation system without regard for their actual needs and circumstances, and deprive them of an opportunity to establish the validity of their individual claim on a fair basis. While the legislature's concern to efficiently allocate resources within the workers' compensation system so as to give priority to the most severe cases is laudable, it cannot serve to shield an outright failure to recognize the actual needs of

an entire category of injured workers from *Charter* scrutiny. As such, there is no ameliorative purpose upon which the respondents can rely.

(iv) Nature of the Interest Affected

103 The Court of Appeal accepted the respondents' argument that the disadvantage suffered by injured workers was solely economic in nature and that the deprivation of benefits was relatively minor. First, I believe it is important to clarify the status of economic interests in the substantive discrimination context. While a s. 15(1) claim relating to an economic interest should generally be accompanied by an explanation as to how the dignity of the person is engaged, claimants need not rebut a presumption that economic disadvantage is unrelated to human dignity. In many circumstances, economic deprivation itself may lead to a loss of dignity. In other cases, it may be symptomatic of widely held negative attitudes towards the claimants and thus reinforce the assault on their dignity.

104 In my view, given the circumstances of injured workers, particularly those who may be permanently impaired by chronic pain and have no source of support other than the provincial compensation scheme, it cannot be said that the loss of financial benefits here is a trivial matter. More importantly, I cannot agree that the interest affected by the chronic pain provisions is purely, or even primarily, economic. Beyond the financial benefits at stake, injured workers suffering from chronic pain are also denied an opportunity to access the compensation scheme available to other injured workers in the province, on the basis of the nature of their disability. They are also deprived of ameliorative benefits, such as vocational rehabilitation services, medical aid and a right to accommodation, which would clearly assist them in preserving and improving their dignity by returning to work when possible. Our Court

has consistently emphasized the crucial importance of work and employment as elements of essential human dignity under s. 15(1) of the *Charter*. Indeed, in the words of Bastarache J., "work is a fundamental aspect of a person's life" (*Lavoie*, *supra*, at para. 45).

105 Thus, far from dispelling the negative assumptions about chronic pain sufferers, the scheme actually reinforces them by sending the message that this condition is not "real", in the sense that it does not warrant individual assessment or adequate compensation. Chronic pain sufferers are thus deprived of recognition of the reality of their pain and impairment, as well as of a chance to establish their eligibility for benefits on an equal footing with others. This message clearly indicates that, in the Nova Scotia legislature's eyes, chronic pain sufferers are not equally valued as members of Canadian society.

106 The contextual enquiry mandated by *Law* could hardly lead to a clearer conclusion. I am of the view that a reasonable person in circumstances similar to those of the appellants, fully apprised of all the relevant circumstances and taking into account the above contextual factors, would conclude that the challenged provisions have the effect of demeaning his or her dignity. Section 10B of the Act, as well as the FRP Regulations in their entirety, violate s. 15(1) of the *Charter*.

C. *Section 1 of the Charter*

107 The last question raised in these appeals is whether the challenged provisions, although they violate the appellants' right to equality under s. 15(1) of the *Charter*, can be saved as "reasonable limits prescribed by law" that are "demonstrably justified in a free and democratic society" under s. 1. This question requires applying

the four-step test elaborated in *R. v. Oakes*, [1986] 1 S.C.R. 103, and summarized by Iacobucci J. in *Egan, supra*, at para. 182, as follows:

> A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.
>
> (Cited with approval in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 84, and *Vriend, supra*, at para. 108.)

Under s. 1, the government must demonstrate that a limit imposed on a *Charter* right is justified in a free and democratic society. Therefore, the proper focus of enquiry under s. 1 is the limit itself. In the case at bar, the Nova Scotia government has the burden of demonstrating that the exclusion of chronic pain from the purview of the Act and the substitution of very limited, structured benefits for those normally available under the workers' compensation system, is so justified.

108 The first difficulty to arise under s. 1 in this case is the ambiguity of the respondents' submissions with respect to the legislative objective pursued by the challenged provisions. Four principal concerns or objectives emerge from these submissions. The first concern is to maintain the viability of the Accident Fund set up by the Act to compensate injured workers, which has accumulated a considerable unfunded liability. Second is the need to develop a consistent legislative response to the administrative challenges raised by the processing of chronic pain claims. These challenges mostly arise from the difficulties in establishing a causal link between a

workplace accident and the later development of chronic pain, as well as in assessing the degree of impairment resulting from chronic pain in particular claimants. The third concern, closely related to the first, is to avoid potential fraudulent claims based on chronic pain, which would be difficult to detect under the normal compensation system, given that no objective findings are available to support chronic pain claims. This objective is referred to in the submissions of the Attorney General of Nova Scotia, who rejects the choice made by other provinces to process chronic pain claims under the normal system on the ground that "these schemes are based on subjective findings and self-reporting which are unreliable and difficult to verify" (AGNS factum, at para. 159). The fourth and last objective is to implement early medical intervention and return to work as the optimal treatment for chronic pain according to current scientific knowledge, or, as the Attorney General of Nova Scotia puts it somewhat bluntly, "to eradicate the dependency on benefits to motivate return to the workforce" (AGNS factum, at para. 148).

109 The first concern, maintaining the financial viability of the Accident Fund, may be dealt with swiftly. Budgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the *Charter*: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*P.E.I. Reference*"), at para. 281; see also *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 709. It has been suggested, however, that in certain circumstances, controlling expenditures may constitute a pressing and substantial objective: see *Eldridge*, *supra*, at para. 84. I find it unnecessary to decide this point for the purposes of the case at bar. Nothing in the evidence establishes that the chronic pain claims in and of themselves placed sufficient strain upon the Accident Fund to threaten its viability, or that such claims significantly contributed to its present unfunded liability. Admittedly, when a court finds the

challenged legislation to be supported by another, non-financial purpose, budgetary considerations may become relevant to the minimal impairment test: see *P.E.I. Reference*, at para. 283. But at the present stage of the analysis, such a non-financial purpose remains to be identified.

110 Likewise, the second objective, developing a consistent legislative response to chronic pain claims, could not stand on its own. Mere administrative expediency or conceptual elegance cannot be sufficiently pressing and substantial to override a *Charter* right. In my view, this objective only becomes meaningful when examined with the third objective, i.e., avoiding fraudulent claims based on chronic pain. That objective is consistent with the general objective of the Act, as avoiding such claims ensures that the resources of the workers' compensation scheme are properly directed to workers who are genuinely unable to work by reason of a work-related accident. In my view, it is clearly pressing and substantial. As I believe this is the strongest s. 1 argument raised by the respondents, I will first apply the *Oakes* test to this objective. I will then briefly consider the fourth and last objective alleged by the respondents.

111 The challenged provisions of the Act and the FRP Regulations are rationally connected to this objective. There can be no doubt that, by excluding all claims connected to chronic pain from the purview of the Act and, in the case of workers injured after February 1, 1996, providing strictly limited benefits in the form of a four-week Functional Restoration Program, s. 10B of the Act and the FRP Regulations virtually eliminate the possibility of fraudulent claims based on chronic pain for all other types of benefits.

112 The same reasoning, however, makes it patently obvious that the challenged provisions do not minimally impair the equality rights of chronic pain sufferers. On the contrary, one is tempted to say that they solve the potential problem of fraudulent claims by preemptively deeming all chronic pain claims to be fraudulent. Despite the fact that chronic pain may become sufficiently severe to produce genuine and long-lasting incapacity to work, the provisions make no effort whatsoever to determine who is genuinely unable to work and who is abusing the system. As the respondents correctly point out, the government is entitled to a degree of deference in its weighing of conflicting claims, complex scientific evidence and budgetary constraints, especially given the large unfunded liability of the Accident Fund. In other words, it is not sufficient that a judge, freed from all such constraints, could imagine a less restrictive alternative. Rather, s. 1 requires that the legislation limit the relevant *Charter* right "as little as is reasonably possible" (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 772, *per* Dickson C.J.). However, even a brief examination of the possible alternatives, including the chronic pain regimes adopted in other provinces, clearly reveals that the wholesale exclusion of chronic pain cannot conceivably be considered a minimum impairment of the rights of injured workers suffering from this disability.

113 The general compensation scheme under the Act already provides that benefits may be limited, suspended or discontinued if the worker fails to mitigate losses, does not comply with medical advice, or fails to provide the Board with full and accurate information regarding his or her claim (ss. 84 and 113 of the Act). The adaptability of the system is illustrated by the approaches adopted by other provinces such as Alberta, British Columbia, Quebec and Ontario. These provinces all provide compensation for chronic pain within their respective workers' compensation regimes, in some cases by adapting the assessment method to the reality of chronic pain so as

to evaluate accurately each claimant's level of impairment. This general approach is supported by considerable scientific evidence commissioned by the relevant workers' compensation boards and introduced in evidence before this Court. See *Chronic Pain Initiative: Report of the Chair of the Chronic Pain Panels* (2000), which concludes that "[i]t would be difficult to support, on the basis of the existing scientific evidence, any limitation of benefits for chronic pain disability" (p. 5). Difficulties in establishing a causal link between a work-related injury and later development of chronic pain are also adequately handled within the scope of the general compensation system in these provinces: see *Report of the Chair of the Chronic Pain Panels*, *supra*; Dr. T. J. Murray, *Chronic Pain* (1995), prepared for the Workers' Compensation Board of Nova Scotia, App. B; Association of Workers' Compensation Boards of Canada, *Compensating for Chronic Pain — 2000* (2000). In addition, courts faced with tort claims for chronic pain have also developed approaches that do not rely on blanket exclusion: see, e.g., *White v. Slawter* (1996), 149 N.S.R. (2d) 321 (C.A.); *Marinelli v. Keigan* (1999), 173 N.S.R. (2d) 56 (C.A.). Even recognizing the Nova Scotia legislature's constitutional entitlement to select from a range of acceptable policy options, it is impossible to conclude that the blanket exclusion it enacted was necessary to achieve a principled response to chronic pain and avoid fraudulent claims.

114 Since I conclude that the challenged provisions cannot survive the third stage of the *Oakes* test on the basis of this objective, it is unnecessary to consider the general proportionality stage.

115 What of the last objective, which is to implement early medical intervention and return to work as the optimal treatment for chronic pain? First, a cautionary note. In my view, when a legislative provision that draws a distinction based on disability is found not to correspond to the needs and circumstances of the

claimants to such a degree that it demeans their essential human dignity, the government will face a steep evidentiary burden if it chooses to allege that the provision is rationally connected to the objective of providing the best available treatment to such claimants.

116 This being said, assuming, without deciding the point, that the objective of early return to work is pressing and substantial and that the challenged provisions are rationally connected to it, I am of the view that they fail the minimum impairment and general proportionality tests. While the report commissioned from Dr. T. J. Murray by the Board concludes that early intervention and return to work together constitute the best available treatment for work-related chronic pain, nowhere does that report recommend an automatic cut-off of benefits such as the one adopted by the Nova Scotia legislature. No other evidence indicates that an automatic cut-off of benefits regardless of individual needs and circumstances is necessary to achieve the stated goal. This is particularly true with respect to ameliorative benefits which would actually facilitate return to work, such as vocational rehabilitation, medical aid and the rights to re-employment and accommodation. It cannot be seriously countenanced that the challenged measures are minimally impairing of the s. 15(1) right. Moreover, as discussed above, the legislation deprives workers whose chronic pain does not improve as a result of early medical intervention and return to work from receiving any benefits beyond the four-week Functional Restoration Program. Others, like Ms. Laseur, are not even admissible to this program because of the date of their injuries. The deleterious effects of the challenged provisions on these workers clearly outweigh their potential beneficial effects.

117 I conclude that the challenged provisions are not reasonably justified under s. 1 of the *Charter*.

VI. Conclusion

118 I would allow the appeals. Section 10B of the Act and the FRP Regulations in their entirety infringe s. 15(1) of the *Charter*, and the infringement is not justified under s. 1. It follows that the challenged provisions are inconsistent with the Constitution and are of no force or effect by operation of s. 52(1) of the *Constitution Act, 1982*. Since these appeals have been funded by the Workers Advisers Program established under Part III of the *Workers' Compensation Act*, no order for costs has been requested by the appellants.

119 As the appellants point out, the policies that used to provide for individualized assessment of impairment in chronic pain cases have been repealed following the enactment of the challenged provisions of the Act and the FRP Regulations. Therefore, giving immediate effect to the declaration of invalidity of these provisions could result in prejudice to injured workers affected by chronic pain, as the Board would then have no specific policies or provisions to rely on in such cases. While some default or residuary provisions of the Act and of the FRP Regulations as well as policies of the Board might apply, the results would likely be inconsistent, given the considerable discretion which would be left to the Board in chronic pain cases. The default rules might even prevent certain chronic pain sufferers from receiving any benefits, as was the case for Ms. Laseur. Allowing the challenged provisions to remain in force for a limited period of time would preserve the limited benefits of the current program until an appropriate legislative response to chronic pain can be implemented. Therefore, as the appellants requested, it is reasonable to postpone the general declaration of invalidity for six months from the date of this judgment: see *Schachter*, *supra*.

120 This postponement, of course, does not affect the appellants' cases. Mr. Martin is clearly entitled to the benefits he has been claiming, as the challenged provisions stood as the only obstacle to his claims. I would thus reinstate the judgment rendered by the Appeals Tribunal in the Martin case on January 31, 2000.

121 The Appeals Tribunal, however, refused to grant permanent impairment benefits to Ms. Laseur because she did not challenge the constitutionality of the applicable guidelines, which attributed a permanent impairment rating of 0 percent to her injuries. In my view, it is appropriate to return Ms. Laseur's case to the Board for reconsideration on the basis of the subsisting provisions of the Act and the applicable regulations and policies. I note that, if Ms. Laseur elects to raise the constitutionality of the permanent impairment guidelines, the Board will be obliged to consider and decide the issue in accordance with the present reasons.

122 I would answer the constitutional questions as follows:

1. Do s. 10B of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended, and the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96, infringe the equality rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Yes.

2. If the answer to question # 1 is yes, does such infringement constitute a reasonable limit prescribed by law and demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

APPENDIX

Workers' Compensation Act, S.N.S. 1994-95, c. 10

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.

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.

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.

252 (1) The Appeals Tribunal may confirm, vary or reverse the decision of a hearing officer.

Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96

2 In these regulations,

. . .

(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;

. . .

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.

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.

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.

Appeals allowed.

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Solicitor for the respondent the Attorney General of Nova Scotia: Attorney General of Nova Scotia, Halifax.

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Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

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