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Résumé de l'article

Cet article traite des pouvoirs qu'a un tribunal inférieur, de déclarer l'invalidité d'une loi qu'il a le devoir d'appliquer parce que contraire à la *Charte canadienne des droits et libertés* ainsi qu'à la *Charte des droits et libertés de la personne du Québec*. L'auteur étudie notamment les conséquences de l'avènement des chartes sur les pouvoirs des tribunaux inférieurs. Un bref rappel de la situation qui prévalait avant l'adoption de ces amendements permettra de bien situer le débat dans son contexte actuel.

Do Inferior Tribunals have the Power to declare a Law Unconstitutional? A case in support

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ABSTRACT

This paper discusses the ability of an inferior tribunal to declare invalid a law it has the duty to apply as being contrary to the Canadian Charter of Rights and Freedoms *or the* Quebec Charter of Human Rights and Freedoms. *It deals with the implications created by these important legislative changes and their effect upon the powers of an inferior tribunal. A brief discussion upon the power prior to these amendments is undertaken to better place the issue in its current context.*

RÉSUMÉ

Cet article traite des pouvoirs qu'a un tribunal inférieur, de déclarer l'invalidité d'une loi qu'il a le devoir d'appliquer parce que contraire à la Charte canadienne des droits et libertés *ainsi qu'à la* Charte des droits et libertés de la personne du Québec. *L'auteur étudie notamment les conséquences de l'avènement des chartes sur les pouvoirs des tribunaux inférieurs. Un bref rappel de la situation qui prévalait avant l'adoption de ces amendements permettra de bien situer le débat dans son contexte actuel.*

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INTRODUCTION

The ability of an inferior tribunal to declare a law of no force or effect as being inconsistent with the *Canadian Charter of Rights and Freedoms*[1] or opposing the *Quebec Charter of Human Rights and Freedoms*[2] is a most controversial subject. Various conflicting statements have been made by the courts and commentators. It should however be noted immediately that it is not the purpose of this paper to raise an argument that would permit a plaintiff to seek a declaration of unconstitutional validity before an inferior tribunal, this being a superior court's jurisdiction, but rather that a defendant may raise the defence of unconstitutionality in front of an inferior tribunal, and seek the appropriate remedy, otherwise he would be deprived of his constitutional rights. This paper will endeavour to set forth a satisfactory answer to this complex issue, in order to assist the numerous legal entities which must deal with the question.

Our analysis must begin with an examination of the key decisions in this area prior to the 1982 constitutional change. The case in question is the 1973 decision by the Supreme Court of Canada in *Séminaire de Chicoutimi* v. *The City of Chicoutimi.*[3] The case itself dealt with the issue of whether the Quebec Provincial Court had jurisdiction to decide the question of constitutional validity of a by-law. It had been given authority to do so by virtue of section 411 of the *Cities and Towns Act*, R.S.Q. 1964, c. 193. In the *Chicoutimi* case, the Supreme Court of Canada held this legislation to be invalid and *ultra vires* the provincial government as offending section 96 of the Constitution, however one sees in *obiter* the adoption of a rule concerning the inferior tribunals jurisdiction when a defendant raises the issue of unconstitutionality. It may be best to quote in this regard the authors Pépin and Ouellette in their 1982 book on administrative law, *Principes de contentieux administratif*, published prior to the adoption of the *Constitution Act, 1982.*

> On s'est interrogé sur le pouvoir d'un tribunal inférieur ou d'un organisme administratif de prononcer l'inconstitutionnalité d'une loi ou la nullité d'un règlement. Il apparaît, depuis l'arrêt *Séminaire de Chicoutimi* c. *Procureur général du Québec*, qu'un tribunal dont les membres ne sont pas nommés suivant l'article 96 de la constitution n'a pas en principe, le pouvoir de prononcer la nullité d'un texte. Exceptionnellement cependant, lorsque le texte est attributif de juridiction et que son invalidité est soulevée comme moyen incident ou collatéral, le tribunal inférieur met et doit opiner sur sa validité, car il doit statuer préliminairement sur les limites de sa propre

1. *Canadian Charter of Rights And Freedoms* in *Canada Act, 1982*, 1982 c. 11, Schedule B, Part 1, (U.K.) (Hereafter referred to as the *Canadian Charter.*)
2. R.S.Q., c. C-12. (Hereafter referred to as the *Quebec Charter.*)
3. *Séminaire de Chicoutimi* v. *The City of Chicoutimi*, [1973] S.C.R. 681. (Hereafter referred to as the *Chicoutimi* case.)

> juridiction. Sa décision pourra faire l'objet du pouvoir de surveillance de la Cour supérieure. Si le texte dont la validité est soulevée n'est pas attributif de juridiction, le tribunal inférieur doit le présumer valide et l'appliquer. [4]

The consequences of such a decision seem clear. One could not seek a declaration of constitutional invalidity from an inferior tribunal such as an administrative tribunal. But it did not decide the question of whether or not a tribunal has the power to hold a law as invalid without declaring it so. Mr. Justice Fauteux, C.J.C., in *obiter*, indicates a favourable disposition towards the ability of a tribunal to hold a law invalid :

> Moreover, and in view of the form in which these two questions have arisen in the present case, I would add that I am respectfully in agreement with the conclusion reached by the Court of Appeal. Because, since the want of jurisdiction by reason of the subject matter was raised *in limine litis* and throughout the whole contestation by the City, as it could moreover be raised by the court of its own motion by virtue of what is implied in art. 164 of the *Code of Civil Procedure*, I do not really see how the Provincial Court could in the circumstances ascertain, as it was bound to do, that it had jurisdiction by reason of the subject matter, and so dispose of the City's objection, without ruling on the constitutionality of the Act conferring jurisdiction on it. [5]

Since the decision by the Supreme Court in the *Chicoutimi* case there has been an extensive evolution in the canadian constitutional system. Over the approximate fifteen years since the *Chicoutimi* case important amendments have been made to the constitutional system in Canada and Quebec.

One must consider the implications created by the adoption of the *Constitution Act, 1982* and the effects it will have on inferior tribunal rulings, in particular the issues raised by section 24 of the *Canadian Charter* and section 52 of the *Constitution Act, 1982*. They read as follows :

> Section 24(1)) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent

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4. G. PÉPIN and Y. OUELLETTE, *Principe de contentieux administratif*, 2nd ed., Cowansville, Québec, Les Éditions Yvon Blais Inc., 1982, pp. 205-206.

5. *Supra*, note 3, pp. 685-686. The French version of the judgment may assist in better understanding the meaning of the passage.

> Du reste et telles que ces deux questions se présentent en l'espèce, j'ajouterais que je suis respectueusement d'accord avec la conclusion à laquelle en est venue la Cour d'appel. C'est que l'incompétence *ratione materiae* ayant été soulevée *in limine litis* et tout au cours du débat pour la Cité comme elle pouvait d'ailleurs l'être d'office par le tribunal selon que l'implique l'art. 164 C.P.C. je ne vois guère comment le tribunal pouvait, en l'espèce, comme il en avait le devoir, s'assurer de sa compétence *ratione materiae* et disposer ainsi de l'objection de la Cité, sans se prononcer sur la constitutionnalité de la loi qui lui confère cette compétence.

> jurisdiction to obtain such remedy as the courts considers appropriate and just in the circumstances [...].
>
> (Section 52) The Constitution of Canada is 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.

Here one can quickly realize what the main difficulty will be in applying these two key sections of the constitution. To what extent will inferior tribunals be considered a court of competent jurisdiction? And who will be able to apply section 52 to render a law of no force or effect?

All of the above mentioned issues will be addressed in the context of this paper and possible solutions proposed.

I. SECTION 96 OF THE *CONSTITUTION ACT, 1867*

As was discussed at the beginning of this paper, one of the problems in regards to the issue at hand is a seeming conflict with section 96 of the *Constitution Act, 1867*. Presumably only superior courts, whose judges are appointed by the federal government, have the power to decide a question of constitutionality. This is so as result of the constitution itself which confers upon these courts a general jurisdiction to apply any federal or provincial law. Inferior tribunals are created in accordance with section 92(14) of *Constitution Act, 1867* for matters concerning provincial law and section 101 for matters in regards to federal law. Their jurisdiction is limited to what is expressly conferred upon them by the statute. Furthermore due to the *Chicoutimi* case this grant of jurisdiction cannot take away from superior courts subject matters which they were competent to deal with in 1867, subject to exceptions recognized by subsequent decisions of the Supreme Court. Even exclusive grants of jurisdictions to the Federal Court does not take away the section 96 courts' power to inquire upon the constitutional validity of a statute.[6] It is thus only when the Federal Court has jurisdiction on a subject matter before it that it may validly inquire upon the validity of a federal statute.[7]

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6. *Attorney-General of Canada* v. *Law Society of British Columbia*, [1982] 2 S.C.R. 307, where the court held that the federal parliament can establish a court under section 101 of the constitution, however, it lacks the authority to take away from superior courts the power to declare a federal statute *ultra vires*.

7. *Northern Telecom* v. *Communication Workers*, [1983] 1 S.C.R. 733, p. 714 where Estey, J., states;

> The nexus between the Federal Court and the Constitutional issue here arising is the proceeding under the *Federal Court Act* which in turn arises from the patently valid proceedings of the Board conducted under the admittedly valid provisions of the *Canada Labour Code*. In these surrounding circumstances the Federal Court is in the same position as any statutory court, provincial or federal, and therefore can determine the constitutional

Although this is a recurring theme throughout the paper, it is best to deal with it immediately. As a result of the constitutional changes a new structure or interpretation should be adopted to remain in accordance with the "living tree" principle enunciated by the Judicial Committee of the Privy Council. [8] Such an approach seems to have been adopted by the Supreme Court of Canada in *Re Residential Tenancies Act, 1979* [9] by Mr. Justice Dickson (as he then was) :

> The phrase — "it is not the detached jurisdiction or power alone that is to be considered but rather its setting in the institutional arrangements in which it appears" — is the central core of the judgement in *Tomko*. It is no longer sufficient simply to examine the particular power or function of a tribunal and ask whether this power or function was once exercised by s. 96 courts. This would be examining the power of function in a "detached" manner, contrary to the reasoning in *Tomko*. What must be considered is the "context" in which this power is exercised. *Tomko* leads to the following result : it is possible for administrative tribunals to exercise powers and jurisdiction which once were exercised by the s. 96 courts. It will all depend on the context of the exercise of the power. It may be that the impugned "judicial powers" are merely subsidiary or ancillary to general administrative functions assigned to the tribunal (*John East*; *Tomko*) or the powers may be necessarily incidental to the achievement of a broader policy goal of the legislature (*Mississauga*). In such a situation, the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal (*Farrah*) so that the tribunal can be said to be operating "like a s. 96 court". [10]

Thus we can observe that even prior to the enactment of the *Canadian Charter* the courts already began to interpret the powers of the tribunal in a more extensive manner. Administrative tribunals can exercise certain powers which may be necessarily incidental to the functions of the administrative organ. This position was further supported by the Supreme Court in *Massey-Ferguson* v. *Saskatchewan* [11] which summarized *Re Residential Tenancies Act, 1979*, with its three step test to establishing whether a tribunal infringes upon section 96.

> 1. Does the challenged power or jurisdiction broadly conform to the power or jurisdiction exercised by Superior, District or County Courts at the time of Confederation?
>
> 2. Is the function of the provincial tribunal within its institutional setting a judicial function, considered from the point of view of the nature of the

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issue arising as a threshold question in the review of administrative action in issue.

8. *Edwards* v. *Attorney-General of Canada*, [1930] A.C. 124, p. 126 where Lord Sankey states;

> The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.

9. *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714.
10. *Id.*, pp. 735-736.
11. *Massey-Ferguson* v. *Saskatchewan et al.*, [1981] 2 S.C.R. 413.

> question which the tribunal is called upon to decide or, to put it in other words, is the tribunal concerned with a private dispute which it is called upon to adjudicate through the application of a recognized body or rules and in a manner consistent with fairness and impartiality?
>
> 3. If the power or jurisdiction of the provincial tribunal is exercised in a judicial manner, does its function as a whole in its entire institutional context violate s. 96? [12]

Thus one can see that an inferior tribunal may exercise certain functions originally handled by superior courts, if they sustain the test. To sustain the test set out by the Supreme Court, if any one of the three questions is answered in the negative then the tribunal's jurisdiction will be deemed valid. If on the other hand all three questions are answered in the affirmative, the tribunal's jurisdiction will be deemed invalid. In the *Massey-Ferguson* case it was decided that the Agricultural Implements Board was not an infringement on section 96 even if the Board's power had been considered parly judicial and broadly conformable to a section 96 court. The institutional setting in which it operated distinguished it markedly from these courts. Thus, the tribunal was held to be acting validly. Although the issue was not one of whether a declaration of invalidity could be made, it is a clear indication that the Board's powers had been accepted as valid, although some powers had originally been exercised by section 96 courts.

The Supreme Court of Canada in *Re Residential Tenancies Act, 1979*, clearly adopted the view that a tribunal may exercise section 96 powers if done "subsidiary or ancillary to general administrative functions assigned to the tribunal". Furthermore such position is in agreement with the decision rendered by the Chief Justice in the *Chicoutimi* case. The court has thus held that an inferior tribunal has at a minimum the power to hold a law to be of no force or effect without declaring it so. This position is adopted by professor Yvon Duplessis in his article [13] discussing the power of an inferior tribunal pronouncing itselt on a question of *ultra vires* legislation.

> Il est donc important de noter que le juge du tribunal inférieur ne peut que CONSTATER que le règlement municipal est *ultra vires* et non le déclarer. [14]

Thus one can see that the inferior tribunals clearly have established themselves with the right to use section 96 powers that are ancillary to their general administrative duties. As has been discussed there exists a

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12. *Id.*, p. 429.

13. Y. DUPLESSIS, "Un tribunal inférieur peut-il se prononcer sur une disposition législative *ultra vires*?", (1984) 15 *R.G.D.* 127. See also D. PINARD, "Le pouvoir des tribunaux administratifs québécois de refuser de donner effets à des textes qu'ils jugent inconstitutionnels", (1987) 33 *McGill L.J.* 170. See also *Tétreault-Gaboury* v. *C.E.I.C.*, F.C.A., 23-08-88.

14. Y. DUPLESSIS, *loc. cit.*, note 13, p. 131.

tendency to find that inferior tribunals have the authority to hold a law invalid.

The purpose of establishing inferior tribunals was for the better administration of justice. Thus when defining the power of these tribunals, it is of paramount importance to retain an approach that is not detached but rather considers the whole context of the judicial intent and constitutional change.

The most prominent constitutional change has been the patriation of the Constitution in 1982. The changes to most affect the issue under discussion in this paper were section 24 (the remedy clause of the *Canadian Charter*) and section 52 (the supremacy clause).

II. SECTION 52 OF THE *CONSTITUTION ACT, 1982*

The first question we submit is whether section 52 has created a change in our system which has given the right to an inferior tribunal the power to decide a law as invalid, which it has the duty to apply, on constitutional grounds. Section 52 grants a power that is more declaratory in nature to the extent that a court may declare a law of no force or effect. The issue is whether the inferior tribunal will also have this power in regards to declarations of no force or effect as contradicting the *Canadian Charter*.

It is of interest to note that a second approach also seems to be developing in this field and that is for the inferior tribunal to find a law unconstitutional without declaring it so. In this way the law would be held of no force or effect.

However, the ability to declare something of no force or effect seems to be a power stemming from section 52. Again one may raise the argument that only superior courts have the inherent jurisdiction to consider questions of constitutional validity and to make such declarations. However such an interpretation would limit a litigant's defences at proceedings that could adversely affect his rights. The failure to determine whether a law is of no force or effect under section 52 until the superior courts have rendered a decision is a severe recourse to permit. It may be more proper and reasonable to reserve for superior courts questions of distribution of powers because of their political considerations. Charter questions on the other hand may benefit from the opinion and experience of inferior tribunals.

In addition, it is section 52(1) that declares a law that is inconsistent with any provision of the Constitution is of "no force or effect". Thus when a tribunal decides to apply section 52, then the tribunal is merely applying the constitutional law of Canada, that itself declares the law to be of no force or effect and thus the tribunal has

authority to declare a law invalid under section 52. In relation to the effect of section 52, professor Hogg states the following :

> I concluded therefore that the supremacy clause of section 52(1) of the *Constitution Act, 1982* is effective to make the *Constitution Act, 1982* (as well as the other parts of the Constitution of Canada) supreme in the sense that *it will invalidate* inconsistent laws enacted by the Parliament or a legislature. [15]

The principle is that an inferior tribunal can only declare itself on laws that are within its jurisdiction to apply, reserving the ability to make general declarations of constitutional validity to superior courts. This position was adopted in an unequivocal manner by Mr. Justice Pratte of the Federal Court of Appeal in *Zwarich* v. *Attorney General of Canada.* [16] In that case a decision by the Unemployment Insurance Committee to reject an application was appealed to a Board of Referees and an Umpire on the grounds that section 44(1) of the *Unemployment Insurance Act, 1971*, violated the *Canadian Charter.* In rendering his decision Mr. Justice Pratte states :

> It is clear that neither a board of referees nor an umpire have the right to pronounce declarations as to the constitutional validity of statutes and regulations. However, like all tribunals, an umpire and a board of referees, must apply the law. They must, therefore, determine what the law is. And this implies that they must not only construe the relevant statutes and regulations but also find whether they have been validly enacted. If they reach the conclusion that a relevant statutory provision violates the Charter, they must decide the case that is before them as if that provision had never been enacted. [17]

There have in effect been conflicting results coming from the courts. As an example the decisions by the Quebec Court of Appeal in the two *Wade Johnson* [18] cases can be referred to. Although these cases deal with the *Quebec Charter*, it is of interest to note their divergency. In *Wade Johnson* Mr. Justice Lamer of the Quebec Court of Appeal (as he then was) specifically authorized the *Commission des affaires sociales* (hereafter *C.A.S.*) and other inferior tribunals to decide on the legality

15. P.H. HOGG, "Supremacy of the Canadian Charter of Rights and Freedoms", (1983) 61 *Can. B. R.* 69, p. 79. Emphasis added.

16. *Zwarich* v. *Attorney-General of Canada*, [1987] 3 F.C. 253.

17. *Id.*, p. 255. In the later decision of *Attorney-General of Canada* v. *Vincer*, F.C.A., n° A-132-87, December 1, 1987, (unreported) the Federal Court of Appeal held that the review committee established pursuant to the *Family Allowance Act, 1973*, S.C. 1973-74, c. 44 did not have the power to decide as was held in *Zwarich.* But they distinguished it as being an *ad hoc* committee and not one to be equated with an administrative tribunal.

18. *Wade Johnson et al.* v. *Commission des Affaires Sociales et al.*, [1980] C.A. 22. (Hereafter referred to as *Wade Johnson 1*); *Wade Johnson et al.* v. *Commission des Affaires Sociales et al.*, [1984] C.A. 61. (Hereafter referred to as *Wade Johnson 2*).

and constitutionality of laws they were to apply. [19] In the second decision, *Wade Johnson 2* Mr. Justice Bisson of the Quebec Court of Appeal finds the reverse and holds that the *C.A.S.* does not have the authority to decide matters of a constitutional nature. [20]

In deciding the potential for an inferior tribunal to use section 52 of the *Canadian Charter* one may want to refer to practises set out by administrative agencies such as Labour Relations Boards. The first of these case is *Placer Development Ltd.,* [21] in which the Labour Relations Board of British Columbia embarks upon an exhaustive analysis of the *Canadian Charter* and its application to the law being reviewed and concludes that the *Charter* argument ought to be rejected. The Board implicitly indicates that it has or feels to have the authority required to consider matters under section 52. [22] In an earlier case the same reasoning was adopted by the same Board holding that the *Canadian Charter* applied to disciplinary proceedings where a violation of the fundamental freedom is involved. [23] Again there is an implicit presumption that the Board has the ability to decide these issues.

The Ontario Labour Relations Board has demonstrated the same attitude in the case of *United Steelworkers of America* v. *Walter Tool and Die Ltd.* [24] The Board gives consideration to an argument raising the *Canadian Charter*, in particular section 2 and section 52 and renders its decision.

> Consequently, that part of the respondent's argument that suggest that any requirement that they bargain with the complainant is a breach of their rights under section 2 of the Charter can be of no assistance to the respondents and the Board finds it unnecessary to deal with that argument in disposing of these complaints. [25]

Again here one is able to observe that the Board seems to feel it has jurisdiction to deal with the constitutional issue by such terms as "the Board finds it unnecessary to deal with that argument" which would indicate that had the facts been different the court may have well considered this argument.

It is interesting to note that in all the cases mentioned that the view has always focused upon legislation which the administrative agency or tribunal has had a duty to oversee as being within their jurisdiction. Thus the view has always evolved around legislation which

19. *Wade Johnson 1*, *supra*, note 18, p. 23.
20. *Wade Johnson 2*, *supra*, note 18, pp. 70-71.
21. *Placer Development Ltd.*, (1985) 11 C.L.R.B.R. (n.s.) 195.
22. *Id.*, pp. 209–217.
23. *Re Health Labour Relations Association and Employee's Union*, (1985) 18 L.A.C. (3d) 369.
24. *United Steelworker's of America* v. *Walter Tool And Die Ltd.*, [1986] O.L.R.B. Rep. 1167.
25. *Id.*, p. 1172.

the tribunal has a duty to apply. In addition inferior tribunals can take account of other relevant statutes if required to do so to dispose of the case it must deal with. This of course seems the only logical reasoning as if an inferior tribunal were to go beyond its own statutory jurisdiction in deciding question of law it would clearly be acting *ultra vires* its statute. [26]

Thus one can see that there has been a tendency permitting the inferior tribunals to make declarations under section 52 when the case is plainly within their own jurisdiction. Mr. Justice Dickson (as he then was) in the case of *R.* v. *Big M Drug Mart Ltd.* [27] states in *obiter* :

> If a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding effect of the *Constitution Act, 1982* , s. 52(1) is to give the Court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer "of force or effect". [28]

It may also be useful in giving the french version in part to assist in better understanding this passage.

> Si un tribunal judiciaire ou administratif juge une loi incompatible avec la Constitution, ce tribunal a [...] non seulement le pouvoir mais encore l'obligation de considérer comme "inopérants" les dispositions incompatibles de cette loi. [29]

In carefully reading this statement, one can notice the fine distinction Mr. Justice Dickson makes. In referring to the power which section 52 vests in inferior tribunals, he declares them to have the jurisdiction to regard the affected dispositions as of no force or effect. However, the most supportive argument found in permitting inferior tribunals to declare a law invalid comes from a recent decision by the British Columbia Court of Appeal in *Re Shewchuk and Ricard* [30] where the court had to consider this question. Although the case was in reference to a provincial court (which is considered an inferior court) Mr. Justice MacFarlane's reasons are convincing. Not only does he decide that an inferior court has the ability to hold a law of no force and effect but to also declare it so. It may be best to cite Mr. Justice MacFarlane at length.

> The question of whether the provincial court judge had jurisdiction to make a declaration that the *Act* was of no force or effect would not have arisen had Judge Auxier [provincial court judge] dismissed the complaint of the mother on the basis that the *Child Paternity and Support Act* was inconsistent with and an infringement of s. 15 of the *Charter*, and was therefore of no force and

26. G. PÉPIN and Y. OUELLETTE, *op. cit.*, note 3, pp. 215-217.
27. *R.* v. *Big M Drug Mart Ltd.*, [1983] 1 S.C.R. 295.
28. *Id.*, p. 353.
29. *Ibid.*
30. *Re Shewchuk and Ricard and Attorney-General of British Columbia et al.*, (1986) 28 D.L.R. (4d) 429 (B.C.C.A.).

> effect by reason of s. 52 of the *Constitution Act, 1982*. Her judgement did not conclude in that way, but rather with a bare declaration that the *Act* was of no force and effect. That is understandable because that was the preliminary legal question which she was asked to decide. The next step in this case, the provincial court judge having found that the *Act* was of no force and effect, was to dismiss the complaint [...].
>
> It is clear that the power to make general declarations that enactments of Parliament or of the Legislature are invalid is a high constitutional power which flows from the inherent jurisdiction of the superior courts.
>
> But it is equally clear that if a person is before a court upon a charge, complaint, or other proceeding properly within the jurisdiction of that court then the court is competent to decide that the law upon which the charge, complaint or proceeding is based is of no force or effect by reason of provisions of the *Canadian Charter of Rights and Freedoms*, and to dismiss the charge, complaint or proceeding. The making of a declaration that the law in question is of no force and effect, in that context, is nothing more than a decision of a legal question properly before the court. It does not trench upon the exclusive right of the superior courts to grant prerogative relief, including general declarations. [31]

By this reasoning one is led to conclude that the British Columbia Court of Appeal has adopted an interpretation that would authorize inferior courts to make declarations concerning the validity of a law that is within their jurisdiction to apply.

In light of all of the above one is led to a conclusion the inferior tribunals are empowered to regard and, as a result of *Re Shewchuk and Ricard*, to declare a law as having no force or effect as contradicting the canadian constitution. The authority for such action can be found in section 52 of the *Constitution Act, 1982* as well as in case law.

III. SECTION 24 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

In addition to section 52 of the *Constitution Act, 1982* one can consider the effect section 24 of the *Canadian Charter* will have on inferior tribunal's power to decide a law constitutionally invalid. One must ask whether an "inferior tribunal" falls within the jurisdiction of section 24. In particular one must ask whether the *Canadian Charter* in using the words "courts of competent jurisdiction" includes *inter alia* inferior tribunals.

Although the *Canadian Charter* is a recent document it has undergone careful scrutiny by the courts since its inception. A constitutional document must be construed in a more liberal manner. In his article [32]

31. *Id.*, pp. 439-440.

32. Y. OUELLETTE, "La Charte canadienne et les tribunaux administratifs", (1984) 18 *R.J.T.* 295.

professor Yves Ouellette in reference to the interpretation of section 24 of the *Canadian Charter* states the following :

> On n'interprète pas un texte constitutionnel à l'aide de dictionnaires, mais plutôt par sa finalité, vient de rappeler la Cour suprême du Canada dans *Hunter* c. *Southman Inc.* La justice à l'anglaise n'hésite pas à s'appuyer sur des considérations de *public policy* [...]. S'agissant de l'article 24 et d'une question de redressement ou de procédure, l'efficacité du remède ne devrait pas être compromise par une interprétation étroite qui restreindrait l'accessibilité du forum compétent. [33]

Thus one can see that the interpretation should not be of a restrictive nature. In deciding upon the applicability of section 24 one must consider both official versions of the *Canadian Charter*. The English text uses the words "court of competent jurisdiction" whereas the french text uses the words *tribunal compétent*. This discrepancy may lead to different interpretations. One may wish to bring forth the argument that as "court" is more restrictive than its French translation an equally restrictive interpretation be given. But such an attitude would run contrary to the spirit expanded upon by professor Ouellette. An interpretation considering both the English and the French version would thus be the most reasonable way of conducting the interpretation. In interpreting the scope of the words "court of competent jurisdiction" or *tribunal* in such a way so as to adopt the more restrictive meaning of the two could not benefit the development of law. One must be prepared to advance the law in a manner that is progressive and constructive. Thus to adopt the more extensive French definition of "court" would be in accordance with such a position. This was the position taken by a court shortly after the coming into force of the *Canadian Charter* in *Re Nash and The Queen.* [34] The headnote summarizes the decision well.

> Finally, the disciplinary panel itself appointed pursuant to the provincial legislation is a court of competent jurisdiction within the meaning of s. 24(1) of the Charter having regard to the fact that the French version of s. 24(1) uses the term "un tribunal" which has much broader meaning than the English word "court" and is clearly broad enough to encompass the disciplinary panel or any other similar body. [35]

Thus we can see that from the beginning certain courts have seen the *Canadian Charter* as a document broad enough to include inferior tribunals such as a police disciplinary panel in Newfoundland. [36]

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33. *Id.*, p. 325.
34. *Re Nash and The Queen*, (1982) 70 C.C.C. (2d) 490 (Nfld. Prov. Crt.)
35. *Id.*, pp. 490-491.
36. It must be noted that recent decisions by the Supreme Court of Canada have held that police disciplinary proceedings do not come within the ambit of section 11 of the *Canadian Charter*. See *Burham* v. *Metropolitain Toronto Police*, [1987] 2 S.C.R. 572 and also *R.* v. *Wigglesworth*, [1987] 2 S.C.R. 541.

Yet this position has not been adopted by the courts in a unanimous way. In fact, certain administrative tribunals have held themselves to be without jurisdiction to apply section 24 of the *Canadian Charter*. In fact Judge Brière of the Quebec Labour Tribunal adopts this position in both *Les Magasins Harts Inc.* c. *Demers*[37] and *Fortier* c. *Schnaiberg*[38] cases. But with all due respect to the learned judge, one does not feel he has correctly adopted and interpreted the case law that precedes his decisions. In fact he goes to the extent of citing judgements and authors whom he decides to refute. In a recent decision of the Supreme Court of Canada, *Mills* v. *The Queen*,[39] reference to section 24 and "court of competent jurisdiction" is made. The court states unequivocally that no additional jurisdiction is conferred upon the courts by section 24 and held the preliminary inquiry presiding judge had no jurisdiction to stay the proceedings. The court must always act within its jurisdiction as defined by statute or by the constitution. However, the court did not deal with the more difficult question of an inferior tribunal's jurisdiction with respect to section 24, limiting itself to the criminal jurisdiction.

Since the inception of the *Canadian Charter* there seems to have been a greater trend in administrative law which would permit inferior and administrative tribunals to give effect to rights a litigant may have whether constitutional or statutory. This position reflects well the basis of our judicial and quasi-judicial systems, that being the importance of natural justice.

The proposition that an inferior tribunal has competence to decide the question in issue is not based solely on the grounds of lower court decisions such as in *Re Nash and The Queen.*[40] This issue has arisen and various superior courts have rendered a decision that indicates a favourable interpretation of section 24 to the extent of including inferior tribunals. In British Columbia, the Supreme Court in *Moore* v. *B.C. (Gov't)*[41] states the following :

> Authority exists to support the view that the world "court" is broad enough to include statutory boards and tribunals in addition to traditional courts [...] [T]he French version of s. 24(1) seems to be broad enough to include more than traditional courts.[42]

37. *Les Magasins Hart* v. *Demers*, [1984] T.T. 119.
38. *Fortier* v. *Scnaiberg*, [1985] T.T. 171.
39. *Mills* v. *The Queen*, [1986] 1 S.C.R. 865.
40. *Supra*, note 34.
41. *Moore* v. *R.* (1986), 4 B.C.L.R. (2d) 247 (B.C.S.C.).
42. *Id.*, p. 3.

In this statement J. Lander, is referring to the case of *Law* v. *Solicitor General of Canada*. [43] At the trial division of the Federal Court, the court held the Immigration Appeal Board to be a court of competent jurisdiction within the contemplation of section 24 and held that the Board had jurisdiction to hear and determine all questions of law in relation to removal orders. [44] These included the constitutional validity of the removal order. The Federal Court of Appeal takes the subject up also. In reference to the argument whether the appellant could raise the issue of unconstitutionality before the Board, J. Stone, can be quoted as saying :

> In my view, the appellant should have the opportunity of advancing that argument before the Board. [45]

The issue has of yet not been definitely resolved by the Supreme Court of Canada. But as has been demonstrated thus far it would only be consistent with the established principles of fundamental and natural justice to permit a litigant to put forward all legal arguments before a tribunal that can or has the ability to affect his personal rights.

This position may also be further strengthened by the principle of having the right to give a full answer and defence.

IV. Full Answer and Defence

Although the right to a full answer and defence is found in mainly criminal or penal proceeding, [46] it has also been considered to form part of natural justice. [47] Furthermore, this principle seems to have gained constitutional protection as a result of section 7 of the *Canadian Charter* which seems to include procedural requirements such as a full answer and defence. In their book on Administrative Law Jones and deVillars state the following :

> Further, one may speculate that the wording of section 7 of the Charter may extend the procedural requirements (called the "principles of natural justice"

43. *Law* v. *Solicitor General of Canada et al.*, (1983) 144 D.L.R. (3d) 549 (F.C.T.D.).

44. *Id.*, p. 553.

45. *Law* v. *Solicitor General of Canada et al.*, [1985] F.C. 62, p. 70 (F.C.A.). The Québec Court of the Session of the Peace holds the same view. See *R.* v. *Deschênes*, J.E. 84-9, (C.S.P.).

46. *Summary Convictions Act*, R.S.Q., c. P-15, s. 30; *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 35; *Criminal Code*, R.S.C. 1970, c. C-34, s. 737, (R.S.C. 1985, c. C-46, s. 802).

47. *R.* v. *Jefferies and Watts*, (1956) 115 C.C.C. 331 (B.C.C.A.) in which it was held that a failure to afford a full answer and defence is a denial of natural justice and will result in a conviction being set aside.

> or "duty to be fair") which Administrative Law imposes on delegates to whom the legislative branch has granted power. [48]

In addition the principle of a right to a full answer and defence is clearly entrenched in the *Quebec Charter* which states at section 35 that "Every accused person has a right to a full and complete defense [...]".

The issue of whether seeking the remedy of having a law declared unconstitutional is part of a full answer and defence may be questioned. However in studying the case law it would seem clear that at a minimum, an inferior tribunal has the power the decide a law unconstitutional and refuse its application. The Superior Court of Quebec in an unreported decision held that inferior tribunals had the jurisdiction to decide questions of constitutionality in relation to section 737 of the *Criminal Code*. The issue was whether the Superior Court would issue a writ of prohibition under section 783 of the *Criminal Code* following a non-guitly plea in front of Justice of the Peace on the basis of unconstitutionality. The court held a right to a full answer and defence included such a defence and stated :

> L'intimé (Cour des sessions de la paix) ayant juridiction pour entendre cette affaire et décider de la constitutionnalité de certains articles tant de la *Loi relative aux enquêtes sur les coalitions* que du *Code criminel* il n'y a pas lieu pour cette Cour d'émettre un bref de prohibition. [49]

We can conclude from this case that inferior tribunals do have the power to decide questions of constitutional validity. This position was later accepted and reinforced by the Quebec Court of Appeal in *Khana et al.* c. *Procureur Général du Québec et al.* [50] Mr. Justice Nolan in his decision goes in a careful analysis of prior case law before coming to his conclusion. He cites a prior decision [51] of the Quebec Court of Appeal in support of the view that the court recognizes the right of an accused to evoke in his defence the nullity of a statutory provision. Mr. Justice Nolan clearly states the position :

> In disposing of that argument Mr. Justice Mayrand held that an accused has the right in all instances, including before a Justice of the Peace, to evoke the nullity of provision in order to make his "full answer and defence". (In that case the dispute was dealing with section 737 of the *Criminal Code*). [52]

It is thus clear that the right to a full answer and defence includes the right to raise the question of constitutional validity whenever brought before a

48. D.P. JONES and A.S. DEVILLARS, *Principles of Administrative Law*, Toronto, Carswell, 1985, p. 39.
49. *Factory Carpet Ldt.* c. *Labelle*, J.E. 82-791, (S.C.), p. 6 of the "full text".
50. *Khana et al.* c. *Procureur Général du Québec*, [1984] C.A. 591.
51. *R. et al.* c. *Rice et al.*, [1980] C.A. 310.
52. *Khana et al.* c. *Procureur Général du Québec*, *supra*, note 50, p. 596.

tribunal that has the power to effect your rights. To deny this right in front of an inferior tribunal would be contrary to the spirit of a well-established principle. Madam Justice Barrette-Joncas of the Superior Court sums up the position well :

> Il y a donc lieu de déterminer si l'intimé a juridiction pour déterminer si une loi est *ultra vires* du Parlement qui l'a votée. À première vue, il m'apparaît que le plaidoyer de non-culpabilité basé sur l'inconstitutionnalité de la loi sous laquelle on est accusé est un plaidoyer dont l'intimé peut décider de la validité. Admettre qu'une défense en droit comme celle-ci ne peut exister devant une Cour des poursuites sommaires serait conclure à l'inexistence d'une défense pleine et entière alors que ce droit est explicitement reconnu à l'article 737(1) du *Code criminel* [...]. [53]

It is thus clear that a right of a full answer and defence includes the right to raise the issue of constitutional validity and this in front of any tribunal, including inferior tribunals. To decide otherwise goes contrary to the principle itself and established case law.

V. THE *CHARTER OF HUMAN RIGHTS AND FREEDOMS*

The *Quebec Charter* does not have a section similar to section 24 of the *Canadian Charter* rather a section similar to section 52 of the *Canadian Charter.*

> No provision of any Act, even subsequent to the *Charter* may derogate from s. 1 to s. 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the *Charter*. [54]

The French version uses the terminology *ne peut déroger aux articles 1 à 38*. It would thus seem clear that the implication and intent is that any conflict between the *Quebec Charter* and a provincial statute renders the Quebec statute inoperative.

An important factor to remember when discussing the *Quebec Charter* is that the *Charter* itself is a special act passed by the Quebec Assembly that holds itself to be paramount. Nevertheless it only has the status of a quasi-constitutional document. Such a position may assist in distinguishing the reasons for the decisions made by the courts under the *Quebec Charter* and the *Canadian Charter* which has the status of a constitutional text.

In an effort to avoid merely repeating established case law it may be of greater assistance to summarize the two positions that are displayed by the courts. The first of these two positions held by the courts is that an inferior tribunal has the jurisdiction to hold (*statuer*) a law as of

53. *Factory Carpet Ltd.* c. *Labelle*, *supra*, note 49, p. 2.
54. R.S.Q., c. C-12, s. 52.

no force or effect if it is a law which they have jurisdiction to apply. This position may be best understood in reading Justice Lamer's decision in *Wade Johnson* :

> Je ne me crois pas autorisé en l'espèce à ne pas suivre une jurisprudence établie par la Cour d'Appel du Québec et qui reconnaît aux tribunaux inférieurs, quoique soumis aux pouvoirs de surveillance et de contrôle de la Cour supérieure, le pouvoir de statuer sur la légalité et la constitutionnalité des lois qu'on les invite à appliquer [...]. Comme ils ont choisi d'en saisir la C.A.S., ce qu'ils n'étaient aucunement obligés de faire, et comme je suis d'avis que la C.A.S. a la compétence voulue pour en décider, et surtout parce que ce sont les appelants eux-mêmes qui se sont pourvus à la C.A.S., j'estime qu'il était inopportun qu'il fût statué par la Cour Supérieure sur la question constitutionnelle. [55]

This position adopted by the Quebec Court of Appeal was not a new position, but one that was previously held by the same court [56] and reaffirmed by other courts. [57] It would thus seem clear that a trend is leading in this direction and supports this view.

Yet when conducting a research of the law it is clear that a second position is being developed in case law. In fact there seems to be a reversal by the Court of Appeal from their first decision of *Wade Johnson 1*. In *Wade Johnson 2* the court adopts a position that it is only within the jurisdiction of the superior courts to decide questions of constitutional validity. [58] Thereby concluding that an inferior tribunal (*i.e. C.A.S.*) cannot decide upon the question of a law's validity on the basis of the *Quebec Charter*. Again here the conflict sees an adaptation in case law supporting the view held in *Wade Johnson 2*. [59] Yet in coming to their conclusions, these courts fail to considerer *Wade Johnson 1* or any of the previous cases. The cases themselves either fail to explain their refusal to accept the other position or merely overlook that particular case law.

However it should be of interest to note that the first position held that a court could "hold" a law as illegal and thus of no effect. Thus the court is placing an importance upon the *Quebec Charter* and thus

55. *Wade Johnson 1*, *supra*, note 18, pp. 23-24.

56. *Harwood* c. *Laganière et al.*, [1976] C.A. 301; *Montreal (City of)* c. *Provincial Court et al.*, [1975] C.A. 147; *Association des enseignants de la Tardivel* c. *Cour des sessions de la paix et al.*, [1975] R.P. 46 (C.A.).

57. *R.* c. *Deschênes*, J.E. 84-9, (C.S.P.); *Montreal (City of)* c. *Saint-Martin-Poitras*, (1981) 15 M.P.L.R. 289 (M.C. Mtl.); *Montreal (City of)* c. *Meli*, (1981) 14 M.P.L.R. 311 (S.C. Qué.); *Comité-Infirmières et infirmiers 3*, [1981] D.D.C.P. 171; *Ville de Laval* c. *Eymard*, [1979] R.L. 181 (M.C. Laval).

58. *Wade Johnson 2*, *supra*, note 18, p. 70.

59. *Ohayon* c. *Municipal Court of the City of Côte St-Luc et al.*, [1986] R.J.Q. 2731 (Qué. S.C.); *Les Magains Hart* v. *Demers*, [1984] T.T. 119; *Fortier* v. *Scnaiberg*, [1985] T.T. 171; *Municipalité du Canton de Chatham* c. *Lemay*, [1985] R.L. 224 (Qué. P. C.).

authorizes a limited right to the tribunal to uphold the individuals rights. Note that this position does not reduce the superior courts power of judicial review. The second position reflects the importance of the role of the court, in that it is the jurisdiction of the superior courts to decide issues of constitutionality. The importance is thus placed more upon the courts than on the *Quebec Charter*.

Yet there is clearly a move away from this position in our judicial evolution. As was demonstrated in *Wade Johnson 1* the courts are moving towards a more liberal position permitting inferior tribunals to decide the validity of certain laws when the question of constitutionality is raised in defence. This position is also reflected in recent articles by such jurists as Pépin and Ouellette. In his article professor Ouellette states :

> Ainsi, on a reconnu aux cours inférieures, dans le cadre de leur juridiction habituelle pour décider de questions de droit sans égard à la Charte, juridiction pour statuer selon l'article 24 sur la constitutionnalité d'un texte, qu'il soit ou non attributif de juridiction. [60]

Professor Pépin in his recent article states the following :

> Les cours inférieures auraient l'autorité, en matière civile, non seulement de se prononcer sur la légalité des lois et des règlements qui leur octroient des attributions, mais aussi, généralement, sur toute loi ou tout règlement invoqué de façon incidente dans le cadre d'un litige dont elles seraient par ailleurs régulièrement saisies. [61]

It should however be noted that professor Pépin does not hold the same view in matters concerning administrative tribunals.

> [N]ous avons fait voir dans les lignes qui précèdent notre réticence à reconnaître la juridiction sous étude (le pouvoir de stériliser les textes législatifs et réglementaires qu'il leur revient d'appliquer) aux tribunaux administratifs qui n'ont pas le statut de cour de justice [...]. Devant ces tribunaux, en conséquence, les lois et les règlements devraient être présumés valides et effectifs. Les parties désireuses de faire stériliser ces textes disposent des recours nécessaires à cet effet, devant les cours supérieures [...]. [62]

A further fallacy in the reasoning adopted by *Wade Johnson 2* is that a tribunal will be given the right to decide sometimes and not at other times. This would create in the eyes of the administered a sense of unfairness as a judge will only decide the validity of certain laws and not all laws. Although this may be the result of section 96, it is important to

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60. Y. OUELLETTE, "La Charte canadienne et les tribunaux administratifs", (1984) 18 *R.J.T.* 295, p. 326.

61. G. PÉPIN, "La compétence des cours inférieures et des tribunaux administratifs de stériliser, pour cause d'invalidité ou d'ineffectivité, les textes législatifs et réglementaires qu'ils ont mission d'appliquer", (1987) 47 *R. du B.* 509, p. 526. See also *Hull (Corporation de la Ville de)* c. *Beauchesne*, J.E. 86-979, (M.C. Hull).

62. G. PÉPIN, *loc. cit.*, note 61, p. 533.

remember that the constitution is "living" and that it must continue to grow and render decisions that reflect the society in Canada. Moreover the distinction is unworkable in a *Charter* context. When will a conflict with the *Quebec Charter* rendering the section inoperative, amount to a jurisdictional question? Never or always, depending on how jurisdiction is defined. The *Quebec Charter* may well be a quasi-constitutional document for the purpose of protecting individual's rights, yet it remains a provincial statute. As such, there is no constitutional limitation that forbids provincial courts or tribunals to inquire upon its validity. Such a quasi-constitutional document did not exist in 1867 and one cannot believe declaring that they prevail over other statutes amount to a declaration of constitutional invalidity. It is merely the application of the law as set out by the parliament. It would thus be advantageous to adopt the position that favours the *Quebec Charter* and the individual over the courts.

Since the introduction of the *Canadian Charter* the rights of the individual has been brought to the forefront and as a result the provincial Human Rights Codes may have felt and increased application. In the case of *Winnipeg School Board N^o 1* v. *Crayton*[63] the issue revolved around the Manitoba *Human Rights Act*[64] and the conflicting *Public Schools Act*.[65] The basis of discrimination was age and the issue of mandatory retirement. In their decision the Supreme Court of Canada permitted the *Human Rights Act* to prevail and reaffirmed the importance of the individual :

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement [...]. In this case it cannot be said that s. 50 of the 1980 consolidation is a sufficiently express indication of a legislative intent to create an exception to the provisions of s. 6(1) of *The Human Rights Act*.[66]

It is thus clear that the emphasis is towards the individual in judicial or quasi-judicial proceedings and should be reflected throughout the legal system, including the lower courts and the administration. Thus in a system such as ours, where training of those in inferior tribunals to know and understand the basis of law is done, it may be best to reflect our constitution and statutes as protecting the individual and not the court.

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63. *Winnipeg School Board No. 1* v. *Crayton*, [1985] 2 S.C.R. 150.
64. *Human Rights Act, 1974*, (Man.), c. 65.
65. *Public Schools Act, 1980*, (Man.) c. 33.
66. *Supra*, note 63, p. 156. See also *Insurance Corporation of British Columbia* v. *Heerspink*, [1982] 2 S.C.R. 145.

This is an important consideration to make in deciding the issue and may well reflect the trend of the future. As professor Yvon Duplessis concluded :

> Pour terminer, il y aurait lieu de s'interroger sur l'opportunité d'apporter une modification à l'article 96 de la *Loi constitutionnelle de 1867* qui permettrait aux juges des tribunaux inférieurs de se prononcer sur la légalité des dispositions législatives. Une telle modification aurait pour résultat, selon nous, de rehausser l'image de la justice aux yeux du public, de rendre plus efficace le processus judiciaire, d'éviter que des décisions contradictoires soient rendues et surtout de rendre justice aux parties au litige. [67]

This is not to say a constitutional amendment is necessary, as section 52 of the *Constitution Act, 1982* provides us with the proper recourse, but rather to reflect the growing importance of the individual.

As a result of the constitutional and quasi-constitutional changes, a judicial trend leading in the direction of *Wade Johnson 1* is occurring. Adoption of this position would ensure that Quebec case law be brought more into line with those principles established above in regard to the *Canadian Charter.*

CONCLUSION

As has been discussed throughout this paper, one is led to conclude that inferior tribunals have at a minimum the ability to hold a law unconstitutional. However it is felt that as a result of the constitutional amendments, in particular section 52 of the *Constitution Act, 1982*, have granted inferior tribunals the power to declare a statute invalid. It has not encroached upon section 96, which still maintains its general declaratory power, but merely attributed to inferior tribunals the right to decide questions of importance to a person's defence if it falls within its well-defined jurisdiction. Its decision is still subject to judicial review. To decide or conclude otherwise would limit a person's right to a full answer and defence. It would only seem reasonable with the advent of the *Canadian Charter* and the importance placed upon the rights of the individual, that one must insure that justice is done and appears to be done in proceedings of such a powerful forum as the administrative tribunals of our country.

> Nos tribunaux administratifs jouent un rôle fort important dans notre organisation sociale et comme tels méritent que nous les traitions d'une façon qui corresponde au prestige dont ils ont besoin pour s'acquitter adéquatement de leur tâche. [68]

67. Y. DUPLESSIS, *loc. cit.*, note 13, p. 132.
68. *Wade Johnson 1, supra*, note 18, p. 23.

This quotation from Justice Lamer may best reflect the importance of our inferior tribunals and how they should be treated. Permitting inferior tribunals to rule on the validity of laws properly before the tribunals prior to their application would only enhance our judicial system and create a greater air of fairness for all those who must go in front of an inferior tribunal.