Paul *v.* British Columbia (Forest Appeals Commission), [2003] 2 S.C.R. 585, 2003 SCC 55

Attorney General of British Columbia and Ministry of Forests *Appellants*

v.

Thomas Paul *Respondent*

and

Forest Appeals Commission, Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta and First Nations Summit *Interveners*

Indexed as: Paul *v.* British Columbia (Forest Appeals Commission)

Neutral citation: 2003 SCC 55.

File No.: 28974.

Hearing and judgment: June 11, 2003.
Reasons delivered: October 3, 2003.

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

on appeal from the court of appeal for british columbia

Constitutional law — Division of powers — Indians — Forestry — Whether province can constitutionally confer on administrative tribunal power to determine questions of aboriginal rights and title as they arise in course of tribunal's duties — Constitution Act, 1867, s. 91(24) — Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159, s. 96 — Constitution Act, 1982, s. 35.

Administrative law — Forest Appeals Commission — Jurisdiction — Aboriginal rights — Whether Forest Practices Code confers on Commission power to decide existence of aboriginal rights or title — Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159, s. 96.

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

The B.C. Ministry of Forestry seized four logs in the possession of P, a registered Indian, who planned to use the wood to build a deck on his home. P asserted that he had an aboriginal right to cut timber for house modification and, accordingly, s. 96 of the *Forest Practices Code*, a general prohibition against cutting Crown timber, did not apply to him. Both the District Manager and the Administrative Review Panel agreed that P had contravened s. 96. P appealed to the Forest Appeals Commission, which decided, as a preliminary matter of jurisdiction, that it was able to hear and determine the aboriginal rights issues in the appeal. The B.C. Supreme Court concluded that the Legislature of B.C. had validly conferred on the Commission

the power to decide questions relating to aboriginal title and rights in the course of its adjudicative function in relation to contraventions of the Code. A majority of the Court of Appeal set aside the decision, holding that s. 91(24) of the *Constitution Act, 1867*, which gives Parliament exclusive power to legislate in relation to Indians, precluded the Legislature from conferring jurisdiction on the Commission to determine questions of aboriginal title and rights in the forestry context.

Held: The appeal should be allowed.

The province has legislative competence to endow an administrative tribunal with capacity to consider a question of aboriginal rights in the course of carrying out its valid provincial mandate. The parties conceded that the Code is, in its entirety, valid provincial legislation in relation to development, conservation and management of forestry resources in the province, and there was no suggestion that, in operation, the law's effects on Indians are so significant as to reveal a pith and substance that is a matter under exclusive federal competence. As a law of general application, the Code applies *ex proprio vigore* to Indians, to the extent that it does not touch on the "core of Indianness" and is not unjustifiably inconsistent with s. 35 of the *Constitution Act, 1982*. Under the doctrine of incidental effects, it is constitutionally permissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of Parliament. While, through operation of the doctrine of interjurisdictional immunity, the "core" of Indianness is protected from provincial laws of general application, the Commission's enabling provisions do not attempt to supplement or amend the constitutional and federal rules respecting aboriginal rights. The effect of the Code is to prescribe that Indians charged under the Code will first raise an aboriginal rights defence before the

Commission, as opposed to before a superior court judge. This effect has not been shown to have a substantial impact upon Indians *qua* Indians. The doctrine of interjurisdictional immunity relates to the exercise of legislative powers — that is, the power of a province to apply its valid legislation that affects matters under federal competence. The majority of the Court of Appeal erred in applying the doctrine in the context of an adjudicative, not legislative, function. The conclusion that a provincial board may adjudicate matters within federal legislative competence fits comfortably within the general constitutional and judicial architecture of Canada. In determining, incidentally, a question of aboriginal rights, a provincially constituted board would be applying constitutional or federal law in the same way as a provincial court, which is also a creature of provincial legislation. Boards must take into account all applicable legal rules, both federal and provincial, in applying their enabling legislation.

A determination by an administrative tribunal, such as the Commission, is very different from both extinguishment of a right and legislation in relation to Indians or aboriginal rights. First, and most important, any adjudicator, whether a judge or a tribunal, does not create, amend, or extinguish aboriginal rights. Second, the Commission's decisions do not constitute legally binding precedents, nor will their collective weight over time amount to an authoritative body of common law. They could not be declaratory of the validity of any law. Moreover, as for constitutional determinations respecting s. 91(24) or s. 35, the Commission's rulings would be reviewable, on a correctness basis, in a superior court on judicial review.

To determine if a tribunal has the power to apply the Constitution, including s. 35 of the *Constitution Act, 1982*, the essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction

to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide the question at issue in light of s. 35 or any other relevant constitutional provision. There is no persuasive basis for distinguishing the power to determine s. 35 questions from the power to determine other constitutional questions, and practical considerations will not suffice generally to rebut the presumption that arises from authority to decide questions of law. Here, the Commission has the power to decide questions relating to aboriginal rights arising incidentally to forestry matters and to hear P's defence of his aboriginal right to harvest logs for renovation of his home. Section 131(8) of the Code permits a party to "make submissions as to facts, law and jurisdiction". The Commission thus has the power to determine questions of law and nothing in the Code provides a clear implication to rebut the presumption that the Commission may decide questions of aboriginal law. The nature of the appeal does not prohibit the Commission from hearing a s. 35 argument. Even if the Administrative Review Panel has no jurisdiction to determine a s. 35 question, the Commission is not restricted to the issues considered by that board. Lastly, any restriction on the Commission's remedial powers is not determinative of its jurisdiction to decide s. 35 issues, nor is the complexity of the questions.

Cases Cited

Applied: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; **referred to:** *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31; *Reference*

re Firearms Act (Can.), [2000] 1 S.C.R. 783, 2000 SCC 31; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749; *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 2002 SCC 65; *Buhs v. Board of Education of Humboldt Rural School Division No. 47* (2002), 217 Sask. R. 222, 2002 SKCA 41; *Adler v. Ontario*, [1996] 3 S.C.R. 609; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *R. v. Francis*, [1988] 1 S.C.R. 1025; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *Ermineskin Cree Nation v. Canada* (2001), 297 A.R. 226, 2001 ABQB 760; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81; *R. v. Hynes*, [2001] 3 S.C.R. 623, 2001 SCC 82; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Dupras v. Mason* (1994), 99 B.C.L.R. (2d) 266; *McKenzie v. Mason* (1992), 72 B.C.L.R. (2d) 53, leave to appeal refused, [1993] 1 S.C.R. vii; *British Columbia Chicken Marketing*

Board v. British Columbia Marketing Board (2002), 216 D.L.R. (4th) 587, 2002 BCCA 473.

Statutes and Regulations Cited

Bill 69, *Forest and Range Practices Amendment Act, 2003*, 4th Sess., 37th Parl., British Columbia, 2003 (date of first reading, May 29, 2003).

Canadian Charter of Rights and Freedoms, ss. 11, 24(1).

Constitution Act, 1867, ss. 91(24), 92A(1)(*b*), 96.

Constitution Act, 1982, ss. 35, 52.

Forest and Range Practices Act, S.B.C. 2002, c. 69 [not yet in force], ss. 77, 80, 82.

Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159, ss. 96, 130 to 141, 131(8).

Indian Act, R.S.C. 1985, c. I-5, s. 88.

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, s. 92.1.

Workers Compensation Act, R.S.B.C. 1996, c. 492.

Workers' Compensation Act, S.N.S. 1994-95, c. 10, s. 48.

Authors Cited

British Columbia. *Debates of the Legislative Assembly*, vol. 16, No. 7, 4th Sess., 37th Parl., May 29, 2003, p. 7108.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 1, loose-leaf ed. Scarborough, Ont.: Carswell, 1992 (updated 2002, release 1).

APPEAL from a judgment of the British Columbia Court of Appeal (2001), 201 D.L.R. (4th) 251, 154 B.C.A.C. 254, 252 W.A.C. 254, 89 B.C.L.R. (3d) 210, 38

C.E.L.R. (N.S.) 149, [2001] 7 W.W.R. 105, [2001] 4 C.N.L.R. 210, [2001] B.C.J. No. 1227 (QL), 2001 BCCA 411, supplementary reasons (2001), 206 D.L.R. (4th) 320, 40 C.E.L.R. (N.S.) 169, [2001] B.C.J. No. 2237 (QL), 2001 BCCA 644, allowing an appeal from a judgment of the British Columbia Supreme Court (1999), 179 D.L.R. (4th) 351, 31 C.E.L.R. (N.S.) 141, [2000] 1 C.N.L.R. 176, [1999] B.C.J. No. 2129 (QL). Appeal allowed.

Timothy P. Leadem, Q.C., and *Kathryn Kickbush*, for the appellants.

M. Hugh G. Braker, Q.C., and *Robert C. Freedman*, for the respondent.

T. Murray Rankin, Q.C., and *Mark G. Underhill*, for the intervener the Forest Appeals Commission.

Mitchell R. Taylor and *Peter Southey*, for the intervener the Attorney General of Canada.

Michel Y. Hélie, for the intervener the Attorney General of Ontario.

Written submissions only by *Pierre-Christian Labeau*, for the intervener the Attorney General of Quebec.

Written submissions only by *Gabriel Bourgeois, Q.C.*, for the intervener the Attorney General of New Brunswick.

Holly D. Penner, for the intervener the Attorney General of Manitoba.

Written submissions only by *P. Mitch McAdam*, for the intervener the Attorney General for Saskatchewan.

Written submissions only by *Kurt J. W. Sandstrom*, for the intervener the Attorney General of Alberta.

Arthur C. Pape and *Jean Teillet*, for the intervener the First Nations Summit.

The judgment of the Court was delivered by

BASTARACHE J. —

I. Overview

1 These are the reasons following the decision of the Court on June 11, 2003 to allow the appeal. In August 1995, an official in the British Columbia Ministry of Forestry seized four logs in the possession of Thomas Paul, a registered Indian. Mr. Paul had cut three trees and found the fourth, and planned to use the wood to build a deck on his home. Mr. Paul asserted that he had an aboriginal right to cut timber for house modification, and accordingly that s. 96 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 ("Code"), a general prohibition against cutting Crown timber, did not apply to him. Both the District Manager and the Administrative Review Panel agreed that Mr. Paul had contravened s. 96. Mr. Paul then appealed to the Forest Appeals Commission ("Commission"). No one disputes these facts.

2 The issue in dispute is whether the Commission has jurisdiction to hear Mr. Paul's defence that he cut the trees and possessed the logs in the exercise of his aboriginal rights. To this point, Mr. Paul has asserted his right but never attempted to prove it. The issue is not whether provincial legislation can override an aboriginal right recognized and affirmed by s. 35 of the *Constitution Act, 1982*. As the submissions by the parties and the interveners show, the question is of great significance both to aboriginal persons and to provincial governments, which enable administrative tribunals to address a vast diversity of issues that may encompass s. 35 rights.

3 The Commission had decided, as a preliminary matter of jurisdiction, that it was able to hear and determine the aboriginal rights issues in the appeal. In the Supreme Court of British Columbia, Mr. Paul moved, under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, for an order for *certiorari* quashing the preliminary decision of the Commission and an order of prohibition preventing the Commission from considering and determining questions relative to his aboriginal rights. Pitfield J., the chambers judge, concluded that the Legislature of British Columbia had validly conferred on the Commission the power to decide questions relating to aboriginal title and rights in the course of its adjudicative function in relation to contraventions of the Code: (1999), 179 D.L.R. (4th) 351. A majority of the Court of Appeal allowed the appeal: (2001), 89 B.C.L.R. (3d) 210, 2001 BCCA 411. Lambert J.A. concluded that s. 91(24) of the *Constitution Act, 1867*, which gives Parliament exclusive power to legislate in relation to Indians, precluded the Legislature from conferring jurisdiction on the Commission to determine questions of aboriginal title and rights in the forestry context. Huddart J.A., dissenting, held that an administrative decision maker must be able to decide questions of aboriginal rights

necessary to the exercise of its statutory authority. Specifically, she held that the Commission had capacity to hear and decide the issues in relation to Mr. Paul's aboriginal rights.

4 In the hearing before this Court, all parties conceded the general validity of the Code and of the Legislature's power to create the Commission. The Code, a law of general application, is clearly legislation in relation to the development, conservation and management of forestry resources in the province under s. 92A(1)(*b*) of the *Constitution Act, 1867*. Within the Code, ss. 130 to 141 regulate the appeals process for all persons, rather than singling out Indians or any other group.

5 There are two prongs to the respondent's challenge to the jurisdiction of the Commission. The first is that the Legislature of British Columbia cannot give the Commission the power to adjudicate questions relating to aboriginal rights, on the basis that doing so would encroach on the federal power under s. 91(24). This is the constitutional argument. The majority of the Court of Appeal had also determined, as an alternative approach, that the Code ran afoul of the doctrine of interjurisdictional immunity. The Court of Appeal reasoned that, since the existence and extent of aboriginal title and aboriginal rights come within the essential core of "Indianness" (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010), a law granting quasi-judicial jurisdiction to determine matters of aboriginal title and aboriginal rights intrudes upon the core of Indianness and is therefore inapplicable to Indians. Furthermore, held the majority, s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5, which makes provincial laws of general application apply to Indians, fails to invigorate the relevant portions of the Code, since s. 88 incorporates laws respecting Indians, not land.

6 With respect, I think that the majority of the Court of Appeal misunderstood the scope of the doctrine of interjurisdictional immunity. The doctrine relates to the exercise of legislative powers, that is, the power of a province to apply its valid legislation that affects matters under federal competence. As the parties conceded, the Code is constitutional. The majority of the Court of Appeal applied the doctrine in the context of an adjudicative, not legislative, function. The effect of the Code is not to alter the substance of any federal rule or aboriginal right, but rather to prescribe that Indians charged under the Code will first raise an aboriginal rights defence before the Commission, as opposed to before a superior court judge. This effect has not been shown to have a substantial impact upon Indians *qua* Indians. There is therefore no need to consider s. 88; the Code applies *ex proprio vigore*.

7 The second prong of Mr. Paul's challenge deals with the Commission's statutory jurisdiction. The respondent argued that the enabling provisions of the Code were insufficient to empower the Commission to decide the existence of aboriginal rights or title. Mr. Paul argues that the Legislature would need to confer the power to determine such questions, even ones arising incidentally to forestry matters, upon the Commission expressly. I note that the appellants agree with the respondent that the particular provisions of the Code fail to confer such power on the Commission. Only the Commission itself, intervening, believes it has been so empowered. Since the majority of the Court of Appeal believed that granting the Commission power to determine questions of aboriginal law would be unconstitutional, it did not examine the statutory interpretation question in detail. Nevertheless, the majority believed that practical considerations militated against a finding that the Code conferred jurisdiction on the Commission. In his brief concurring reasons, Donald J.A. referred to *Cooper*

v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854, as authority for the importance of practical considerations in seeking out implied jurisdiction (paras. 92-109). This prong of the challenge is the administrative law question of interpretation of a tribunal's enabling statute.

8 The facts in this appeal and in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, released concurrently, have given this Court the opportunity to reappraise the law respecting the jurisdiction of administrative tribunals to apply the Constitution. The correct approach in a constitutional case such as the present appeal is the same as that in *Martin*, which concerns the *Canadian Charter of Rights and Freedoms*. That approach is to determine whether the tribunal is empowered to decide questions of law. If so, the judge must verify whether there is a clear implication arising from the statutory scheme that the power to decide questions of law was meant to exclude the legal issues under review. In this case, s. 131(8) of the Code permits a party to "make submissions as to facts, law and jurisdiction". It is therefore clear that the Commission has power to determine questions of law. The Commission is not restricted to the issues considered by the Administrative Review Panel, the decision maker appealed from. Any restriction on the Commission's remedial powers is not determinative, nor is the complexity of the questions. Nothing in the Code provides a clear implication to rebut the presumption that the Commission may decide questions of aboriginal law.

II. Analysis

9 My analysis follows the two prongs of the challenge to the Commission's jurisdiction identified above. In the first part, the division of powers discussion, the

question is whether the Legislature of British Columbia is constitutionally capable of conferring on an administrative tribunal the power to determine questions of aboriginal right and title as they arise in the course of the tribunal's duties. In the second part, I will consider the extent of the power actually conferred on the Commission in this case. I turn first to the doctrines relevant to determining the Legislature's powers in endowing administrative tribunals to adjudicate questions relative to aboriginal rights.

A. *Division of Powers: Can the Province Empower the Commission to Hear and Determine Section 35 Questions?*

(1) The Scope of the Constitutional Challenge

10 It is important to indicate precisely which provisions of the Code are under discussion at this point. The challenge is to the notion that ss. 130 to 141, which provide that a person may appeal the decision of the Administrative Review Panel to the Commission, permit the Commission to hear and rule upon a defence of aboriginal rights. In contrast, there is no challenge to the substantive prohibition, which appears in s. 96(1):

> **96** (1) A person must not cut, remove, damage or destroy Crown timber unless authorized to do so
>
> . . .

Nor, I should note, do the appellants take the position that s. 96(1) would prevail in a conflict with a demonstrated aboriginal right affirmed by s. 35 of the *Constitution Act, 1982*. Once an aboriginal right is proven, s. 96(1) would be of no effect to the extent that it was inconsistent with that right, unless that inconsistency could be justified

according to the test in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. On this, there is no dispute.

(2) The Validity and Application of the Code

11 As I noted above, at the hearing the parties conceded that the Code is in its entirety valid provincial legislation. In any case, it is clear to me that the Code is legislation in relation to development, conservation and management of forestry resources in the province, under s. 92A(1)(*b*) of the *Constitution Act, 1867*. There was no argument made that the entire Code, or that portion treating appeals before the Commission, has as its true meaning, essential character, or core matters relating to Indians and lands reserved for the Indians (s. 91(24)) or to any other federal head of power. More specifically, there was no suggestion that, in operation, the law's effects on Indians are so significant as to reveal a pith and substance that is a matter under exclusive federal competence: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 54; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 18.

12 As a law of general application, the Code applies *ex proprio vigore* to Indians, to the extent that it does not touch on the "core of Indianness" and is not unjustifiably inconsistent with s. 35 of the *Constitution Act, 1982*. There is no need to consider whether s. 88 of the *Indian Act* would revive the statute and render it applicable.

13 In the classic federalism cases, the *vires* of legislation is challenged: *Reference re Firearms Act (Can.)*, *supra*; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21. Here the question is the relationship

between valid provincial legislation and matters under the federal competence to legislate under s. 91(24).

(3) Incidental Effects

14 The doctrine of incidental effects holds that where there is a valid provincial law of general application, the provincial law applies if its effects upon matters within federal legislative competence are "merely incidental, irrelevant for constitutional purposes": P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 15-8, quoted in *Global Securities*, *supra*, at para. 22. See also *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 670. In other words, as Iacobucci and Major JJ. put it in *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 81, "it is constitutionally permissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of Parliament". Since all relevant provisions of the Code are valid provincial legislation, it follows that by virtue of the doctrine of incidental effects, any impact of the Code upon aboriginals is irrelevant for classification purposes. It remains to be seen, however, whether the law's application to specific factual contexts can be put in issue.

(4) Interjurisdictional Immunity

15 The doctrine of interjurisdictional immunity is engaged when a provincial statute trenches, either in its entirety or in its application to specific factual contexts, upon a head of exclusive federal power. The doctrine provides that, where the general language of a provincial statute can be read to trench upon exclusive federal power in its application to specific factual contexts, the statute must be read down so as not to

apply to those situations: *Grail*, *supra*, at para. 81. The doctrine has limited the application of a provincial statute to a matter of exclusive federal power in numerous contexts. For example, in *Grail*, a provincial statute of general application was found to have the effect of regulating indirectly an issue of maritime negligence law. The provincial statute had the effect of supplementing existing rules of federal maritime negligence law in such a manner that the provincial law effectively altered rules within the exclusive competence of Parliament. Accordingly, the provincial statute of general application was read down so as not to apply to a maritime negligence action. In *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, this Court held that a provincial occupational health and safety statute was inapplicable to a federal undertaking. More relevant, for present purposes, in *Delgamuukw*, *supra*, at para. 181, Lamer C.J. held that s. 91(24) protects a "core" of Indianness from provincial laws of general application, through operation of the doctrine of interjurisdictional immunity. See also *Kitkatla Band*, *supra*, at para. 75: in that case it was not established that the impugned provisions affected "the essential and distinctive core values of Indianness", and thus they did not "engage the federal power over native affairs and First Nations in Canada".

16 The question, then, is whether, in a valid law of general application, provisions that empower a provincially constituted administrative tribunal to hear and rule upon arguments relating to aboriginal rights as they arise in execution of its provincial mandate trench upon the core of Indianness. If so, those provisions will be inapplicable to Indians.

(5) Application: Adjudication Versus Legislation

17 Lambert J.A., in the British Columbia Court of Appeal, concluded that such provisions would touch the core of Indianness. The doctrine of interjurisdictional immunity would, accordingly, render those enabling provisions inapplicable to questions of aboriginal law. It is helpful to review the heart of his reasoning on this point, at para. 72:

> The existence and extent of aboriginal title and aboriginal rights has been held in *Delgamuukw* to come within the essential core of Indianness. That being so, I cannot imagine that a law granting quasi-judicial jurisdiction to determine matters of aboriginal title and aboriginal rights could be anything other than equally and co-extensively within the core of Indianness. As such it fulfils the conditions for application of the principle of interjurisdictional immunity . . . .

18 This short passage reveals the fundamental error in the analysis of the majority of the Court of Appeal. It equates legislation respecting the "existence and extent of aboriginal title and aboriginal rights" (a legislative or regulatory function) with legislation enabling a board "to determine matters of aboriginal title and aboriginal rights" (an adjudicative function) (emphasis added). The respondent made the same error, stating in his factum that "the province's power to enact the jurisdiction-granting sections of the Code cannot extend to matters that are not within the province's legislative competence" (respondent's factum, at para. 105).

19 Legislation that triggers the doctrine of interjurisdictional immunity purports to regulate indirectly matters within exclusive federal competence, that is, to alter rights and obligations. Such inapplicable legislation may purport to "supplement" existing federal rules, as in *Grail*, *supra*. It may purport to "regulate" the essential parts of federal undertakings, as in *Bell*, *supra*. To my knowledge, none of the authorities applying the doctrine of interjurisdictional immunity has done so in respect of an adjudicative function. The function at issue in this appeal is one of identifying

where existing aboriginal rights affirmed by s. 35 of the *Constitution Act, 1982* prevail over provisions in the Code. The Commission's enabling provisions do not attempt to supplement or amend the constitutional and federal rules respecting aboriginal rights. Indeed, the question is whether the legislature may empower the Commission to take cognizance of existing constitutional rights and rights under federal rules, not to alter or supplant them. In my view, as I shall explain, there is no reason under the Constitution that the legislature may not so empower the Commission.

20 The respondent cites Professor Hogg's discussion of the rationale for the conferral upon Parliament by the founders of Confederation of legislative power over Indians. Professor Hogg writes that the main reason "seems to have been a concern for the protection of the Indians against local settlers" (Hogg, *supra*, at p. 27-2). Once adjudicative and legislative functions are separated, however, it becomes clear that neither s. 91(24) itself nor Professor Hogg's discussion refers to adjudication. The passage is therefore unhelpful in this context.

21 The conclusion that a provincial board may adjudicate matters within federal legislative competence fits comfortably within the general constitutional and judicial architecture of Canada. In determining, incidentally, a question of aboriginal rights, a provincially constituted board would be applying constitutional or federal law in the same way as a provincial court, which of course is also a creature of provincial legislation. At the hearing all parties agreed that a provincial court may determine s. 35 issues. I believe that *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206, is helpful. It stands for the proposition that legislative and adjudicative competence are not coterminous. In that case, this Court concluded that a small claims court, a provincially constituted inferior court, was

competent to hear a case of admiralty law. Admiralty law, of course, falls within exclusive federal competence. The Court noted that, within the unitary court system in Canada, provincially constituted inferior and superior courts apply federal as well as provincial laws. There are procedural and structural differences between provincially created courts and administrative tribunals, including the judicial independence requirements bearing upon them. Nevertheless, I believe that, analogous to the result in *Pembina*, *supra*, the division of powers does not preclude a validly constituted provincial administrative tribunal, legislatively empowered to do so, from determining questions of constitutional and federal law arising in the course of its work.

22 I do not agree with the respondent that the conclusion in *Pembina* that a provincially constituted court could determine questions of federal law implies, *a contrario*, that a provincially constituted administrative tribunal cannot do so. First, while I need not decide this point, it is arguable that La Forest J.'s reference to "courts of inferior jurisdiction" naturally includes an adjudicative tribunal such as the Commission. Such a conclusion follows perhaps even more readily from the French version, "*tribunaux d'instance inférieure*" (*Pembina*, *supra*, at p. 225). Second, even if the statement in *Pembina* does not embrace the Commission, La Forest J. was speaking of the jurisdiction of a small claims court, and I do not think he can be taken to have been pronouncing, by implication, on broader questions. Third, the constitutional protection of judicial review of administrative tribunals, derived from s. 96 of the *Constitution Act, 1867*, integrates administrative tribunals into the unitary system of justice: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. By performing judicial review of the decisions of administrative tribunals, superior courts play an important role in assuring respect for the rule of law (*Dr. Q v. College of*

Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21). While there are distinctions between administrative tribunals and courts, both are part of the system of justice. Viewed properly, then, the system of justice encompasses the ordinary courts, federal courts, statutory provincial courts and administrative tribunals. It is therefore incoherent to distinguish administrative tribunals from provincial courts for the purpose of deciding which subjects they may consider on the basis that only the latter are part of the unitary system of justice.

23 The conclusion sought by the respondent would pose intractable difficulties for administrative tribunals in the execution of their tasks. A provincially constituted board cannot respect the division of powers under the *Constitution Act, 1867* if it is unable to take into account the boundary between provincial and federal powers. For example, in *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 2002 SCC 65, the Law Society could only stay within the limits of its jurisdiction to review a prosecutor's ethical breach if it considered federal law relating to prosecutorial discretion. Indeed, a multitude of administrative tribunals, both provincial and federal, routinely make determinations respecting matters within the competence of the other legislator. Provincial boards may have an express statutory mandate to pronounce upon federal legislation: *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 92.1; *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, s. 48; *Workers Compensation Act*, R.S.B.C. 1996, c. 492 (enabling legislation of provincial boards directing them to interpret and apply federal income tax, pension and employment insurance legislation). Alternatively, the necessity to consider a question of constitutional or federal law may simply arise in the course of a primary determination: *Buhs v. Board of Education of Humboldt Rural School Division No. 47* (2002), 217 Sask. R. 222, 2002 SKCA 41, at para. 31 (municipal tax Board of Revision could hear assessment appeal on ground that

property subject to aboriginal title). In short, in applying their enabling legislation, boards must take into account all applicable legal rules, both federal and provincial. I therefore decline to accept the respondent's argument and its logical extension that the practices just described are constitutionally impermissible.

24 Further reasons persuade me to reject the respondent's general position that questions relating to aboriginal rights are untouchable by a provincially created tribunal by virtue of their falling within federal legislative competence. It is necessary to examine side by side two provisions in the Constitution. The one on which the respondent relies heavily is s. 91(24), which empowers Parliament to legislate in relation to "Indians, and Land reserved for the Indians". The other is s. 35 of the *Constitution Act, 1982*. Unless otherwise specified, such as official language rights in the *Charter* particular to New Brunswick, every right in the *Constitution Act, 1982* applies to every province as well as to the federal government. Section 35 therefore applies to both provinces and the federal government. It is also established that one part of the Constitution cannot abrogate another: *Adler v. Ontario*, [1996] 3 S.C.R. 609. By virtue of s. 35, then, laws of the province of British Columbia that conflict with protected aboriginal rights do not apply so as to limit those rights, unless the limitation is justifiable according to the test in *Sparrow*, *supra*. I find it difficult to think that the Province cannot, when administering a provincial regulatory scheme, attempt to respect its constitutional obligation by empowering an administrative tribunal to hear a defence of aboriginal rights.

25 *Sparrow* stands for the proposition that government regulation, including provincial regulation, may, by legislation, infringe an aboriginal right if that infringement is justified. Though this is not the basis of the Commission's

jurisdiction, where legislation justifiably infringing rights is possible, surely adjudication by the Commission, which simply takes existing rights into account, must be permissible. This conclusion follows from the distinction between legislation and adjudication and the nature of their impact upon rights.

26 I rely considerably on this distinction. I wish, therefore, to address an argument made by the respondent that, in practical terms in the aboriginal rights context, the two are insufficiently distinguishable.

27 The respondent submits that, in deciding a question arising from a defence of aboriginal right, the Commission will necessarily turn to matters at the core of s. 91(24). In his view, the Commission would determine not only the scope and content of the claimed right, but also perhaps the respondent's relationship to his First Nation, the times at which the claimed right can be practised, and the limits on the right, if any, and how the right can be exercised and by whom. He notes that the Commission might be required to determine whether the aboriginal right at issue had been extinguished. Then he argues that a determination by a provincial decision maker that a right has been extinguished is as much an extinguishment of an aboriginal right as provincial legislation attempting to extinguish that right directly. The respondent's argument, in essence, is that adjudication respecting aboriginal rights is tantamount to legislation respecting them.

28 I wish to reiterate a point acknowledged by the respondent himself, namely that a province lacks the constitutional capacity to extinguish aboriginal rights and aboriginal title. This is because the clear and plain intent necessary to extinguish an aboriginal right would make a law one in relation to Indians and Indian lands and thus

ultra vires the province: *Delgamuukw*, *supra*, at para. 180. I will now explain why, in two important respects, a determination by an administrative tribunal, such as the Commission, is very different from both the extinguishment of a right and legislation in relation to Indians or aboriginal rights.

29 First, and most important, any adjudicator, whether a judge or a tribunal, does not create, amend or extinguish aboriginal rights. Rather, on the basis of the evidence, a judicial or administrative decision maker may recognize the continued existence of an aboriginal right, including its content and scope, or observe that the right has been properly extinguished by a competent legislative authority. Of course the decision maker may also conclude on the evidence that the aboriginal right simply has not been proven at all.

30 Admittedly, within the administrative state, the line between adjudication and legislation is sometimes blurred. Administrative tribunals that develop and implement policy while adjudicating disputes, such as the Competition Tribunal and a provincial Securities Commission, come to mind. Indeed, this Court's standard of review jurisprudence is sensitive to the deference that may be appropriate where an expert tribunal is simultaneously adjudicating and developing policy, which may sometimes be viewed as a legislative function: *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 28; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 48. There is, however, a crucial distinction between a board that has been empowered by valid legislation to make policy within an area that is *intra vires* the enabling legislator, and a provincial board that is called upon, in executing its mandate, to answer incidentally a legal question relating to the Constitution or to federal law. No

one has suggested that the Legislature has the constitutional power to enable a board to determine questions of aboriginal law on the basis of policy considerations favourable to the Province.

31 Second, while both provincially constituted courts and provincially constituted tribunals may consider the Constitution and federal laws, there is nevertheless one important distinction between them that the respondent overlooked. Unlike the judgments of a court, the Commission's decisions do not constitute legally binding precedents, nor will their collective weight over time amount to an authoritative body of common law. They could not be declaratory of the validity of any law. Moreover, as constitutional determinations respecting s. 91(24) or s. 35, the Commission's rulings would be reviewable, on a correctness basis, in a superior court on judicial review: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, at para. 40; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 23; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570. To avoid judicial review, the Commission would have to identify, interpret, and apply correctly the relevant constitutional and federal rules and judicial precedents. As a result of the contrast between the general application of a provincial law by a court and the specific, non-binding effect of a board's particular decision, there is a substantial difference.

(6) The Present Role of the Commission and the Core of Indianness

32 The preceding point brings me to consider the role of the Commission in this case. Recall that the general prohibition against cutting Crown timber appears in s. 96(1) of the Code, and is not attacked in this appeal. The question, then, is not

whether that prohibition unjustifiably infringes an aboriginal right. The question is whether provisions that would enable the Commission to hear a defence of aboriginal right are unconstitutional. I have already noted that the determinations of the Commission respecting aboriginal rights would be reviewable on a correctness standard. Provincial officials cannot initiate any inquiry into aboriginal rights before the Commission. Instead, a question of aboriginal law will arise only when a respondent raises an aboriginal right before the Commission in seeking relief from a general prohibition or other regulatory provision in the Code. I do not see how, by raising a defence of aboriginal right, a respondent should be able to alter the primary jurisdiction of the Commission or halt its proceedings. The nature of a particular defence should be seen as secondary to the Commission's primary jurisdiction. A person accused of violating the Code should not be able to oust the Commission's jurisdiction relating to forestry simply by raising a particular defence and thereby highlighting a constitutional dimension of the main issue. In any event, constitutional law doctrines aside, I think it would be most convenient for aboriginal persons to seek the relief afforded by their constitutionally protected rights as early as possible within the mechanisms of the administrative and judicial apparatus.

33 The respondent has failed to grasp the distinction between adjudication by a provincially created tribunal, on the one hand, and limits on regulation by a province of a matter under federal competence, on the other. Taking this distinction into account, I cannot see how the ability to hear a defence based on s. 35 would constitute an indirect intrusion on the defining elements of "Indianness". The "core" of Indianness has not been exhaustively defined. It encompasses the whole range of aboriginal rights that are protected by s. 35(1): *Delgamuukw, supra*, at para. 178. For present purposes, it is perhaps more easily defined negatively than positively. The

core has been held not to include labour relations (*Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031) and highway traffic regulation on reserves (*R. v. Francis*, [1988] 1 S.C.R. 1025). On the evidence adduced in *Kitkatla Band*, *supra*, at para. 70, the status or capacity of Indians was found not to be impaired by the impugned *Heritage Conservation Act*, R.S.B.C. 1996, c. 187. Given that these substantive matters were held not to go to the core of Indianness, I cannot see how the procedural question in this appeal can. The respondent has failed to demonstrate that the procedural right to raise at first instance a defence of aboriginal rights in a superior court, as opposed to before a provincially constituted tribunal, such as the Commission, goes to the core of Indianness.

34 I conclude, therefore, primarily on the basis that adjudication is distinct from legislation, that the Legislature of British Columbia has the constitutional power to enable the Commission to determine questions relative to aboriginal rights as they arise in the execution of its valid provincial mandate respecting forestry. I turn now to the question of whether the provisions of the Code in force at the time of this appeal's events actually gave such a power to the Commission.

(7) The Disguised Claim of Bias

35 There was much discussion in the written and oral submissions concerning the unsuitability of any organ created by the Province of British Columbia hearing an argument relating to s. 35 rights. The concern, evidently, is that the significant number of aboriginal land claims in the Province assure that the interests of the Province are adverse to those of aboriginal persons. As I understand it, this argument is not one of constitutional law. It finds no place within the doctrine that has accreted around the

division of powers. It strikes me more as an administrative law argument respecting the Commission's impartiality. The constitutional determination made here says nothing either way about the impartiality of the Commission, and does not preclude a fact-specific argument being raised in the future in the context of a particular constituted board and its practice: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, at paras. 44 and 197; *Matsqui*, *supra*, at pp. 67-72. In short, the potential bias argument is irrelevant to the constitutional division of powers issue.

B. *Statutory Interpretation: Does the Code Empower the Commission to Hear and Decide Section 35 Questions?*

(1) Are Section 35 Questions Distinct From Other Constitutional Matters?

36 As a preliminary issue, I note that there is no basis for requiring an express empowerment that an administrative tribunal be able to apply s. 35 of the *Constitution Act, 1982*. There is no persuasive basis for distinguishing the power to determine s. 35 questions from the power to determine other constitutional questions, such as the division of powers under the *Constitution Act, 1867* or a right under the *Charter*. Section 35 is not, any more than the *Charter*, "some holy grail which only judicial initiates of the superior courts may touch" (*Cooper*, *supra*, at para. 70, *per* McLachlin J. (as she then was), dissenting). This Court has rejected the theory that Indian reserves are federal "enclaves" from which provincial laws are excluded: Hogg, *supra*, at p. 27-10, discussing *Francis*, *supra*; *Four B*, *supra*. Similarly, aboriginal rights do not constitute an enclave that excludes a provincially created administrative tribunal from ruling, at first instance, on the border between those aboriginal rights and a provincial law of general application. The arguments that s. 35 rights are qualitatively

different — that they are more complex, and require greater expertise in relation to the evidence adduced — have little merit. As Moen J. noted in *Ermineskin Cree Nation v. Canada* (2001), 297 A.R. 226, 2001 ABQB 760, at para. 51, in determining that a Human Rights Tribunal had jurisdiction to consider a s. 35 argument:

> [T]here is no principled basis for distinguishing *Charter* questions from s. 35 questions in the context of the Tribunal's jurisdiction to consider constitutional questions. In either case, the decision-maker is simply applying the tests set out in the case law to determine if the particular right claimed is protected by the *Constitution*. In either case, if the applicant is successful, the result is a declaration of invalidity or a refusal to apply only the particular statute or provision before the decision-maker.

To the extent that aboriginal rights are unwritten, communal or subject to extinguishment, and thus a factual inquiry is required, it is worth noting that administrative tribunals, like courts, have fact-finding functions. Boards are not necessarily in an inferior position to undertake such tasks. Indeed, the more relaxed evidentiary rules of administrative tribunals may in fact be more conducive than a superior court to the airing of an aboriginal rights claim.

37 One difficulty with the argument about complexity is that it is difficult to draw the line between simple questions of aboriginal law, that boards like the Commission should be able to hear, and complex questions. In the hearing, counsel for the appellants was unable to provide a principled and convincing way to distinguish aboriginal law questions simple enough and therefore appropriate for the Commission from those that, in her view, were not. A member of the Court asked counsel for the appellants whether the Commission would be able to determine whether a person charged with an infraction was an Indian for the purposes of applying a superior court's declaration delineating an aboriginal right. Counsel replied that that would

simply be a factual determination and well within the Commission's competency. She had no response, however, to the rejoinder that even ostensibly "factual" questions of aboriginal status can routinely engage more complex questions of s. 35 and federal aboriginal rights. The nature of the question (fact, mixed fact and law, or law) assists in determining the standard of review for decisions by administrative tribunals: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748. Such distinctions are not watertight enough, however, to serve as the basis for determining a board's jurisdiction to hear and decide a question. A further unconvincing argument was that aboriginal rights are, today, complicated and in a state of flux, but that in the future, when they have been settled, it may be appropriate for administrative tribunals to consider them. Again, such lines are not easily enough drawn for that to be the judicial test. The Attorney General of British Columbia presented no workable way of taking from administrative tribunals the complicated aboriginal law issues and leaving with them the simpler aboriginal law issues that they could resolve speedily and satisfactorily, in the best interests of all concerned.

38 I conclude, therefore, that there is no principled basis for distinguishing s. 35 rights from other constitutional questions.

(2) The Appropriate Test: the Power to Determine Questions of Law

39 The facts and arguments in this appeal and those in *Martin*, *supra*, have presented this Court with an opportunity to review its jurisprudence on the power of administrative tribunals to determine questions of constitutional law. As Gonthier J. notes in *Martin*, at para. 34, the principle of constitutional supremacy in s. 52 of the *Constitution Act, 1982* leads to a presumption that all legal decisions will take into

account the supreme law of the land. "In other words", as he writes, "the power to decide a question of law is the power to decide by applying only valid laws" (para. 36). One could modify that statement for the present appeal by saying that the power of an administrative board to apply valid laws is the power to apply valid laws only to those factual situations to which they are constitutionally applicable, or to the extent that they do not run afoul of s. 35 rights. This Court's decision in *Cooper*, *supra*, has too easily been taken as suggesting that practical considerations relating to a tribunal may readily overcome this presumption. I am of the view that the approach set out in *Martin*, in the context of determining a tribunal's power to apply the *Charter*, is also the approach to be taken in determining a tribunal's power to apply s. 35 of the *Constitution Act, 1982*. The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision. Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law. This is not to say, however, that practical considerations cannot be taken into consideration in determining what is the most appropriate way of handling a particular dispute where more than one option is available.

40 The parties spent some time discussing the relationship between a tribunal's remedial powers and its jurisdiction to hear particular categories of legal questions. The appellants referred the Court to *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 ("*Dunedin*"), and *R. v. Hynes*, [2001] 3 S.C.R. 623, 2001 SCC 82. In those cases, this Court articulated a functional and structural approach for determining whether an inferior court is a "court of competent jurisdiction" for the purposes of

granting a remedy under s. 24(1) of the *Charter*. It was suggested in the hearing that the test in *Dunedin* gives credit to the view that remedial powers are a central feature to determine jurisdiction, that *Dunedin* and *Hynes* can be read broadly as indicating that there are distinctions between particular subject matters of constitutional law, and that implied jurisdiction to consider general questions of law may include only certain questions concerning the constitutional validity of the tribunal's enabling statute. I cannot accept these points. First, this Court has already recognized that the power to find a statutory provision of no effect, by virtue of s. 52(1) of the *Constitution Act, 1982*, is distinct from the remedial power to invoke s. 24(1) of the *Charter*: *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 31. In other words, an inferior court's remedial powers are not determinative of its jurisdiction to hear and determine constitutional issues. In any case, s. 35 is part of the *Constitution Act, 1982*, but not of the *Charter*. Accordingly, there is no issue whatsoever of remedies under s. 24(1), and the Commission's remedial powers are not before us in the present appeal. Second, this Court's decisions in *Dunedin* and *Hynes* dealt, in two different contexts, with the same question: Was there a "court of competent jurisdiction" for the purposes of s. 24(1) of the *Charter*? In *Dunedin*, *supra*, at para. 73, McLachlin C.J. held that, where there is no express legislative intention to grant jurisdiction, jurisdiction may nonetheless be implied from the structure of the tribunal's enabling legislation, the powers conferred on the tribunal, the function it performs, and its overall context. The inquiry in those cases, and prior ones, such as *Mills v. The Queen*, [1986] 1 S.C.R. 863, arises from the term "court of competent jurisdiction" in s. 24(1). The test developed for applying that term should not, in my view, be taken as suggesting that, outside that unique context, there will be lines drawn between the kinds of constitutional questions that a tribunal is able to hear.

(3) Application of the Test

(a) *The Statutory Scheme*

41 In my view, it is clear that the statutory mandate given to the Commission by the Code requires the Commission to determine questions of law. Consider s. 131(8):

> **131** . . .
>
> (8) A party may
>
> . . .
>
> (d) make submissions as to facts, law and jurisdiction.

The provision providing for an appeal is also revealing:

> **141** (1) The minister or a party to the appeal before the commission may, within 3 weeks after being given the decision of the commission and by application to the Supreme Court, appeal the decision of the commission on a question of law or jurisdiction.

These provisions make it impossible, in my reading of the Code, to sustain the argument that the Commission, an adjudicative body, determines purely factual matters. Moreover, the Commission's past decisions reveal that it has, in the conduct of its mandate, been determining legal questions including, for example, the availability of protections guaranteed by s. 11 of the *Charter*; application of the principle of double jeopardy; availability of the defences of due diligence, estoppel and officially induced error; and application of the principle *de minimis non curat lex*.

42 I note, in passing, that the *Forest and Range Practices Act*, S.B.C. 2002, c. 69, s. 77, introduced amendments providing the Minister the power to require the holder of an agreement to remedy or mitigate "a potential, unjustifiable infringement of an aboriginal right, including aboriginal title". The Minister's order would be appealable to the Commission (ss. 80 and 82). The Commission noted in its factum (at para. 46), "[a]ccordingly, despite the Province's position in this Court that the Commission is incapable of dealing with 'aboriginal rights issues', the Legislative Assembly has seen fit very recently to bring those very same issues before the Commission." Those amendments are not in force. Indeed, on May 29, 2003, the Legislative Assembly gave First Reading to Bill 69, the *Forest and Range Practices Amendment Act, 2003* (*Debates of the Legislative Assembly*, vol. 16, No. 7, 4th Sess., 37th Parl., p. 7108), which would amend s. 77 (ss. 36 and 39 of Bill 69). It would be inappropriate to rely on s. 77, and it is unnecessary to do so for my analysis.

(b) *The Nature of an Appeal to the Commission*

43 The respondent Mr. Paul made an argument based on the Commission's role within the forestry administrative scheme. He submitted that the Commission is an appeal board without power to deal with a dispute *de novo*. Therefore, he submits, the Commission's jurisdiction is limited in the same way as that of the District Manager and Administrative Review Panel. These bodies were found, by the chambers judge, to have no jurisdiction to determine whether a s. 35 right could be invoked. It is unnecessary for the purposes of this appeal to pronounce upon the jurisdiction of the District Manager and the Administrative Review Panel. Assuming for argument's sake, however, that Pitfield J. was correct, I reject the respondent's argument that it would necessarily follow that the Commission could not have a broader jurisdiction

than the two decision makers below. In support of his position, the respondent referred to two cases, *Dupras v. Mason* (1994), 99 B.C.L.R. (2d) 266 (C.A.), and *McKenzie v. Mason* (1992), 72 B.C.L.R. (2d) 53 (C.A.), leave to appeal refused, [1993] 1 S.C.R. vii. Both relate to the right of appeal to the Supreme Court of British Columbia from a decision of the Chief Gold Commissioner under provincial mining legislation. Both involved Rule 49 of the British Columbia *Supreme Court Rules.* The Court of Appeal in both cases held that the right of appeal did not permit a trial *de novo*.

44 I wish in no respect to comment on the validity of those decisions in their proper context or on the interpretation of Rule 49. Those cases, however, dealt with an appeal from an administrative scheme to a superior court. It was on precisely that basis that the Court of Appeal in *British Columbia Chicken Marketing Board v. British Columbia Marketing Board* (2002), 216 D.L.R. (4th) 587, 2002 BCCA 473, recently distinguished *Dupras*. The issue there was a statutory appeal from the Chicken Marketing Board to the Marketing Board. The former was not an adjudicative body. In contrast, the Marketing Board almost always conducted hearings with witnesses, sworn testimony and oral submissions; provided the opportunity for parties to be represented by counsel; and gave reasons for its decisions. The Court of Appeal held that the statutory appeal to the Marketing Board was a full hearing on the merits, there being no suggestion that significant deference was owed to the lower board. The chambers judge had erred in applying *Dupras*, an appeal from a specialized statutory office to a superior court, not an appeal within an administrative scheme to a specialized appeal board. The Marketing Board was not a generalist court, but a specialized tribunal expected to use its expertise. That expertise would be squandered if the Marketing Board were bound to defer to the lower board and restrict its inquiry

to the grounds before the lower board (paras. 11-14). I note that in the case of an appeal from a tribunal to a superior court, as opposed to an appeal within an administrative scheme, the reviewing judge will follow the pragmatic and functional approach to determine the appropriate standard of review: *Dr. Q*, *supra*, at para. 25. This Court's decision in *Tétreault-Gadoury*, *supra*, is another relevant example. In that case, again within an administrative scheme, only the umpire was expressly given powers to determine questions of law. This Court held that it was the umpire, who sat on appeal from the Board of Referees, who had the power to consider constitutional questions. La Forest J. noted that where the litigant has the possibility of an administrative appeal before a body with the power to consider constitutional arguments, the need for determination of the constitutional issue by the tribunal of original jurisdiction is clearly less (p. 36). That conclusion would have been impossible if, as a general proposition, an appeals tribunal could not consider issues not raised below. I see no basis for prohibiting the Commission from hearing a s. 35 argument on the basis of the nature of the appeal.

45 I conclude, therefore, that the Commission has the power to decide questions relating to aboriginal rights arising incidentally to forestry matters. No argument was made that the Legislature has expressly or by clear implication arising from the statutory scheme withdrawn from the Commission the power to determine related questions under s. 35 that will presumptively attend the power to determine questions of law. The Commission therefore has the power to hear and decide the incidental issues relating to Mr. Paul's defence of aboriginal rights.

III. Conclusion

46 For the reasons given above, I would allow the appeal. The province of British Columbia has legislative competence to endow an administrative tribunal with the capacity to consider a question of aboriginal rights in the course of carrying out its valid provincial mandate. More specifically, the Commission, by virtue of its power to determine legal questions, is competent to hear Mr. Paul's defence of his aboriginal right to harvest logs for renovation of his home.

47 My conclusions mean that the Commission has jurisdiction to continue hearing all aspects of the matter of Mr. Paul's four seized logs. Unless he moves in the Supreme Court of British Columbia for a declaration respecting his aboriginal rights, Mr. Paul must present the evidence of his ancestral right to the Commission. As yet he has merely asserted his defence. If he is unsatisfied with the Commission's determination of the relationship between his s. 35 rights and the prohibition against cutting trees in s. 96 of the Code, he can move for judicial review in the Supreme Court of British Columbia. The standard of review for the Commission's determinations concerning aboriginal law will be correctness.

48 The Attorney General of British Columbia and the Ministry of Forests, who are successful respecting the Province's legislative capacity but unsuccessful respecting the scope of the Commission's actual power, did not seek costs. The respondent, Mr. Paul, sought costs, but has been unsuccessful. Only the Commission, a party intervener, succeeded fully in this appeal. The Commission did not seek costs in this Court, but did request an order setting aside the costs award against it in the court below. In my view, this request should be granted, and accordingly the costs award in the Court of Appeal is set aside.

49 I would answer the constitutional questions as follows:

1. Can ss. 130 to 141 of the *Forest Practices Code of British Columbia*, S.B.C. 1994, c. 41, constitutionally apply *ex proprio vigore* to confer upon the Forest Appeals Commission jurisdiction to decide questions of law in respect of aboriginal rights or aboriginal title?

Answer: Yes. As a law of general application, the *Forest Practices Code of British Columbia* applies *ex proprio vigore* to Indians, to the extent that it does not touch on the "core of Indianness" and is not unjustifiably inconsistent with s. 35 of the *Constitution Act, 1982*.

2. If the answer is "no", do the impugned provisions nonetheless apply to confer this jurisdiction by virtue of s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5?

Answer: It is not necessary to answer this question.

Appeal allowed.

Solicitor for the appellants: Attorney General of British Columbia, Victoria.

Solicitors for the respondent: Braker & Company, Port Alberni, British Columbia.

Solicitors for the intervener the Forest Appeals Commission: Arvay Finlay, Victoria.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Vancouver.

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

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the First Nations Summit: Pape & Salter, Vancouver.