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INTRODUCTION

The case of the *Attorney General of Canada* v. *Bibi Alli*[1] (hereinafter *Alli*) demonstrated that before one can argue the substantial issues of equality and discrimination, one must first consider other less 'sexy' but equally important matters such as the competence of the court or tribunal to rule on the constitutionality of legislation, and what is the appropriate remedy.

The facts of the *Alli* case are straightforward. Mrs. Alli and her husband came to Canada from Guyana in 1980. Both claimed to be Convention refugees. In 1981 they were joined in Canada by their two young children. In 1983, a third child was born in Toronto.

Both Mr. and Mrs. Alli worked. As refugee claimants, they had been given employment authorization. They also paid taxes. Although the Allis were pleased to have two incomes, they nevertheless were having difficulty making ends meet. In February 1983 Mrs. Alli submitted an application for benefits under the *Family Allowances Act, 1973*[2], (hereinafter the *Act)* commonly known as the 'baby bonus'. Bureaucracy worked slowly. In November 1985, Mrs. Alli was informed that she was not eligible to receive a family allowance.

THE LEGISLATION

Eligibility for a family allowance is not universal. To receive the benefit one must satisfy certain criteria set out in Section 3(1) of the *Act* and Section 2(3) of the *Family Allowances Regulations*[3] (hereinafter the *Regulations).* An allowance is payable:

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1 (9 May 1988), #A-670-86 (Federal Court).

2 S.C. 1973-74, c. 44, as am. S.C. 1976-77, cc. 3,52.54; 1978-79, c. 5; 1980-81-82-83, cc. 47, 139; 1986, c. 12..

3 C.R.C., c. 642, as am. SOR/78-505; 79-718; 82-915.

> "in respect of each child whose parents are resident in Canada or deemed to be resident in Canada in prescribed circumstances and who has at least one parent who
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> (a) is a Canadian citizen; or
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> (b) is a person who
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> (i) is a permanent resident within the meaning of the *Immigration Act*, 1976,[4] or
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> (ii) in prescribed circumstances, is a visitor in Canada or the holder of a permit in Canada within the meaning of the *Immigration Act, 1976*".[5]

The "prescribed circumstances" referring to visitors or permit holders are that such persons must have been admitted to Canada or authorized to remain in Canada for a period of not less than one year and have income which is subject to income tax under the *Income Tax Act*.[6] Health and Welfare Canada, which administers the family allowance benefits, determined that Mr. and Mrs. Alli met none of the eligibility criteria set out in the legislation; therefore, Mrs. Alli's application for benefits was refused. She appealed.

Under the *Act*, one may appeal a negative decision to a specially-constituted tribunal.[7] The three-person tribunal consists of one member chosen by the applicant, a second chosen by the Regional Director of Family Allowances, and a third appointed by the other two.[8] The chair person appointed to Mrs. Alli's tribunal was a progressive-minded professor from the Osgoode Hall Law School. Her own representative was a lawyer from a community legal clinic. When Mrs. Alli's appeal was heard, she was given a sympathetic hearing.

TRIBUNAL'S DECISION

By a 2 to 1 decision, the appeal was allowed. The first reason for the decision was based on an interpretation of the *Act* which is not rele-

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4 S.C. 1976-77, c. 52.

5 *Act, supra,* note 2, s. 3(1). Note that a permanent resident is often referred to as a landed immigrant and a holder of a permit is called a Minister's permit holder.

6 S.C. 1970-71-72, c. 63.

7 *Regulations, supra,* note 3, s. 2(3)(a-b).

8 *Act, supra,* note 2, s. 15.

vant for the purposes of this discussion. The second reason given by the majority of the tribunal was:

> "Even if we had reached the contrary conclusion as a matter of statutory interpretation, we would have held Section 3(1) unconstitutional as being in violation of Section 15 of the *Charter of Rights and Freedoms*[9]."[10]

The Attorney General subsequently applied for a review of this decision under Section 28 of the *Federal Court Act*[11] to the Federal Court of Appeal.

SECTION 15

Establishing that a violation of Section 15 of the *Canadian Charter of Rights and Freedoms* (hereinafter the *Charter)* has occurred can be a complicated matter. This article does not allow for a detailed discourse on the *Charter* argument. What follows is a brief summary of the main submission in the *Alli* case.

A frequently-cited proposition in Section 15 *Charter* cases is that the constitutional requirement of equal protection and equal benefit essentially means that persons who are similarly situated be similarly treated.[12] To determine if groups are in fact similarly situated, one must look to the purpose of the legislation. An example best illustrates this point. A twenty-year old and a fifteen year-old are both charged with theft over $1000.00. In this sense, they are similarly situated. Because of the *Young Offenders Act,*[13] however, the fifteen-year old will be treated differently, in fact more leniently, than the twenty-year old. This difference in treatment does not violate the *Charter* because the very purpose of the *Young Offenders Act* is, as a general rule, to treat young offenders differently than adults charged with the same offence. The distinction made between the two offenders is acceptable as far as the *Charter* is concerned because it is relevant to the legislation's purpose.[14]

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9 Part I of the *Constitution Act, 1982,* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

10 *Alli, Supra,* note 1.

11 R.S.C. 1970, c. 10 (2nd Supp.).

12 Tussman and tenBroek, "The Equal Protection of the Laws" (1948) 37 Cal. L. Rev. 341 at 344.

13 S.C. 1980-81-82-83, c. 11.

14 *R.* v. *Century 21 Ramos Realty Inc. and Ramos* (1987), 19 O.A.C. 25; *R.* v. *Ertel* (1987), 20 O.A.C. 257.

Under the *Family Allowances Act*, 1973, Canadian citizens, permanent residents, Minister's permit holders and visitors are all potentially eligible to receive family allowance benefits. Refugee claimants, like Mrs. Alli, are not. There is not, in other words, 'similarity of treatment' between these groups. Is there 'similarity of situation'? Clearly, it would be difficult to show that refugee claimants are 'similarly situated' to Canadian citizens or permanent residents, who have a more permanent tenure in this country than do refugee claimants. Permit holders, as well, have more 'status' than refugee claimants, who only receive a Minister's permit if accepted as Convention refugees. Visitors, who by definition, are only in Canada for a "temporary purpose" are more comparable to refugee claimant than are the others.[15] Are refugee claimants similarly situated to visitors, with respect to the *Act*? To properly answer that question, one must examine the purpose of the legislation.

The preamble to the *Act* describes the statute as "An Act to provide for the payment of family allowances in respect of children (defined as individuals resident in Canada, less than 18 years of age) to supplement the income of Canadian families...".[16] Since visitors to Canada who have been here for a year and have income subject to Canadian income tax are eligible to receive benefits, one can assume that the term "Canadian families" is used loosely. The aim of this legislation appears to be to assist families with children under 18 living in this country, whether the parents are in Canada permanently or temporarily.

Are then, refugee claimants like Bibi Alli similarly situated to visitors, with respect to the *Act*? An example helps to answer that question. Consider a family of American "visitors" to Canada, as defined by the *Immigration Act, 1976*. The parents both work for a multinational corporation. They have authorizations to work in this country, and expect to be here for three years. They have been here for one year already. This family, like the Alli family, has three children, all under the age of 18. The income of both families is subject to Canadian income tax. Both families have the same familial obligations: to provide clothing, food and shelter for their children. The American family is eligible for a family allowance. Their American children will benefit monthly as a result. Mr. and Mrs. Alli are not eligible, and their three children, including one who is a Canadian

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15 *Immigration Act, supra*, note 4, s. 2(1).

16 *Act, supra*, note 2, preamble.

citizen, will be deprived accordingly. Given the purpose of the *Act*, to assist families with children, whether here on a permanent or temporary basis, this distinction makes no sense. Furthermore, it is unfair, unreasonable and therefore discriminatory.[17]

JURISDICTION

Although the equality issue was thoroughly argued before the Federal Court of Appeal in the *Alli* case, the decision in *Alli* was not based upon the *Charter*. Rather, it was decided on issues of jurisdiction – of the review tribunal and of the Federal Court of Appeal – and, in part, on the remedy being sought by Mrs. Alli. The decision is noteworthy because it dealt with two earlier, and apparently contradictory, decisions of the Federal Court of Appeal: the *Attorney General of Canada* v. *Vincer*[18] (hereinafter *Vincer*), and *Zwarich* v. *Attorney General of Canada*[19](hereinafter *Zwarich*).

Like *Alli*, *Vincer* dealt with a review by the Federal Court of Appeal of a decision of a review tribunal established under the *Family Allowances Act*, 1973. That case concerned Section 7(1) of the *Act* and Section 9(1) of the *Regulations*, which provide that except in very precise circumstances, a family allowance is payable to the mother of the children in question. Vincer was a father who had joint custody of two dependent children. He challenged these provisions under Section 15 of the *Charter*, and the review tribunal held that the provisions were indeed unconstitutional.

The three members of the Federal Court of Appeal in *Vincer* were unanimous in overturning the tribunal's decision, but for different reasons. The Honourable Justices Stone and Marceau held that a tribunal established under the *Act* was not a court of competent jurisdiction and therefore had no power to grant a remedy under Section 24(1) of the *Charter*. Furthermore, the tribunal, in deciding an appeal under the *Act*, did not have the power to challenge the constitutional invalidity of the statutory provisions it is called upon to apply. "My opinion," states Marceau J., "is...that there is one basic condition for a public decision-making body to be entitled to challenge the validity of an Act of Parliament: it must be part of the judicial branch of govern-

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17 *Andrews* v. *Law Society of British Columbia* (1986), 4 W.W.R. 242.

18 (1988), 1 F.C. 714.

19 (1987), 3 F.C. 253.

ment."[20] Clearly, the *ad hoc* tribunal established under the *Act* was not part of the judicial branch.

The third member of the *Vincer* panel, Mr. Justice Pratte, differed from his colleagues with respect to the power of the tribunal to deal with legislation which is unconstitutional. His position had been set out in *Zwarich,* to which he made reference in *Vincer.* The *Zwarich* case dealt with the power of umpires under the *Unemployment Insurance Act,* 1971[21] to determine the constitutional validity of statutory provisions in the *Unemployment Insurance Act.*

> "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. That is the privilege reserved to the superior courts. However, *like all tribunals* (emphasis added), 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 statues 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."* (emphasis added)[22]

Support for this proposition was found in *Re Schewchuck and Ricard,*[23] a decision of the British Columbia Court of Appeal. Both decisions are consistent with Section 52(1) of the *Constitution Act, 1982,*[24] which states that:

> "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."

In *Vincer,* Pratte J. wrote that he was "not ready to concede that he was wrong" in *Zwarich.*[25] He was able to avoid the issue of the tribu-

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20 *Vincer, supra,* note 17.

21 S.C. 1970-71-72, c. 48.

22 *Zwarich, supra,* note 18 at 255.

23 (1986), 28 D.L.R. (4th) 429 at 439-440.

24 Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

25 *Vincer, supra,* note 17 at 717.

nal's powers, however, by finding that the provisions challenged in *Vincer* did not violate Section 15 of the *Charter*.

It was Mr. Justice Pratte who wrote the decision of the Court in *Alli*. He dealt first with the issue of whether a tribunal established under the *Family Allowance Act* was a court of competent jurisdiction as described in Section 24 (1) of the *Charter*, an issue which obviously did not arise in *Zwarich*. The answer was no. Unlike umpires, who are either sitting or former Federal Court judges, the members of a tribunal established under the *Act* have no special qualifications to deal with issues such as the constitutionality of legislation. Did, however, the proposition expressed in *Zwarich* apply in *Alli*? In making a decision that it is empowered to make under the statute, did the tribunal have the authority to ignore provisions which, in its view, contravene the constitution and are, for that reason, "of no force or effect"? Unfortunately, in the *Alli* case, that question is never answered, for the simple reason that to render the applicable provisions of the *Family Allowance Act* of no force or effect would not have brought the desired result of making Mrs. Alli eligible for family allowance benefits. Mrs. Alli's remedy was not to have the offensive provisions struck down, or considered of no force or effect, but rather to have the eligibility criteria in the *Act* expanded, so as not to exclude refugee claimants who have been in Canada for more than a year and who have income subject to Canadian income tax. Had the remedy desired by Mrs. Alli been to have had provisions in the statute considered of no force or effect, then presumably the Court would have had to deal with the contradictory rulings in *Vincer* and *Zwarich*. Whether a tribunal established under the *Act* has the power to ignore constitutionally-invalid legislation is still to be determined.

At the *Alli* hearing, it was submitted that whatever powers the tribunal had, the Federal Court of Appeal, as a court of competent jurisdiction, did have the power to uphold the tribunal's decision on the basis that Mrs. Alli's rights under the *Charter* had been violated. With that submission, the Court respectfully disagreed. On a Section 28 application, the Federal Court of Appeal has a very limited role. Wrote Mr. Justice Pratte:

> "In reviewing a decision of a tribunal lacking the power to grant remedies under Section 24, the only question that this Court may answer is whether the decision was correctly made. In answering that question, the Court cannot exercise its Section 24 power."[26]

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26 *Alli, supra*, note 1 at 8.

On its interpretation of Section 3(1) of the *Act*, the Federal Court of Appeal found that the review tribunal in *Alli* had erred in law. On the *Charter* issue, the Court held that the tribunal lacked jurisdiction to grant the remedy required by Mrs. Alli. The Attorney General's application was allowed.

CONCLUSION

What lessons can be learned from the *Alli* decision? Certainly, when contemplating a *Charter* challenge, one must consider the powers of the court or tribunal from which one is seeking relief. Is it a court of competent jurisdiction and, therefore, given broad remedial powers under section 24(1) of the *Charter*? Two decisions of the Supreme Court of Canada are helpful in this regard, *Mills* v. *Her Majesty the Queen*,[27] and *Rahey* v. *The Queen*.[28] When dealing with a tribunal one should take into account such factors as how are the members appointed, what special qualifications are required of members, and is this a court of record.[29]

A second preliminary, and extremely important consideration in *Charter* litigation is what relief is being sought? Does one want legislation struck down and considered of "no force or effect", or does the desired remedy require a declaration, for example, that benefits be extended to a group being denied equal benefit of the law? As the decision in *Alli* demonstrates, such a determination can affect the outcome of the entire case.

A very recent decision of the Federal Court of Appeal, *Tetreault Gadoury* v. *Canada Employment and Immigration Commission*[30] (hereinafter *Gadoury*) has finally put to rest some of the issues raised in *Alli, Vincer* and *Zwarich*. The issue in *Gadoury* is age discrimination under the *Unemployment Insurance Act*. The Federal Court of Appeal held that a Board of Referees does have the power to declare provisions of the *Unemployment Insurance Act* of no force or effect, where such provisions are inconsistent with the *Charter*. Furthermore, the Court held that this power is not restricted to a Board of Referees. Mr. Justice Lacombe writes:

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27 (1986), 1 S.C.R. 863.

28 (1987), 75 N.R. 81.

29 *Law* v. *Solicitor General of Canada* (1985), 1 F.C. 62. The Federal Court of Appeal held that the Immigration Appeal Board is a court of competent jurisdiction within contemplation of Section 24(1) of the *Charter*.

30 (23 September 1988), #A-760-88 Federal Court.

> "The power to refuse to give effect to a legislative or regulatory provision which has been found to be unconstitutional is inherent in *any body* (emphasis added) exercising the power of adjudication between the rights of parties in a particular instance."[31]

The limitations of a Federal Court of Appeal on a Section 28 application, as expressed in *Alli*, are also challenged by the *Gadoury* decision. Madame Justice Desjardins stated:

> "It matters little whether the Board of Referees can rule on the constitutional validity of Section 31 of the *Unemployment Insurance Act, 1971* since this Court can do so. In a proceeding under Section 28(1) or (4) of the *Federal Court Art*, this Court can rule on a constitutional point, 'arising as a threshold question in the review of the administrative action in issue.' [*Northern Telecom Canada Ltd. et al* v. *Communication Workers of Canada et al* (1973) 1 S.C.R. 733 at 744]."[32]

In *Gadoury*, the Federal Court held that a determination whether Section 31 of the *Unemployment Insurance Act* was of no force or effect because of its inconsistency with the *Charter* was a proper question of law to be before a Board of Referees. By refusing to consider the constitutional arguments put before them the Federal Court held that the Board of Referees had erred in law.

Finally, on a Section 28 application to the Federal Court of Appeal, one must keep in mind the limited powers of that Court. Unlike the provincial superior courts, the Federal Court is a creation of statute alone, and as such has its jurisdiction on such matters prescribed completely by the *Federal Court Act*.

What then of Bibi Alli's *Charter* challenge to the *Family Allowances Act*, 1973? Although they did not rule on the constitutionality of the provisions in question, the Court in *Alli* did say that they found her argument on this point 'persuasive'. Hope springs eternal. An application to the Federal Court Trial Division is now in process.

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31 *Ibid.*, 14.

32 *Ibid.*, 2.