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Implications of the Schachter Decision

by Louise Maguire Wellington, Counsel, Legal Services, Health and Welfare Canada

The decision of the Supreme Court of Canada in the *Schachter* case contains lessons that all public servants should bear in mind when developing social benefit programs or policies.

At issue was the passage in the *Unemployment Insurance Act* (section 32) which provided for child care leave for adoptive parents but not for natural parents. The Act also allowed for maternity benefits for natural mothers.

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Mr. Schachter, a natural father, challenged these provisions as contrary to the equality rights protected under the Charter. The trial judge found that having maternity benefits for natural mothers only was not discriminatory, because of the unique health needs of this group. However, the court also found that the restriction of child care leave to adoptive parents was discriminatory within the meaning of section 15 of the Charter. The court therefore ordered that these benefits should be extended to include natural parents. The court stayed its decision pending appeal, and stated that it expected interim consideration would be given to appropriate legislative action.

Parliament did indeed amend the *Unemployment Insurance Act* to extend child care benefits to natural parents, but established the benefit period at 10 weeks for all, instead of the original 15 weeks.

It is worth noting that the government's appeal did not challenge the finding of discrimination. The appeal dealt only with the type of remedy the trial judge could have provided to Mr. Schachter. The government's position was that the court did not have the authority to extend the child care benefit program to natural parents.

In its decision rendered on July 9, 1992, the Supreme Court of Canada allowed the appeal of the federal government and ruled that the Charter did not in this specific case give the court the power to extend child care benefits to natural parents. According to the Supreme Court, such an extension — which would have turned a $5 million program into a $500 million one — would constitute a substantial intrusion into the legislative domain.

According to the Supreme Court of Canada, the question is not whether courts can make decisions that affect budgetary policy, but rather to what degree they can do so appropriately. A remedy that entails an intrusion so substantial as to change the nature of the legislative scheme is clearly inappropriate. On the other hand, where the group to be added to a social program would be smaller than the group originally covered, extension of benefits could be considered appropriate.

The Schachter case could have serious implications for government

When a court finds legislation to be contrary to the Charter, but where striking down the legislation would pose a danger to the public, deprive people in need of social benefits, or have a substantial impact on budgetary policy, a court may suspend the effect of its judgment until Parliament has had an opportunity to fill the void.

(Continued on page 4)

Codification of the Carltona Doctrine: Amendments to the Interpretation Act

by Henry L. Molot, Senior General Counsel, Advisory and Administrative Law Section

The statutes of Canada are replete with provisions conferring an enormous variety of powers, duties and functions on individual ministers of the Crown. Must a minister personally perform each such statutory responsibility? If not, who else may do so — and subject to what limitations, if any?

Under Canada's system of parliamentary democracy, ministers are individually responsible to Parliament for the manner in which they carry out their duties. Moreover, it is normal to have statutory schemes administered principally by ministers. Of course, nobody expects a minister to have the time, energy or expertise to perform all these statutory powers and duties personally. That is why a minister is supported by a department and a bureaucracy of public servants whose principal function generally is to administer the programs and schemes for which their minister is responsible.

the courts have acknowledged that departmental officials may act for their minister

Applying these constitutional principles and realities, the courts have acknowledged that departmental officials may act for their minister in exercising his or her statutory powers. This was first expressly acknowledged by the English Court of Appeal in the wartime case of *Carltona* v. *Commissioners of Works,* where the Commissioners (who were ministers) were empowered to requisition property. This was followed by the Supreme Court of Canada in a case where the Attorney General was given a discretion by the *Criminal Code* to appeal a verdict of acquittal. In both cases, the courts agreed that the minister's statutory authority had been validly exercised even though performed by departmental officials.

The courts, however, have imposed limits on the application of this so-called *Carltona* doctrine. For example, are there statutory powers to which it will not apply? And may anyone in a department act for the minister?

Not every power falls under the doctrine. It has been said that an "important" power — for example, one involving very serious interference with individual rights — cannot be exercised by departmental officials. On the one hand, *Carltona* has recently been applied to a minister's deportation power; to the requisition and expropriation of property; to the confiscation of trees and shrubs under the *Plant Quarantine Act;* to granting subdivision and planning permission for specific lands; and to authorizing an application to the court for a corporate winding-up order. But on the other hand, *Carltona* has been held to be unavailable where the minister's power was legislative or quasi-judicial in nature, or where the power in issue was the consent of the Attorney General to prosecution under the *Lord's Day Act.*

In advising departments in this area, the Department of Justice has therefore had to be very concerned about the nature of the statutory power in issue. Is it legislative or quasi-judicial in nature? Could it have seriously adverse effects on the rights of the individual?

Even if *Carltona* is available in the circumstances, who may exercise the minister's power? Based on the constitutional principles described above, only officials employed in the minister's department may do so. Consequently, notwithstanding claims of administrative efficiency, power cannot be exercised under *Carltona* by officials of some other department or agency, by private contractors of the minister, by a minister of state, or by the minister's chief of staff or other personal staff.

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Furthermore, may any official in the department exercise any of the minister's powers subject to the *Carltona* doctrine? For example, could the authority to cancel a Newfoundland fishing licence be exercised by the ADM (Pacific), by the ADM (Policy), or even by the departmental librarian? Could the Attorney General's discretion whether to launch a criminal appeal be exercised by the Director of Civil Litigation or by the ADM (Finance)? The question asked by the courts is this: Which departmental officials, based upon their areas of official responsibility and other such factors, could be expected to exercise this particular power for the minister? In

other words, which officials in functional terms are "appropriate" for doing so? For example, in the case of the Attorney General's discretion to commence appeal proceedings, it was held that an official of the Department of Justice who exercised managerial responsibility in the Criminal Law Section of the Vancouver Regional Office was appropriate in the circumstances to act for the Minister. But must a minister or deputy minister normally expressly indicate this in some form of instrument? Needless to say, uncertainties remain.

On February 1, 1992, Parliament amended subsection 24(2) of the *Interpretation Act* to read as follows (amendments are in bold type):

> (2) **Words directing or empowering a minister of the Crown to do an act or thing, regardless of whether the act or thing is administrative, legislative or judicial, or otherwise applying to that minister as the holder of the office, include**
>
> (a) a minister acting for that minister or, if the office is vacant, a minister designated to act in the office by or under the authority of an order-in-council;
> (b) the successors of that minister in the office;
> (c) his or their deputy;
> (d) **notwithstanding paragraph (c), a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.**

Three points in particular should be noted about these amendments:

1. By inserting "regardless of whether the act or thing is administrative, legislative or judicial" in the opening portion, it is hoped to limit or eliminate the emphasis sometimes placed on the nature of the minister's power. The courts should focus not on whether a particular discretion is legislative or quasi-judicial, but rather on whether Parliament intended the discretion to be exercised (a) by the minister personally, based on the serious negative effects an exercise of the minister's discretion could have for an individual and on the statutory context in which that power appears; or (b) by the deputy minister, based on paragraph 24(2)(c). In other words, the language of a particular scheme may well lead to the conclusion that subsection 24(2) has no application at all in the circumstances. For example, the Supreme Court of Canada has concluded that a statutory discretion conferred on the "minister himself" made it abundantly clear that the minister alone was meant to exercise the power.

an instrument of authority signed by the minister or the deputy minister ... may well influence a court

2. The phrase "appointed to serve in the department or ministry of state over which the minister presides" limits those persons who may act for a minister. "Appointed to serve" means that the person must be a public servant; private contractors would not be included. This service must be "in the department or ministry of state," thereby excluding ministerial staff and a minister of state without a ministry, neither of whom serves in a department. Moreover, the public servant must serve in the department "over which the minister presides."

3. Finally, even when these conditions are fulfilled, the person must also "serve in a capacity appropriate to the doing of the act or thing." This last condition would measure the particular power against such factors as position and job description, hierarchical relationships, and geographical location, in order to assess whether the person could reasonably be expected to exercise that power within the department. Of course, who is "appropriate" may be in part determined by who in the department has been expressly designated to carry out a particular ministerial responsibility. In other words, though it is generally unnecessary for taking advantage of the *Carltona* principle, an instrument of authority signed by the minister or the deputy minister and designating who should perform the specific ministerial function in question may well influence a court.

While this new provision is far from being a panacea, it should nevertheless clarify for courts and legal advisers alike the principles to be applied in this area. Where there is any doubt about the applicability of subsection 24(2) or the *Carltona* doctrine to a particular ministerial power in an enabling statute, it may be wise to give serious consideration to including an express delegation clause. ■

Echo Flash

The *Federal Real Property Act* came into force on September 15, 1992. For a discussion of the implications of this Act, we refer readers to the article by Bill Nelson in *Justice Echo* Issue 14 (April 1992).

Justice Delayed = Justice Denied? The Aftermath of Askov

by Faye Campbell, Senior Counsel, Legal Services, Health and Welfare Canada, and Cathy Doolan, law student (adapted from materials prepared by Judge Sheila Ray)

The possible consequences of two recent decisions of the Supreme Court of Canada will be of particular interest to those who administer programs where prosecutions may occur. In the *Askov* trial in late 1990, the Court found that where a delay between committal for trial and the actual trial exceeds a six to eight month "outside limit," a person's right to be tried within a reasonable time, as guaranteed by paragraph 11(b) of the *Canadian Charter of Rights and Freedoms,* has been infringed.

there has been much serious concern about the erosion of public confidence in the administration of justice

The application of this decision by lower courts resulted in hundreds of charges being dropped because some of the lower courts decided the outside limit was, in fact, a strict upper time limit. Consequently, there has been much serious concern about the erosion of public confidence in the administration of justice.

In the midst of this flood of dropped charges, the Supreme Court rendered its decision in the *Morin* case (March 1992). This was intended to clarify the earlier decision by indicating that the outside limit of six to eight months is merely a flexible administrative guideline, not a rigid time limit or ceiling. The Court also indicated that this guideline may require adjustment to take into account local conditions and changing circumstances, as well as the complexity of the case and the presence or absence of prejudice to the accused as a result of the delay. This has brought some psychological relief to busy Crown prosecutors who were worried that under *Askov* crowded court dockets could result in serious cases being dropped.

Impact on Administrative Action

At present, it is not clear whether the courts will extend the application of the principle of unreasonable delay beyond the criminal law setting to areas of regulatory and administrative law. Recently, the Federal Court of Appeal has indicated that the principles of fundamental justice in section 7 of the Charter may be affected by delays in administrative action. Lest anyone think that there are simple solutions, it should be noted that the Federal Court has not been receptive to any suggestion that institutional problems justify delays.

There is also an indication from the courts that the delay will be more critical in cases where a person's fundamental rights are at stake. An example might be the right to a hearing within a reasonable time in a refugee determination process where there are "unreasonable restrictions, bureaucratic hassles and interminable delays in processing claims that touch the fundamentals of human existence" (the *Akthar* case). Applicants in such cases, however, must demonstrate that they have suffered actual prejudice or unfairness because of the delay. Similar factors may also be relevant in the investigation of human rights complaints.

Applicants ... must demonstrate that they have suffered actual prejudice or unfairness because of the delay

Until the question of delays in the administrative process is clarified by the courts, federal bureaucrats will have to be vigilant in ensuring that delays are not unreasonable. Managers who have operational concerns as a result of these recent developments in the courts may wish to consult legal counsel. ■

*(**Schachter**, continued from page 1)*

The *Schachter* case could have serious implications for government as courts attempt to apply the remedy of "reading in" to legislation to bring it into compliance with the Charter. Recently, in *Haig* v. *Canada,* the Ontario Court of Appeal concluded that the omission of sexual orientation as a prohibited ground of discrimination in the *Canadian Human Rights Act* offended the Charter. In choosing to read sexual orientation into that Act rather than to strike it down entirely, the Court invoked *Schachter.* ■

Workplace Drug Testing in the Federal Government

by Catherine Jones, Counsel, Human Rights Law Section

Mandatory drug testing in the workplace has been a subject of controversy and debate in recent years. Although it remains relatively uncommon in Canada, some large companies have implemented programs, and within the federal government, two departments have confirmed plans to introduce workplace drug testing. The Canadian Forces recently received cabinet approval for a program scheduled to commence in the fall of 1992, and is in the process of drafting administrative orders for its implementation; and Transport Canada intends to initiate a similar plan.

The Canadian Forces program will include blind (anonymous) testing for statistical purposes, testing for cause or post-incident, testing of those in safety-sensitive positions who are participating in drug abuse programs, and random testing. Transport Canada has reconsidered the random testing aspect originally contemplated, and will include a "no use" alcohol policy while on duty or subject to duty. (Two other departments, Correctional Services Canada and the National Parole Board, currently have drug testing programs in place, but these pertain only to penitentiary inmates and parolees, not employees.)

Unlike blood alcohol testing, which is administered through breath analysis (or blood tests in some cases), drug testing is conducted through urinalysis. Samples are provided to test for the presence of prescription, non-prescription or illicit drugs. A small number of programs also test for alcohol.

Urinalysis reveals only whether a particular substance has been ingested; it cannot determine either the quantity consumed or the extent to which its use may have impaired job performance. Ideally, substance testing should include both initial and subsequent confirmatory testing to avoid potentially inaccurate or "false positive" test results which may otherwise occur. False positive results can occur through inadequate handling of a urine specimen or through ingestion of substances other than those being tested for, which may affect test results.

A positive test can have significant consequences for an employee

A positive test can have significant consequences for an employee, ranging from poor work performance assessments to suspension, dismissal or the denial of employment opportunities. Proponents of mandatory drug testing maintain that substance abuse compromises workplace safety and may constitute a public hazard, and that testing acts as a deterrent. Critics question whether substance abuse poses any greater safety risk than such factors as fatigue or stress. They argue that test results may be inaccurate and that the limited amount of information gained is outweighed by the infringement of individual rights involved in the testing process.

Various circumstances can trigger a demand for testing, many of which may be incorporated into a given program. These could include: testing as a prerequisite to employment or as a condition of transfer into safety-sensitive positions; routine testing of a particular group; testing following a specific occurrence (such as an industrial accident) or where there are reasonable grounds to believe that an individual has used a particular substance in the course of employment; and testing on a completely random basis, regardless of evidence implying substance use or abuse. The last of these "testing triggers" has caused the greatest controversy, because it is perceived as the most arbitrary basis for testing.

Drug testing programs involve interference with an individual's privacy and liberty, and a positive test may result in discriminatory treatment on the basis of an alleged disability — i.e. a substance abuse problem. Existing federal legislation provides some protection from such infringements. For example, the *Privacy Act* imposes limits on the collection, use and disclosure of personal information by the federal government. Moreover, the *Canadian Human Rights Act* prohibits discrimination in employment based on actual or perceived physical or mental disability; and disability is defined to include previous or existing drug or alcohol dependence.

The Canadian Human Rights Commission's policy on drug testing suggests that the use of a positive test to discipline, dismiss or deny an employment opportunity to any individual may constitute a discriminatory practice, and an employer may be required to make reasonable accommodation for an employee in such circumstances. Depending upon the employer's resources, this might mean transferring an employee to a less safety-sensitive position, initiating an employee assistance plan or providing leave for employees to seek treatment.

Substance testing may have an impact on a number of Charter rights

Any mandatory testing program implemented by the government will also be subject to scrutiny under the

Charter. Substance testing may have an impact on a number of Charter rights, depending upon the features of the particular program. The principal Charter rights affected would be the right to be secure against unreasonable search and seizure (section 8); the right to security of the person, and not to be deprived thereof except in accordance with the principles of fundamental justice (section 7); and the right to equal treatment under the law (section 15). If a drug testing program is found to infringe any Charter right, the government would then be called upon to justify the infringement under section 1.

The determination of whether a particular program offends the Charter and whether it can be saved by section 1 will be affected by many factors: the testing triggers described above (whether testing is completely random, only for reasonable cause, etc.); the extent to which employees are informed of testing requirements; the existence of procedural protections in the testing process and the use of information obtained; the inclusion of testing prerequisites and other criteria in the enabling legislation or regulations; the consequences of a positive test; whether the group subject to testing and the substances tested for include only (or all) those clearly linked to the problem being addressed; the severity of the problem which caused the testing program to be introduced; whether less intrusive methods have previously been tried; and whether there is a link between the information disclosed by testing and the objective an employer is seeking to achieve.

These factors are not exhaustive. They are intended simply to illustrate the many considerations which must be addressed in deciding whether or not to implement a drug testing program. But managers should bear in mind that the onus will be on the employer to defend the program in the event that it is challenged. ■

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The purpose of this newsletter is to help public service managers keep abreast of legal developments and topics that have broad interest and impact across government. The contents do not constitute legal advice.

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