



In this Issue:

[Khosa: Extending and Clarifying *Dunsmuir*](#)

[No Longer Necessary to Be Patently Unreasonable, Being Unreasonable Will Do – A Comment on *Dunsmuir v. New Brunswick*](#)

[Administrative Law Cases at the Court of Appeal for Ontario](#)

[Administrative Law Cases at the Supreme Court of Canada](#)

[Upcoming Programs](#)

SECTION NEWS

[Message from the Chair](#)

[Pursuing Human Rights Claims within Non-Human Rights Tribunals – January 27, 2009](#)

[Ethics, Administrative Law and Good Government – the Realm of Integrity Commissioners – May 6, 2008](#)

[Section Executive 2008-2009](#)

Khosa: Extending and Clarifying *Dunsmuir*

*Andrew Wray and Christian Vernon**

Introduction

The Supreme Court's recent decision in *Khosa* represents its first significant guidance with regard to the implementation of the standard of review analysis post-*Dunsmuir* (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9). This decision provides some insight into how the standard of review analysis should be conducted after the elimination of the most deferential patent unreasonableness standard.

Dunsmuir was the most significant administrative law decision released last year. It represents a break from past standard of review jurisprudence because it reduced the available standards from three to two. Whereas previously there were two deferential standards of review, these being reasonableness and patent unreasonableness, there is now only reasonableness. The non-deferential standard of review remains the same as before – correctness.

Khosa is significant because it is the first decision in which the Supreme Court conducts a standard of review analysis where the only options for review are either reasonableness or correctness. It is also important because it provides specific guidance with respect to the role that the common law plays in many judicial reviews conducted under the auspices of the *Federal Courts Act*. More generally, the majority reasons in *Khosa* also clarify and explain the role that statutorily mandated standards of review play in the standard of review analysis. It is not the case that a statutory direction with regard to the applicable standard would ever completely oust the common law. At minimum, the common law remains an important interpretive aid.

Justice Binnie wrote the majority decision, with McLachlin C.J. and LeBel, Abella and Charron JJ. concurring. Justice Rothstein wrote a concurring reason based on a different analysis, and Justice Deschamps, in brief reasons, concurred with much of Justice Rothstein's analysis, and concurred in the result with the majority. Justice Fish wrote a dissent in which he largely endorsed the reasons of the majority at the Federal Court of Appeal.

Background

Khosa was convicted by the British Columbia Supreme Court of criminal negligence causing death in connection with a street racing incident that took place in Vancouver in 2000 (*R. v. Khosa*, 2003 BCSC 357). Khosa and another driver were travelling far in excess of the speed limit when Khosa lost control of his vehicle and struck and killed a pedestrian.

Khosa, having been a landed immigrant at the time of his offence, was subject to a removal order as he was found to be a person engaged in “serious criminality” within the meaning of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. After serving a conditional sentence of two years less a day, Khosa appealed his removal order to the Immigration Appeal Division (“IAD”) requesting special relief from the order on humanitarian and compassionate grounds. Khosa did not contest the validity of the order per se.

Immigration Appeal Division

The IAD considered the relevant common law test for whether a person, who is subject to a valid removal order, should be granted special relief on humanitarian and compassionate grounds. In a 2-1 split decision, the IAD decided that Khosa’s mitigating factors were not sufficient to prevent the enforcement of the removal order. The majority emphasized that although Khosa had expressed remorse for his actions, he continued to deny that he was involved in a “street race.” Khosa admitted during his criminal sentencing and before the IAD that he had been driving dangerously, and that his dangerous driving had caused a death, but he did not go so far as to admit that he had actually been involved in a “street race.” The majority of the IAD concluded that Khosa’s qualified expression of remorse indicated that he lacked insight into his conduct.

Federal Court

Khosa v. Canada (Minister of Citizenship and Immigration), 2005 FC 1218

Khosa applied to the Federal Court to have the IAD’s decision judicially reviewed. The Federal Court denied Khosa’s Application for judicial review in reasons that were released prior to the Supreme Court’s decision in *Dunsmuir v. New Brunswick*.

Lutfy C.J. found that the standard of review applicable to the IAD’s decision was patent unreasonableness based in part on an application of the factors from *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, but also based on the Supreme Court’s analysis in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, which was based on an interpretation of s. 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. In Lutfy C.J.’s view, patent unreasonableness was the applicable standard because Parliament intended the IAD to have wide discretion in immigration removal matters, because the question was one of mixed fact and law, and because the IAD had greater expertise than the Court in making the factual determinations necessary to exercise its humanitarian and compassionate discretion within this regime.

Federal Court of Appeal

Khosa v. Canada (Minister of Citizenship and Immigration), 2007 FCA 24

The Federal Court of Appeal, like the Federal Court before it, did not have the benefit of the Supreme Court’s reasons in *Dunsmuir* at the time it rendered its decision in this case. The majority at the Federal Court of Appeal, in reasons drafted by Décaré J.A., found that the applicable standard of review was reasonableness,

and that the IAD's decision had been unreasonable. The majority disagreed with Lutfy C.J.'s standard of review analysis for a number of reasons. In Décary J.A.'s view, the Federal Court had given short shrift to the fact that decisions of the IAD are not protected by a privative clause, are related to humanitarian and compassionate factors, and that the issue in this case related to criminal law sentencing principles with which the IAD had no expertise or qualification. The majority found that the Federal Court had not properly considered the parallels between the matter before the IAD in this case, and the standard of review analysis in *Baker v. Canada*, [1999] 2 S.C.R. 817. In *Baker*, the Court had considered a matter that similarly dealt with a discretionary immigration decision made on humanitarian and compassionate grounds, and had concluded that the applicable standard was reasonableness simpliciter.

The majority's view was that the IAD had placed excessive emphasis on the question of whether Khosa was street racing, and on the issue of Khosa's refusal to characterize his actions as street racing. The IAD appeared to have concluded, based on Khosa's qualified expression of remorse, that he was not a candidate for rehabilitation and therefore should not be granted relief from his removal order on humanitarian and compassionate grounds. The IAD's fixation on this issue, to the detriment of Khosa's other mitigating factors, was seen by the Court of Appeal as unreasonable, particularly in light of the fact that the IAD had no expertise or qualification with regard to criminal law sentencing or rehabilitation issues.

This lack of expertise was highlighted, in the majority's view, by the fact that Khosa's expression of remorse was sufficient to persuade the British Columbia Court of Appeal to uphold the trial judge's imposition of a conditional sentence of two years less a day (*R. v. Bhalru, R. v. Khosa*, 2003 BCCA 645). The British Columbia Supreme Court and the British Columbia Court of Appeal felt that Khosa *was* a candidate for rehabilitation and not likely to re-offend and, as such, they did not hand down a custodial sentence. Given the severity of the offence for which Khosa was convicted, a lengthy custodial sentence would not have been out of the question in his case. The IAD acknowledged these findings of the criminal courts, but did not distinguish them in its reasons.

Supreme Court of Canada

Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12

The Minister of Citizenship and Immigration appealed the Federal Court of Appeal's decision to the Supreme Court. By the time this appeal was heard, the Supreme Court had released its decision in *Dunsmuir*. The lower courts did not have the benefit of this decision when drafting their reasons and the decision in *Khosa* represents the Supreme Court's first significant application of its own reasons from *Dunsmuir*.

The majority, led by Binnie J., overturned the decision of the Federal Court of Appeal, finding that although the standard of review was properly found to be reasonableness, the Court of Appeal did not afford the IAD the appropriate level of deference commensurate with that standard of review, having regard to the nature of the question and the statutory regime that was implicated.

Justices Rothstein and Deschamps concurred in the result, but held that a standard of review analysis based on common law principles was unnecessary and misplaced in this case. In their view, the standard of review was statutorily directed by the *Federal Courts Act* and the statutory direction displaced any role that *Dunsmuir* may have otherwise played in determining the standard of review.

Fish J. dissented, largely agreeing with the reasons of the majority at the Federal Court of Appeal, in his view, the IAD gave short shrift to the findings of the British Columbia Court of Appeal and the British Columbia Supreme Court with regard to Khosa's prospects for rehabilitation, re-offending, and with regard to the level

of remorse that he had expressed. Justice Fish acknowledged that the findings of the criminal courts were not binding on the IAD, but that it was unreasonable for the IAD to simply ignore these findings without at least distinguishing them.

How *Khosa* Clarifies *Dunsmuir*

The reasons of the majority in *Khosa* offer a number of significant clarifications with respect to how the standard of review analysis should be implemented post-*Dunsmuir*. Many of these points were present in *Dunsmuir* itself, but it was not clear on the strength of that decision alone how significant each point would be in future standard of review analyses.

Justice Binnie writes the majority decision in *Khosa*, whereas he wrote separate concurring reasons in *Dunsmuir*. *Khosa* closes some of the analytical gap between the majority reasons and Binnie J.'s concurring reasons in *Dunsmuir*. Justice Binnie's reasons in *Dunsmuir* were supportive of the elimination of the patent unreasonableness standard of review, but were critical of a standard of review exercise that he viewed as being prone to over-abstraction (*Dunsmuir* at para. 122). In his view, reviewing courts should not approach the standard of review analysis mechanically by checking items off a list or by attempting to mathematically calibrate the degree of deference that should be afforded to a particular tribunal. Similarly, he takes the position that the analysis should not be excessively general and should be specifically linked to the merits of the applicant's case.

Justice Binnie emphasized that the substance of the administrative decision-maker's reasons should not take a back seat to the form of those reasons, or to the constitution of the decision-making body itself. He suggests that although the "nature of the question" before the decision-maker has long been one of a number of elements to be considered in the standard of review analysis, it ought to play a more important role in terms of substantive review and the application of the standard. In *Dunsmuir*, Binnie J. seemed to reserve a special role for the "nature of the question" in determining the range of reasonable outcomes (*Dunsmuir* at para. 138).

In his concurring reasons in *Dunsmuir*, Binnie J. also emphasized that a factor-driven standard of review analysis distracted reviewing courts from examining the merits of the applicant's argument. He stated that, "[t]he problem is that courts have lately felt obliged to devote too much time to multi-part threshold tests instead of focussing on the who, what, why and wherefor of the litigant's complaint on its merits (*Dunsmuir* at para. 154)." In Binnie J.'s view, the default position of reviewing courts should be deference, and the standard of review should be presumed to be reasonableness unless demonstrated otherwise.

Partly because the majority in *Dunsmuir* did not extensively comment on Binnie J.'s reasons on these points, it was not clear how or if the standard of review analysis would change given the elimination of the patent unreasonableness standard. We were left with the same *Pushpanathan* factors that had always been examined under the "pragmatic and functional" test, and we were left with the same admonition to apply the factors globally and contextually, and to not treat the factors as checklist items (*Dunsmuir* at paras. 52-64).

In *Khosa*, however, we get some confirmation that the substance of the application for judicial review is to be emphasized over formal considerations such as the structure of the reasons or the nature of the decision maker, the context of the regime overall, etc. *Khosa* adopts certain aspects of Binnie J.'s concurring reasons in *Dunsmuir*, with the notable exception of his suggestion that there would inevitably be a "sliding scale" or inconsistent application, of deference within the reasonableness standard.

At the outset of the majority's reasons in *Khosa*, Binnie J. writes that, "*Dunsmuir* teaches that judicial review should be less concerned with the formulation of different standards of review and more focussed on substance, particularly on the nature of the issue that was before the administrative tribunal under review (*Khosa* at para. 4)."

Determining the Standard

It is significant that the actual standard of review analysis conducted in *Khosa* consists of a bare seven paragraphs briefly addressing each of the four factors (privative clause, purpose of the decision-maker, nature of the question, and the expertise of the tribunal) (*Khosa* at paras. 52-58). The privative clause factor appeared not to be particularly significant since the majority's only conclusion on this point was that there was no statutory right of appeal. As to the purpose, the majority did not offer a great deal of analysis on this point either, but noted that the IAD had been established as a specialized body designed to adjudicate a variety of immigration issues. Although the majority did not rank the significance of the applicable factors in this case, the nature of the question, combined with the expertise of the tribunal appeared to be significant. Justice Binnie noted that the IAD was charged with the task of determining not only what constituted humanitarian and compassionate considerations in a given case, but was also empowered to determine the sufficiency of those considerations. Further, he noted that an appeal from a valid removal order is properly characterized as a claim for a discretionary privilege (*Khosa* at para. 57). Having regard to these factors, the majority concluded that the reasonableness standard should apply.

Applying the Standard – Two-Stage Approach

In applying the reasonableness standard, the majority followed *Dunsmuir* in examining the reasons of the IAD to determine first, whether there existed justification, transparency and intelligibility within the reasons of the IAD. On this point, the IAD's consideration of the relevant common law factors in determining whether to exercise humanitarian discretion was noted. The majority then considered whether the result fell within the range of possible acceptable outcomes.

The one potential flaw in the justification and intelligibility of the IAD's reasons, as emphasized by the Federal Court of Appeal and by Fish J. in his dissent, was that the IAD did not make any effort to distinguish the findings of the criminal sentencing courts that had already favourably considered *Khosa's* prospects for rehabilitation and his degree of remorse. Justice Binnie obliquely addresses this concern by noting that, "the appropriate degree of deference requires of the courts not submission but a respectful attention to the reasons offered or which could be offered in support of a decision [emphasis Binnie J.'s]" (*Khosa* at para. 63). Justice Binnie then proceeds to effectively 'connect the dots' in the IAD's reasons by explaining that the criminal courts' sentencing considerations are distinct from the considerations of the IAD. In the majority's view, these reasons were sufficiently justified, transparent, and intelligible.

With regard to the final outcome, the majority found that the IAD's decision fell within the range of acceptable outcomes given the highly discretionary nature of the question before it, and given its consideration of the relevant common law test. Assessing whether there are sufficient humanitarian and compassionate grounds to exercise discretion is a fact-driven exercise that requires findings of credibility, and it is one to which the IAD is well-suited.

How *Khosa* Extends *Dunsmuir* – Clarifying the Role of Statutory Direction

The Supreme Court's decision in *Khosa* also extended the application of *Dunsmuir*. Although there was some reference in *Dunsmuir* to statutorily-directed standards of review, there was no guidance given as to

how or when a statutory direction might displace the common law standard of review analysis. Between the majority decision and the concurring reasons of Rothstein J. and Deschamps J., *Khosa* goes to some length in establishing a new front of administrative law analysis in this area.

The statutory direction issue arises in *Dunsmuir* due to the wording of s. 18.1 of the *Federal Courts Act*. This *Act* provides the legal basis for judicial review for a wide range of federal boards and tribunals, including the IAD. It provides some guidance to reviewing courts, listing circumstances in which judicial review may be sought, and establishing some of the outlines of the judicial review exercise in the federal administrative sphere.

In his concurring reasons, Rothstein J. interprets this section as establishing an appellate-type regime whose default reviewing standard should be correctness. Analyzing each of the various subsections under s. 18.1, Rothstein J. finds that the legislature has specified different standards of review depending on the type of question that is being reviewed, and having regard to the legislature's estimation of the expertise of the IAD with regard to that question. In Rothstein's view, s. 18.1 represents a clear indication of legislative intent with regard to the expertise of the tribunal *vis-a-vis* particular questions or issues, and this intent should not be by-passed on judicial review (*Khosa* at para. 96).

He therefore agrees with the majority to some extent that the focus of the analysis should be on the nature of the question under review, but does so solely based on his reading of the statute. According to Rothstein J., *Dunsmuir* has no role to play here. The common law of judicial review is displaced by the clear intent of the legislature.

The majority, on the other hand, sees s. 18.1 as not establishing any standard of review at all, but instead as establishing *grounds* on which judicial review may be sought. On this analysis, the *Federal Courts Act* establishes a basis for applying for judicial review, it does establish a basis for determining what the standard of review should be – the standards remain to be determined by the common law, within the context of the grounds (*Khosa* at paras. 41-48).

The majority, led by Binnie J., states that even had there been a clear statement with regard to the standard of review in s. 18.1, the factors in the standard of review analysis from *Dunsmuir* would still be relevant:

[51] As stated at the outset, a legislature has the power to specify a standard of review, as held in *Owen*, if it manifests a clear intention to do so. However, where the legislative language permits, the courts (a) will *not* interpret grounds of review as standards of review, (b) will apply *Dunsmuir* principles to determine the appropriate approach to judicial review in a particular situation, and (c) will presume the existence of a discretion to grant or withhold relief based on the *Dunsmuir* teaching of restraint in judicial intervention in administrative matters (as well as other factors such as an applicant's delay, failure to exhaust adequate alternate remedies, mootness, prematurity, bad faith and so forth).

In the majority's assessment, no matter how clear the expression of the legislated standard of review, the common law still plays a role in interpretation (*Khosa* at para. 19). At the same time, the majority states that effect must still be given to the clear legislated intent – patent unreasonableness will live on in British Columbia due to the provisions of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

Picking up on Binnie J.'s concurring reasons in *Dunsmuir*, the *Khosa* Court states that where the statutory regime does not refer to a specific standard of review or provide guidance in that regard, the default position is to afford the administrative decision-maker deference – the default position is not to evaluate on the correctness standard (*Khosa* at para. 26). In the majority's view, s. 18.2 of the *Federal Courts Act* cannot be read as giving any instruction with regard to the standard of review to be applied – it covers such a wide

variety of tribunals, boards, and other decision makers that flexibility is the key to interpreting that section. The *Federal Courts Act* enables, but does not require, judicial intervention in these particular circumstances (*Khosa* at paras. 40-43).

Conclusion

Khosa is a significant decision, not only because it brings Binnie J. in from the cold so-to-speak on the standard of review issue post-*Dunsmuir*, but also because it provides additional guidance with respect to the application of the standard of review analysis that should help in making the outcomes of such analyses more predictable. It is now relatively apparent that the default standard of review is reasonableness (without putting it as high as suggesting that the applicant bears any onus of demonstrating that the standard of review on a given question should not be reasonableness).

The decision in *Khosa* is also significant because it provides some clear directions with regard to how the standard of review analysis interacts with legislative directions on the standard of review. The majority essentially tells us that legislative directions with regard to the applicable standards of review must be quite explicit in order to be effective – the Court seems reluctant to relinquish its supervisory function to lukewarm expressions of legislative intent. If the intent to displace the common law standard of review analysis is not very clearly stated, the Court will not search for implied intent. In any event, the Court also states that the common law will always play an interpretive role with regard to the standard of review, even where there is a clear expression of legislative intent.

Ultimately, it appears that the post-*Dunsmuir* process by which the applicable standard of review is to be determined is largely in line with the “pragmatic and functional” approach that was developed in previous jurisprudence. However, what is interesting about *Khosa* is that the question of which standard of review was to be applied was something of a collateral issue. In that regard, *Khosa* has arguably opened a new front in judicial review applications. Given that the majority of judicial review applications will be reviewed on the reasonableness standard in the future (or at least the correctness standard will become more exceptional), it seems likely that counsel will begin concentrating their arguments on the two-step *application* of the reasonableness standard. In our view, the important question now is not, “Which standard should apply?”, but is rather, “How does the reasonableness standard apply to the facts of a given case?” In this regard, the “nature of the question” has a special role to play in determining the range of possible acceptable outcomes.

* *Andrew Wray, Pinto Wray James LLP, awray@pintowrayjames.com.*

Christian Vernon, Pinto Wray James LLP, cvernon@pintowrayjames.com.

No Longer Necessary to Be Patently Unreasonable, Being Unreasonable Will Do – A Comment on *Dunsmuir v. New Brunswick*

Gregory J. Levine*

Spring 2008

In *Dunsmuir v. New Brunswick*,¹ the Supreme Court of Canada has revisited the standard of review yet again. In an attempt to simplify the analysis, the Court has dropped the “patently unreasonable” test and the diction of “reasonableness simpliciter” and has adopted an analysis which focuses on two ideas, reasonableness and correctness. It has also dropped the diction of the pragmatic and functional approach, simply preferring “standard of review analysis”. The case attracted immediate attention by legal commentators.² The decision appears to clarify the law, but it is not without difficulty or complication as Justice Binnie discusses in his concurring opinion. In years to come, the case will no doubt be known for its attempt to transform and clarify standards of review in administrative law, but a lasting and potentially negative effect of the decision may turn out to be in the area of employment law where the Court has revisited the notion of procedural fairness in public sector employment. However, the following discussion focuses on the standard of review.

The facts of the case involve David Dunsmuir who was an employee of the Department of Justice in New Brunswick. He was employed under the *Civil Service Act*, but also was employed on “at pleasure” basis. His probationary period had been extended twice, his employer had reprimanded him three times and ultimately he was formally terminated. He was not explicitly terminated for cause and was given four months pay in lieu of notice. Seeking reasons for his termination, Dunsmuir went through a grievance process and ultimately to an adjudicator. The adjudicator determined that Dunsmuir had been inappropriately denied procedural fairness in his termination and ordered that he be reinstated.

The Court of Queen’s Bench, using the correctness standard, found that the adjudicator had no jurisdiction to inquire into the reasons for the termination and should only have considered the notice issue. It found that Mr. Dunsmuir had been accorded procedural fairness in the grievance process and found that while he should not be reinstated, he was entitled to eight months rather than four months notice. The Court of Appeal held that the proper standard was reasonableness simpliciter and found the adjudicator’s decision to be unreasonable. It agreed that there had been no breach of procedural fairness.

The Supreme Court of Canada took the opportunity this case provided to review the standards of review and their attendant analysis. Affirming the critical role of judicial review in maintaining the rule of law, the Court affirmed that there ought to be only two standards of review – correctness and reasonableness.

Writing for five of the justices, Bastarache J and LeBel J note that the system of review had been very difficult to implement. So “patently unreasonable” and “reasonableness simpliciter” collapse into “reasonableness” which “is a deferential standard animated by the principle that underlies the development of two previous standards...: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead they may give rise to a number of possible reasonable conclusions.”³ Reasonableness itself, the justices state, is “concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”⁴

The deference inherent in reasonableness in this context means “due consideration” of the determinations of decision makers. It is a recognition of expertise and experience in a given area of decision making. It is about respect for that experience, for the will of the legislature and for the different roles of tribunals and courts.

Despite this desire for deference, correctness has to be maintained for jurisdictional and ‘some’ other questions of law. This, Bastarache J and LeBel J indicate, “promotes just decisions and avoids inconsistent and unauthorized application of law”.

To determine the appropriate standard of review in a given situation, one must ascertain whether or not there is a privative clause; whether or not the administrative decision maker has special expertise; and whether or not there is a question of law which is of central importance to the legal system and outside the area of expertise of the decision maker.⁵ If one answers yes to the first two, that tends towards the reasonableness standard. If one also says yes to the third though, that attracts a standard of correctness. The process will henceforth be known as standard of review analysis. This analysis will always involve four components: presence of a privative clause; purpose of the tribunal; nature of the question at issue and the expertise of the tribunal.

In the instant case, the Court found that the adjudicator’s interpretation of *Public Service Labour Relations Act* was not reasonable. There was no justification for saying that the employer had to show cause before dismissal.

In his judgment, Binnie J expresses concern about whether or not the new methodology brings clarity or ultimately simplifies the process. On the correctness standard, he is concerned that the potential debate on whether or not a particular question of law is of central importance to the legal system as a whole will be a distraction.⁶ He favours an approach which would “frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the decision maker...”⁷ On the reduction of the categories of reasonableness, he notes that the previous distinction had not just been about the magnitude of the defect (i.e., more or less reasonable or unreasonable), but also recognized that different administrative decisions command different degrees of deference. The reasonableness test will now incorporate both the dimensions degree of deference and the range of options reasonably open to the decision maker.

Binnie J also discusses the issue of review of substantive decisions. Concern about the nature of the question has also arisen as part of the standard of review analysis, but may be more important respecting consideration of substantive review of the actual decisions. For him, the use of the term patently unreasonable or manifestly indefensible was “not a bad description” of the hurdle one would have to leap in order to have a decision quashed on a substantive ground.

Further and finally, Binnie J expresses concern about the practicality and clarity of the approach. This concern boils down to the need for a framework for analyzing reasonableness and that merely stating that reasonableness is about justification, transparency and the like may simply not be enough.

In ending this brief case comment, it can be said that the Court has tried to clarify and simplify standard of review concepts and practice. As to the latter though, only time will tell if, while having an apparently simpler diction, we actually have a simpler and more straightforward practice in standard of review analysis.

* *Gregory J. Levine, Barrister and Solicitor, London, Ontario.*

¹ 2008 SCC 9.

² E.g., see D. Scrimshaw, “Farewell to Patently Unreasonable: *Dunsmuir v. New Brunswick*”, David Scrimshaw’s Blog, March 7, 2008; L. Sossin, “Dunsmuir: Can the Standard of Review be Resolved?”, UT Law School

Blog, March 18, 2008; A. Woolley, “The Metaphysical Court: *Dunsmuir v. New Brunswick* and the Standard of Review”, available on Ablawg.ca.

³ *Dunsmuir, supra*, Para. 47.

⁴ *Ibid.*

⁵ Issues of jurisdiction defined as the authority of the tribunal to act will always attract the correctness standard. The Court is saying that some questions of law may attract the reasonableness standard.

⁶ *Dunsmuir, supra* Para. 128.

⁷ *Ibid.*

Administrative Law Cases at the Court of Appeal for Ontario

*Benissa Yau, Evan van Dyk, David de Groot, Alexa Sulzenko and Christian Vernon**

Maystar General Contractors Inc. v. International Union of Painters and Allied Trades, Local 1819, 2008 ONCA 265

The union brought a certification application before the Ontario Labour Relations Board. The employer served a response on the union but, through inadvertence, neglected to file its response with the Board within the statutory time limit. The Board made the requested certification order and the employer asked for a reconsideration. Upon reconsideration, the Board held that it had no authority to extend a time limit set out in s. 128.1 of the *Labour Relations Act*, 1995, S.C. 1995, c.1, Sch. A. The Divisional Court granted the employer’s application for judicial review and remitted the matter to the Board. Before the appeal to this court was heard, the Board implemented the Divisional Court order, considered the employer’s information, and rescinded the certification order.

The appeal is dismissed. The appeal is moot: the question is whether the Board can consider the information proffered by the employer, but the Board has already considered and acted on it. This court should not exercise its discretion and decide the appeal because the issues are neither of public importance nor “evasive of review”.

Myrtezaj v. Cintas Canada Limited, 2008 ONCA 277

Errol Myrtezaj brought a claim against Cintas Canada Ltd. for constructive dismissal. The alleged constructive dismissal occurred while the United Food and Commercial Workers were seeking certification and negotiating a collective agreement. Cintas moved under rule 21.03(3)(a) to dismiss the action, arguing that the complaint was within the exclusive jurisdiction of the Ontario Labour Relations Board. The motion judge accepted Cintas’ submission, held that the court had no jurisdiction to hear the claim, and struck the action. On appeal, Myrtezaj submitted that his claim did not give rise to any right of arbitration, since there was no collective agreement in effect, nor to any right to claim relief against Cintas before the Board pursuant to s. 96 of the Act. Alternatively, he submitted that even if the Act could be read to give the Board jurisdiction over his complaints, he could not hope to obtain redress before the Board, because only his Union, which was now decertified, could properly take the complaint before the Board.

The appeal is dismissed. Myrtezaj’s claim was in essence a claim that Cintas had changed his working conditions unilaterally at a time when s. 86 of the Act prohibited Cintas from doing so. Under the Act, the

Board had exclusive jurisdiction to determine whether Cintas had unilaterally changed Myrtezej's working conditions and if so, what remedy should be imposed against Cintas. The Court had no basis to assume jurisdiction, as it could not assume that the Union would not comply with any obligations that it had with respect to Myrtezej's fair representation.

Canadian General-Tower Limited v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steel Workers) Local 862, 2008 ONCA 404

Employees on "temporary layoff" from employment were entitled to a supplemental weekly benefit, pursuant to a supplemental unemployment benefit plan that was incorporated into the collective agreement. A group of employees were laid off, but were recalled almost a year later. The employer denied the benefits on the basis that the layoffs were not "temporary". The arbitrator appointed to consider the union's grievance found that a "temporary layoff" in these circumstances was equivalent to the period that the employees retained recall rights under the collective agreement. The Divisional Court dismissed the employer's application for judicial review using the standard of patent unreasonableness to review the arbitrator's decision. The employer appeals.

The appeal is dismissed. After *Dunsmuir v. New Brunswick*, 2008 SCC 9, the appropriate standard of review of the arbitrator's decision is reasonableness. The *Labour Relations Act*, 1995, S.C. 1995, c. 1, Sch. A, contains a strong privative clause. Arbitrators possess special expertise in interpreting collective agreements, and the interpretation of "temporary layoff" in the collective agreement is not of central importance to the legal system as a whole. The arbitrator's decision was reasonable as it reflects due consideration of the factual background of the layoffs, the terms of the plan and the collective agreement, and the relevant law.

Ontario Racing Commission v. O'Dwyer, 2008 ONCA 446

The respondent had been involved in the horse racing industry for years, including seven years as a starter for the Rideau-Carlton Raceway. At the beginning of the 2003 racing season, the Ontario Racing Commission's Supervisor of Racing received a report from a Commission investigator who alleged that the respondent was involved in a hidden ownership of a horse owned by his step-daughter. As a result of the report, the Supervisor informed the general manager of the raceway that the respondent would not be approved as a starter for the new season. The raceway in turn informed the respondent that it would not re-hire him for the starter position because of Ontario Racing Commission's directive. The respondent contacted the Commission and submitted documents establishing that he was not the owner of the horse in question in an effort to challenge the decision to refuse his approval. The Commission made no response to the respondent's efforts, instead alleging that no decision had been made respecting the respondent's status as a starter. Eventually, the respondent initiated an action in tort against the Commission. The trial judge found that the Supervisor's telephone call to the raceway constituted an unlawful act sufficient to make out liability for the torts of (1) misfeasance in public office, (2) inducing breach of contract and (3) intentional interference with economic relations.

The appeal is dismissed; the decision of the trial judge is varied to result in a finding of misfeasance in public office only. The Supervisor's telephone call was not an unlawful act when the statutory regime governing the sport of horseracing is considered. However, the tort of misfeasance in public office is still established by virtue of the conduct of the Supervisor in having made the decision to refuse to approve the respondent as a starter and the subsequent conduct of the Commission in refusing to acknowledge the existence of such a decision and provide the respondent with his statutory entitlement to a hearing to challenge that decision. Commission officials were recklessly indifferent or willfully blind as to the illegality of refusing to acknowledge the existence of the decision and deprived the respondent of his statutory right to a hearing. The tort of

inducing breach of contract is not established on the facts since the respondent did not have a valid and enforceable contract with the raceway. The tort of intentional interference with economic relations is also not established when the circumstances essential to make out the tort are considered, as most recently described in the House of Lords decision in *OBG*. That case established that the essence of the tort involves wrongful interference with the actions of a third party in which the claimant has an economic interest. Here, no wrongful interference was procured against the actions of the third party, the raceway, therefore the features essential to make out the tort were not satisfied.

Mills v. Workplace Safety and Insurance Appeals Tribunal, 2008 ONCA 436, on appeal from the order of the Divisional Court dated November 15, 2006

The respondent, Mr. Mills, injured his back in 1979 while employed as a driver. He worked at a variety of jobs, including as a driver, over the next few years, and he began to be treated for severe back pain in 1990 and made a request to the Worker's Compensation Board for benefits in 1993. When his request was denied, the respondent appealed to the Workplace Safety and Insurance Appeals Tribunal. The Tribunal dismissed the appeal as it was unable to find a causal relationship between the 1979 injury and the respondent's current condition.

The respondent applied for judicial review, and the Divisional Court, using patent unreasonableness as the standard of review, found that the Tribunal had made several small factual errors which, taken together, undermined its decision. The court was particularly concerned that there was no basis in the record for the Tribunal's rejection of the respondent's medical witness's opinion about causation. The Divisional Court set aside the Tribunal's decision and allowed the respondent's benefits claim. The appellant appeals this decision, arguing that the Divisional Court erred by, in effect, according no deference to the Tribunal's decision and reaching a different conclusion based on its own findings of fact. On the other hand, the respondent suggests that the Tribunal's decision was patently unreasonable because it was contrary to the medical and other evidence presented.

The standard of reasonableness, as defined by the Supreme Court of Canada in *Dunsmuir* should be used in reviewing the Tribunal's decision. *Dunsmuir* establishes that there are two degrees of deference: correctness, where deference is not accorded, and reasonableness, where deference is accorded. However, it is still important to consider factors such as the decision-making process, type and expertise of the decision-maker, and nature and complexity of the decision in assessing the reasonableness of the decision.

The Divisional Court erred in setting aside the Tribunal's decision. The Tribunal's findings of fact with which the court took issue are supported by the evidence. The Tribunal's failure to address the respondent's evidence about the lack of a record of back pain complaints in his medical file was not an error. There was also support on the record for the Tribunal's finding that the respondent continued to work in strenuous ways. The Tribunal was entitled to conclude that the respondent's hunting and snowmobiling activities were not compatible with a long history of back pain. In addition, there was an adequate basis for the Tribunal to have rejected the evidence of the respondent's medical witness. The Tribunal's decision was entitled to deference, and it was neither patently unreasonable (on the test as it then was), nor unreasonable (based on the standard of review established in *Dunsmuir*).

Mulligan v. Laurentian University, 2008 ONCA 523, on appeal from (2007), 230 O.A.C. 187 (Div. Ct.) and [2007] O.J. No. 3135 (Div. Ct.)

The appellants had applied to Laurentian University's Master of Science in Biology program, and the Department of Biology's Internal Committee recommended to the Dean that they be admitted. However,

the M.Sc. Oversight Committee declined to recommend their admission, due to the Department's new funding policy for graduate students. The policy required that students receive some of their funding from the research grants of their proposed supervising professors. Since the appellants did not have such funding available to them, and the university was not willing to accept family support, scholarships, or laboratory support from the supervising professor instead, they were not admitted to the program.

The appellants' application for judicial review was dismissed by the Divisional Court on the basis that admissions decisions are discretionary and go to the "core function" of a university, such that they should not normally be interfered with by the courts.

The appellants argue that the funding policy was an "admission standard" and submit that the university's interpretation of the policy as requiring the funds to come from the supervising professor was patently unreasonable. The appellants also argue that the Department did not have jurisdiction to act on the policy, since it had not been approved by the University Senate.

The Department's motion establishing the funding policy was not an admission standard, but was rather a supplement to the admission requirements. The university has considerable discretion in making its admissions decisions and may take into account its ability to provide an academic program of a high calibre. Even if the funding policy were an admission standard, it did not require Senate approval because individual departments are allowed to supplement the Senate's minimum requirements for admission. The standard of review is whether the university acted reasonably in making the discretionary decision. As the Divisional Court held, admissions decisions go to the core of the university's functions. The decision was made reasonably in this case, and it should be granted considerable deference. There was no lack of procedural fairness, nor was natural justice denied, in the way that the university handled the applications of the appellants.

Flora v. Ontario (Health Insurance Plan, General Manager) (2008), 91 O.R. (3d) 412, on appeal from (2007), 83 O.R. (3d) 721 (Div. Ct.)

The appellant, Mr. Flora, was diagnosed with liver cancer in 1999 and told that he had only a few months to live. At the time, the only liver transplants available in Ontario were cadaveric; living-related liver transplantation (LRLT) was new, and an adult to adult LRLT had not yet been performed in Ontario.

Eligibility for a cadaveric liver transplant was determined based on a set of medical criteria, and the appellant was found not to qualify in Ontario. However, the criteria for liver transplants were different at a hospital in London, England, and the appellant met them. His life was saved by undergoing chemoembolization, as well as an LRLT in England at a cost of \$450,000. The appellant applied to the respondent, the Ontario Health Insurance Plan, to have the cost reimbursed. When his request was rejected, he sought a review before the Health Services Appeal and Review Board, the majority of which upheld the respondent's decision because the treatment in England could not be considered an "insured service" under the *Health Insurance Act* or its regulations. The appellant appealed to the Divisional Court, which dismissed the appeal.

The appellant argues that the Divisional Court erred by using the reasonableness standard to review the decision of the Board, by finding that the Board's decision was reasonable, and, in the alternative, by failing to find that the regulations of the *Health Insurance Act* violate his s. 7 Charter rights.

In determining the appropriate standard of review for the Board's decision, the factors used in the pragmatic and functional analysis are still relevant and were not jettisoned by the Supreme Court's decision in *Dunsmuir*. The Divisional Court correctly applied these factors to find that the reasonableness standard of review should

apply. The Board's decision is owed deference if its justification is "sound, transparent and intelligible" and if it is within a range of outcomes that can be defended on both the facts and the law. In this case, the Board's decision was reasonable.

The provision in question did not deprive the appellant of his s. 7 rights because it provides public funding for certain medical treatments outside of Canada. This is a solely economic benefit, and s. 7 does not constitutionally obligate the government of Ontario to provide it, even where it is life-saving.

1657575 Ontario Inc. v. Hamilton (City) (2008), 92 O.R. (3d) 374, on appeal from (2007), 224 O.A.C. 27 (Div. Ct.)

The City of Hamilton passed a by-law which expressed its desire to reduce by half the number of "adult entertainment parlours". Licenses for existing parlours could be revoked after a hearing before the council's licensing committee to determine whether the licensee had not carried on its business actively "within a reasonable period of time" after the license was issued or renewed. The by-law also set out that the recommendation to revoke a license had to be sent to the licensee, that the licensee was entitled to a hearing, and that the licensing committee had to consider specific factors in making its decision.

The appellant received a licence in March of 2006 for a parlour and planned to open it as soon as she got a liquor license. She also had a second such business that was not in operation at the time, and she intended to re-open it at the same time that she opened the new business. The City revoked the license for the existing business because of its failure to actively carry on business in March of 2006. In May of that year, a hearing was recommended to consider revoking the license for the new business, and the City sent the appellant a notice of the hearing along with a description of the grounds for the hearing. While the appellant's counsel requested disclosure of the City's evidence, the City only responded by letter two days before the hearing and did not provide copies of any of the evidence it would rely on. At the hearing, the appellant's counsel raised the City's failure to provide disclosure, but the hearing proceeded. It turned out that the City's disclosure had been false and misleading, since it relied on the appellant's failure to have opened the parlour for business as of yet. The licensing committee voted to revoke the appellant's license. Based on what the appellant had learned at the meeting, a few days later she opened her business without the liquor license she had been waiting for. The City council followed the committee's recommendation to revoke the license, not having received the information that the appellant had opened her property due to a change in the time of the meeting that was not communicated to the appellant.

The appellant brought an application for judicial review to the Divisional Court on the basis that the licensing committee's revocation had been procedurally unfair and a denial of natural justice. The Divisional Court dismissed her application, holding that the appellant knew the particulars of the complaint and that there was no indication of bias or bad faith.

When considering whether there has been a denial of procedural fairness, it is unnecessary to determine the appropriate standard of review. Unless there is a compelling competing interest, procedural fairness will generally require disclosure. Where there has been a breach of procedural fairness, the court can set the decision aside without having to consider whether a different result would have been achieved without the breach. In this case, the committee was required to at least have provided the appellant with the grounds for the proposed revocation. The notice that was given to the appellant was misleading as to the evidence that would be presented at the hearing, so the Divisional Court erred in finding that the appellant received the particulars of the complaint. This failure to advise the appellant also contravened the by-law. It was, therefore, procedurally unfair. The appellant may also have been prejudiced, since earlier disclosure could have affected her conduct. After learning the grounds for the revocation at the committee hearing, she

immediately opened the business even without the liquor license and sought to advise the council of that fact. The appellant's license should be reinstated.

United States of America v. Fischbacher (2008), 91 O.R. (3d) 401, for judicial review of the Minister of Justice's surrender order

The applicant Fischbacher was charged with first degree murder in the state of Arizona after the death of his wife. After the applicant's arrest in Canada, the United States requested his extradition on the charge of first degree murder. The extradition judge ordered that the applicant be committed on the charge of second degree murder. The respondent Minister of Justice ordered that the applicant be surrendered on the charge of first degree murder. The applicant seeks judicial review of the Minister's decision and submits that the surrender order should be quashed.

The surrender order should be quashed, and the matter should be remitted back to the Minister for further consideration. The Minister's decision to surrender on the first degree murder charge was unreasonable. A surrender order for a particular offence is unreasonable if the requesting state fails to lead any evidence to support an essential element of the offence at the committal hearing. The extradition judge found that the requesting state had not led evidence of premeditation, a required element of first degree murder in Arizona.

There is a "misalignment" between the charges of first degree murder in the surrender order and second degree murder in the committal proceedings. The Minister's view is that these are not different offences under Canadian law, so double criminality can be established for a foreign murder charge of any degree if there is evidence to support any Canadian murder charge. However, first and second degree murder are substantively different under both Canadian and Arizona law in their essential elements and potential penalties. The Minister's decision to surrender the applicant on the clearly more serious charge of first degree murder, in the absence of any evidence of an essential element of that charge in the committal proceeding, was unreasonable.

Schreiber v. Canada (Minister of Justice) (2008), 91 O.R. (3d) 641, for judicial review of the Minister of Justice's decision not to accept further submissions regarding a surrender order

An extradition proceeding was commenced against the applicant in 1999. In October of 2004, the then Minister of Justice ordered the applicant's surrender to Germany on charges of tax evasion, fraud, uttering a forged document, obtaining a secret commission, and bribing a public official. The applicant applied to this court for judicial review of the surrender order in March of 2006, but the request was denied. The Supreme Court then denied leave to appeal this court's decision. The applicant has since made three sets of further submissions asking that the surrender order be reconsidered, and the Minister rejected the third of these in March of 2008 with brief reasons to the effect that the further submissions did not raise new issues of substance that would justify reconsidering the surrender order. Also in March of 2008, the Minister agreed that the applicant's surrender could be delayed to allow him to testify at the Mulroney-Schreiber public inquiry.

The applicant has applied for judicial review of the current Minister's March 2008 decision on the basis that the Minister failed to address his discretion to refuse to extradite nationals under the extradition treaty between Canada and Germany, that the Minister was biased or had a conflict of interest, and that the Minister failed to give reasons for his decision.

The then Minister, in the 2004 surrender decision, at least implicitly considered his discretion under the treaty between Canada and Germany to refuse the applicant's extradition because the applicant is a Canadian citizen and because Germany can choose not to surrender its nationals in a reciprocal fashion. It was open to the

current Minister in the March 2008 decision to find that the applicant's further submissions did not raise a new issue in this regard that would require a response. Furthermore, the Minister's recent actions in allowing the applicant to remain in Canada to testify in the Mulroney-Schreiber inquiry show that there is no bias or conflict of interest in the extradition order. The record does not show any other foundation for claims of bias or conflict of interest. Lastly, while it would have been preferable for the current Minister to specifically respond to the applicant's submissions about the treaty and reciprocity in the March 2008 reasons, those submissions were really only a refinement of earlier submissions that did not require an additional response.

R. v. Hop-Kit Li, 2008 ONCA 613, 92 O.R. (3d) 343 per Curiam

This case concerned a statutory appeal by the Crown disputing the Ontario Review Board's decision to grant the Respondent an unconditional discharge. The Respondent had been charged with an offence, but had been found not criminally responsible due to her mental condition. She was placed with the Centre for Addiction and Mental Health.

The question before the Board was whether the Respondent would pose a danger to others if she was released. The Board considered evidence that the Respondent had previously attempted to grab a police officer's gun during a domestic dispute. The Board also considered evidence that the Respondent was uncooperative during the period of her confinement at CAMH, refusing to attend appointments with her psychiatrist and refusing to take her medications. The Respondent was actively suicidal and, according to her psychiatrist, demonstrated no insight into her illness and had no appreciation of the risk that her behaviours posed to the public.

The Court of Appeal held that the Board had erred in placing the onus on the Crown to prove that the Respondent did not pose a risk to the public. There is no onus on any party in these proceedings. The Board erred in ignoring the uncontroverted evidence that the Respondent's illness continued unabated. The Board appeared to consider the Respondent's evidence that she did not intend to harm others in her efforts to commit suicide, but failed to consider whether her efforts would in fact harm others. Given these errors, the Court of Appeal sent the matter back to a differently constituted Board to reconsider the case.

Man Financial Canada Co. v. Keuroghlian, 2008 ONCA 592, 68 C.C.E.L. (3d) 1 per Feldman J.A.

The Defendant was a foreign exchange trader employed by the Plaintiff. The Defendant's employment was terminated when the Plaintiff discovered that he had been making unauthorized trades in foreign currencies. The Defendant purported to make these trades on behalf of clients of the Plaintiff firm, while in reality these clients had never fronted the money for the trades. When the trades resulted in large losses, the Plaintiff firm was left holding the bag.

The Plaintiff made a claim in fraud against the Defendant based on the false premises on which the Defendant made the trades and based on its assertion that the Defendant knew what he was doing, knew that it was wrong, and that he did it wilfully. The Defendant counterclaimed for wrongful dismissal.

The Defendant argued condonation at trial. The Defendant alleged that the Plaintiff firm knew that the trades were made without being backed by client funds, and that the Plaintiff permitted the trades to go ahead nonetheless. The trial judge, however, found that it was implausible that the Plaintiff would knowingly permit these unfunded trades to go forward. It was found to be even more implausible that the Plaintiff would actually pay the Defendant commissions on trades that it knew were not above board and which exposed the firm to a large amount of risk. The evidence suggested that the Defendant concocted false credits in order to cover his tracks and actively deceived the Plaintiff as to the nature of his trades.

The Defendant appealed on a number of grounds. The first ground was that the trial judge's reasons were not sufficient to permit meaningful appellate review. The Court of Appeal rejected this ground. The trial judge's reasons ran for 78 pages, and although he did not make a ruling on each individual contradiction in the evidence, he addressed the major contradictions and made the necessary findings of credibility.

The Defendant's second ground of appeal was that the trial judge did not apply the distinct burden of proof required for allegations of fraud. The Court of Appeal rejected this ground because the trial judge set out the standard in his introduction as requiring "clear and cogent evidence commensurate with the gravity of the allegations." Further, the trial judge's reference to the Plaintiff's evidence being "far more believable" was a sufficient reference to the higher standard.

The Defendant's third ground of appeal was that the trial judge did not adequately consider that the Plaintiff's own carelessness in regulatory compliance should preclude it from being able to rely on his statements as evidence of fraud. The Court of Appeal rejected this as well, saying that there is no duty of care applicable to the fraud victim. The fraud inquiry is with respect to what the Defendant did and what the Defendant intended.

Deemar v. College of Veterinarians of Ontario, 2008 ONCA 600, 92 O.R. (3d) 151 per Juriensz J.A.

This was an appeal on leave by the College of Veterinarians of Ontario seeking to overturn an order of the Divisional Court. The orders related to disciplinary proceedings that were instituted against a member of the College following a complaint regarding that member. The complaint alleged that a dog owner had gone in to Dr. Deemar's office seeking treatment for her pet's facial rash. Dr. Deemar's assistant took the dog into the back room and emerged a short while later with a diagnosis and a proposed course of treatment. The dog owner became suspicious and asked to speak with Dr. Deemar directly. At this point, the assistant admitted that Dr. Deemar was not present and that she had given her diagnosis by phone.

The Divisional Court had judicially reviewed a number of preliminary rulings made by the Discipline Committee of the College of Veterinarians of Ontario. The Application for judicial review was made by the Respondent, Dr. Deemar, and related in part to the Committee's decision to exclude an expert report that Dr. Deemar had intended to rely upon in the proceeding before the Committee. The report was supportive of Dr. Deemar; however it was prepared by a former employee of the College whose employment had been terminated in acrimonious circumstances. The College decided that this report contained advocacy, raised a reasonable apprehension of bias, and contained an assessment regarding the credibility of a witness. On these bases, the College decided to exclude the report.

The Committee also excluded a report made by another expert on the basis that the report was irrelevant to the professional misconduct issue before the Committee. For example, this report contained opinions regarding the fact that the College did not utilize ADR in this case and opinions regarding Dr. Deemar's legal fees.

The Divisional Court also considered the fact that the Committee did not interview the complainant or Dr. Deemar's assistant. In finding that procedural justice had been denied, the Divisional Court ordered that both expert reports be admitted and that the matter be sent back to the Committee for re-hearing before a differently constituted panel. Pending such, the matter was stayed.

The Court of Appeal reversed the Divisional Court's order. With regard to the first expert report, the Court of Appeal noted that it is up to the trier of fact to qualify expert witnesses. Further, the Court of Appeal observed that it is fundamental that expert witnesses meet a minimum standard of independence, and that if

an expert strays into advocacy, that individual can no longer be considered an expert within the strict meaning of the term. As for the second expert report, the Court of Appeal reversed the Divisional Court's order because no reasons were provided to contradict the Committee's finding that the report had no relevance to the allegations at issue in the proceeding.

The Court of Appeal held that the Committee had no power to compel witnesses to give statements or to submit to interviews and that as such it could not be required to interview any individual in particular. The Committee's only obligation is to make every reasonable effort to examine all of the records and other documents relating to the complaint.

The Court of Appeal set aside the Divisional Court's order and dismissed Dr. Deemar's Application for judicial review. In doing so, however, the Court of Appeal did not agree with the College's submission that the Application for judicial review had been brought prematurely (given that it was on a preliminary matter). The Court of Appeal held that the Divisional Court had jurisdiction based on its initial view that the questions raised in the Application involved issues of natural justice, thereby raising a potentially fatal flaw in the process.

Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal), 2008 ONCA 719, 92 O.R. (3d) 757 per Borins J.A., Rosenberg J.A. concurring, Gillese J.A. dissenting

This appeal concerned a worker who was injured on the job. A dispute arose between the Workplace Safety Insurance Board and the worker with regard to what measure of earnings should be used to calculate his income replacement benefit.

The worker contended that his earnings included benefit plan contributions made by his employer, while the WSIB policy did not include these contributions in the calculation of his pre-accident income. The WSIAT agreed with the Board and decided that the proper measure of this worker's pre-accident income did not include benefit plan contributions.

The majority of the Divisional Court panel noted the very strong privative clause protecting decisions of the WSIAT; however, the Court also emphasized the legislative history of the *Workplace Safety and Insurance Act*. The majority held that the WSIAT committed a reviewable error in not considering this legislative history and in not giving any weight to the interpretational value that such history had for deciding the question of what constitutes "pre-accident earnings." At the same time, the majority did not dispute that the outcome may have been a reasonable one. It found, however, that the failure to consider this relevant evidence was a fatal flaw in the WSIAT's decision. The minority judgment of the Divisional Court would have upheld the WSIAT's decision, noting that legislative histories are not generally determinative of statutory interpretation questions of their own accord.

Applying the reasonableness standard as per *Dunsmuir*, the majority of the Court of Appeal considered whether the decision of the WSIAT fell within a range of possible, acceptable outcomes, and whether there was a comprehensible line of reasoning leading to that decision. It was noted that decisions of the WSIAT on what constitutes pre-accident earnings are afforded the very highest degree of deference, and that not one had ever actually been overturned. It was also observed that the legislative history argument was not central in the submissions that were before the WSIAT and that this history was largely irrelevant in any event. Emphasis was placed on the nature and function of internal WSIB policies in determining what constitutes pre-accident income. The majority upheld the WSIAT's decision as reasonable.

In dissent, the minority disagreed that the legislative interpretation argument was not an important part of the submissions that were before the WSIAT. The failure of the WSIAT to consider the legislative history

argument at all in its reasons, coupled with the fact that the legislative history touched directly on the issue that was to be decided, constituted a significant error. In the minority reasons, the decision of the Divisional Court was not based on the failure of the WSIAT to consider the legislative history, but was instead based on the failure of the WSIAT to consider “relevant evidence.” The minority view was that it was an error for a tribunal; even one afforded as much deference as the WSIAT, to entirely fail to consider a piece of evidence that is directly relevant to an issue at the core of a matter.

Stetler v. Ontario Flue-Cured Tobacco Growers’ Marketing Board, 2009 ONCA 234 per Gillese J.A.

The matter had a somewhat complex history, previously having gone to the Court of Appeal, and having been sent back down to the Board for reconsideration on the penalty issue. The Respondent on this appeal was a tobacco farmer from southwestern Ontario who had been found to have exceeded his allotted quota for tobacco production. The Appellant Board, having convicted the Respondent of exceeding his quota, cancelled his entitlement to future quotas, effectively putting him out of the tobacco growing business.

This decision was the result of an appeal by the Marketing Board from a decision of the Divisional Court, which allowed the Respondent’s application for judicial review on penalty and quashed the penalty that had been imposed by the Board. The Divisional Court found that the Board had still failed to properly consider the relevant factors in imposing a penalty. The Board declined to consider evidence of the Respondent’s personal circumstances, including evidence of his failing health and other personal mitigating factors that had arisen since the incidents that gave rise to the proceedings. The Divisional Court also found that the Board had placed an undue emphasis on general deterrence and that it had incorrectly restricted itself to considering only the evidence that was available at the date of the original hearing. The Divisional Court ordered that the penalty determination issue be sent back to the Board for a third reconsideration, having regard to the direction of the Court.

At the Court of Appeal, Justice Gillese upheld the substance of the Divisional Court’s decision regarding the unreasonability of the Board’s decision on penalty. There was no legal impediment to the Board considering evidence that arose after the original 2002 hearing, and the Board improperly constrained itself in that regard.

Justice Gillese noted the lengthy procedural history of the matter. In nearly every case, deference demands that an unreasonable decision be sent back to the administrative body for reconsideration. This was the Divisional Court ordered in the decision on appeal. However, in light of the Board’s repeated failure to properly address the penalty issue, disregarding the applicable law and the direction previously provided by the Court, the Court of Appeal took the unusual step of declining to send the matter back for reconsideration and directly imposing a more appropriate penalty.

In the result, the Court of Appeal reinstated the Respondent’s tobacco production quota, and ordered that he receive the balance of the proceeds of a previous tobacco sale that had been frozen by the Appellant Board.

* *Benissa Yau*, Law Clerk, Court of Appeal for Ontario, (416) 327-5107 benissa.yau@ontario.ca.

Evan van Dyk, Law Clerk, Court of Appeal for Ontario, (416) 327-9228 evan.vandyk@jus.gov.on.ca.

David De Groot, Law Clerk, Court of Appeal for Ontario, (416) 327-5127 david.degroot@ontario.ca.

Alexa Sulzenko, Law Clerk, Court of Appeal for Ontario, (416) 327-5104 or alexa.sulzenko@ontario.ca.

Christian Vernon, Lawyer with Pinto Wray James LLP, cvernon@pintowrayjames.com.

Administrative Law Cases at the Supreme Court of Canada

*Martin G. Masse and Corinne Brûlé**

Summaries taken from Eugene Meehan's Supreme Court of Canada Law Letter.

Winter 2009 (January 12 - April 14).

Leaves to Appeal Dismissed

Extensions of Time

Younes Ajami Arab v. Attorney General of Canada (Fed. C.A. Oct. 10, 2008) (32941)

The Applicant, his wife and their first child immigrated to Canada in 2002. The Applicant and his wife had two more children and then separated in February 2005. On May 25, 2006, the Quebec Superior Court issued a consent interim relief order stating that the wife would have custody of the three children and that the Applicant would have access to the children by mutual informal arrangement at least two days a week. On July 27, 2006, the Applicant and his wife agreed to vary the interim relief so the wife could return to Syria to take care of her mother. The new order provided that the Applicant would have custody of the three children while the wife was abroad. The wife returned to Canada at the end of August 2006 and resumed custody of the children starting in September 2006. The Applicant had become the recipient of the Canada Child Tax Benefit while the wife was away. On October 13, 2006, after returning from her trip and realizing that this had occurred, the wife applied for the benefits herself. An audit revealed that the Applicant was the eligible individual for August 2006 and that the wife was the eligible individual thereafter. Notices of determination were issued establishing that, as of September 2006, the Applicant had been receiving overpayments for the 2005 base taxation year. The Tax Court of Canada dismissed the Applicant's application on May 21, 2008. The Applicant applied to the Federal C.A. for an extension of time to file a notice of appeal on September 5, 2008. The Federal C.A. dismissed that application on October 10, 2008.

“The application for an extension of time is granted. The application for leave to appeal...is dismissed with costs.”

Standard of Review

Fédération des producteurs acéricoles du Québec v. Érablière J.P.L. Caron inc., et al. (Que. C.A., Nov. 24, 2008) (32974)

Under s. 93 of the Québec *Act respecting the marketing of agricultural, food and fish products*, the Applicant Fédération may, by law, impose on any maple syrup producer who contravenes a marketing by-law made by the Fédération under the Act, “a penalty based on the volume or value of the product marketed or the area under cultivation or operation, and prescribe the use of this penalty for particular purposes”. The Fédération made the *Règlement sur le contingentement de la production et de la mise en marché du produit visé par le Plan conjoint des producteurs acéricoles du Québec*. The Respondent Érablière J.P.L. Caron inc. was ordered by the Régie des marchés agricoles et alimentaires du Québec to pay a penalty under s. 22 of that by-law. On judicial review, the Superior Court declared s. 22 null and void for being inconsistent with s. 93 of the

enabling legislation, since it did not prescribe the particular purpose for which the penalty was to be used. The Fédération appealed this aspect of the trial decision, and the Interveners 9009-0564 Québec inc. et al. were authorized to intervene on this issue. The Court of Appeal dismissed the Fédération's appeal and affirmed the trial judgment. It held that correctness was the standard of review applicable by the Superior Court to the Régie's decision and that the Superior Court had made the right decision.

"The application for an extension of time to serve the application for leave to appeal is granted. The motion of the interveners 9009-0564 Québec inc. and Roger Roy to be designated as respondents is granted and the respondents Régie des marchés agricoles et alimentaires du Québec and Attorney General of Quebec are designated as interveners. The application for leave to appeal...is dismissed with costs to 9009-0564 Québec inc., Roger Roy, Érablière M.D.F. inc. and Bertrand Côté."

Time Extensions in the Federal Court

Afzal Hussain v. Attorney General of Canada (Fed. C.A, June 6, 2008) (32816)

The Applicant applied for disability benefits under the Canada Pension Plan in 2001, three years after his deportation. His application for disability benefits was refused and an appeal to a Review Tribunal unsuccessful. The Applicant appealed to the Pension Appeals Board. The Appeal was dismissed and the Applicant sought judicial review at the Federal Court of Appeal. After much instruction by the Court, the Applicant failed to properly apply for an extension of time to file the notice of application for judicial review and the motion for an extension of time was denied. The Applicant requested the Federal Court to reconsider its decision and this motion was denied.

"The application for an extension of time is granted and the application for leave to appeal...is dismissed."

Leaves to Appeal Granted

None

Judgments

Standard of Review

Canada (Citizenship and Immigration) v. Khosa (Fed. C.A. January 30, 2007) (31952)

"The Respondent, Khosa, immigrated to Canada with his family in 1996, at the age of 14. He left high school after grade 11 to work to help support his family. When he was 18 years of age, he was convicted of criminal negligence causing death and received a conditional sentence of two years less a day, that included house arrest, a driving ban, and community service. The criminal court concluded that Khosa and his co-accused had been "street racing" when Khosa lost control of his vehicle and struck a pedestrian on the sidewalk. He was ordered removed from Canada as he was found to be a permanent resident who was inadmissible for serious criminality, having been convicted of an offence punishable by a maximum term of at least 10 years. He had no prior convictions, continued to work and attend temple, abided by the conditions of his sentence, and expressed his remorse to the victim's family. He married at age 20 and he and his wife lived in an apartment in the basement of his family's home. He appealed the removal order on the basis of humanitarian and compassionate grounds. The Immigration Appeal Division ("IAD"), in a split decision, declined to exercise its discretionary jurisdiction to grant the relief requested. Of particular concern to the majority was the fact that Khosa denied that he had been street racing and asserted that he had been driving fast and lost

control of his vehicle after a tire popped. He applied for judicial review of the removal order. The application was dismissed. On appeal, the majority of the Court of Appeal allowed the appeal.”

Allowing the appeal, Justice Binnie wrote the following for the majority (at pages 3-4, 16-17, 35, 39):

“*Dunsmuir* teaches that judicial review should be less concerned with the formulation of different standards of review and more focused on substance, particularly on the nature of the issue that was before the administrative tribunal under review. Here, the decision of the IAD required the application of broad policy considerations to the facts as found to be relevant, and weighed for importance, by the IAD itself. The question whether Khosa had shown “sufficient humanitarian and compassionate considerations” to warrant relief from his removal order, which all parties acknowledged to be valid, was a decision which Parliament confided to the IAD, not to the courts. I conclude that on general principles of administrative law, including our Court’s recent decision in *Dunsmuir*, the applications judge was right to give a higher degree of deference to the IAD decision than seemed appropriate to the Federal Court of Appeal majority. In my view, the majority decision of the IAD was within a range of reasonable outcomes and the majority of the Federal Court of Appeal erred in intervening in this case to quash it.

...I do not share Rothstein J.’s view that absent statutory direction, explicit or by necessary implication, no deference is owed to administrative decision makers in matters that relate to their special role, function and expertise. *Dunsmuir* recognized that with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision maker rather than to the courts. This deference extended not only to facts and policy but to a tribunal’s interpretation of its constitutive statute and related enactments because “there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal’s decision is rationally supported” (*Dunsmuir*, at para. 41). A policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” (*Dunsmuir*, at para. 49, quoting Professor David J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 *C.J.A.L.P.* 59, at p. 93). Moreover, “[d]eference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context” (*Dunsmuir*, at para. 54).

Dunsmuir stands against the idea that in the absence of express statutory language or necessary implication, a reviewing court is “to apply a correctness standard as it does in the regular appellate context” (Rothstein J., at para. 117). *Pezim* has been cited and applied in numerous cases over the last 15 years. Its teaching is reflected in *Dunsmuir*. With respect, I would reject my colleague’s effort to roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess.

...In my view, the interpretation of s. 18.1 of the *Federal Courts Act* must be sufficiently elastic to apply to the decisions of hundreds of different “types” of administrators, from Cabinet members to entry-level *fonctionnaires*, who operate in different decision-making environments under different statutes with distinct grants of decision-making powers. Some of these statutory grants have privative clauses; others do not. Some provide for a statutory right of appeal to the courts; others do not. It cannot have been Parliament’s intent to create by s. 18.1 of the *Federal Courts Act* a single, rigid Procrustean standard of de-contextualized review for all “federal board[s], commission[s] or other tribunal[s]”, an expression which is defined (in s. 2) to include generally all federal administrative decision makers. A flexible and contextual approach to s. 18.1 obviates the need for Parliament to set customized standards of review for each and every federal decision maker.

...Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

...The weight to be given to the respondent’s evidence of remorse and his prospects for rehabilitation depended on an assessment of his evidence in light of all the circumstances of the case. The IAD has a mandate different from that of the criminal courts. Khosa did not testify at his criminal trial, but he did before the IAD. The issue before the IAD was not the potential for rehabilitation for purposes of sentencing, but rather whether the prospects for rehabilitation were such that, alone or in combination with other factors, they warranted special relief from a valid removal order. The IAD was required to reach its own conclusions based on its own appreciation of the evidence. It did so.”

As stated above, the Supreme Court of Canada held that the appeal is allowed (reasons for the majority by Justice Binnie, concurred by four of his colleagues; concurring reasons in the result by Justice Rothstein; further concurring reasons in the result by Justice Deschamps; dissenting reasons by Justice Fish; Justice Bastarache sat on the appeal hearing, but took no part in the judgment).

* *Martin G. Masse is a Partner and Corinne Brûlé is an Associate with Lang Michener LLP, both working out of the firm’s Ottawa office, (613) 232-7171.*

Administrative Law is published by the Administrative Law Section of the Ontario Bar Association. Members are encouraged to submit articles or suggest story ideas.

The articles that appear in this publication represent the opinions of the authors. They do not represent or embody any official position of, or statement by the OBA except where this may be specifically indicated; nor do they attempt to set forth definitive practice standards or to provide legal advice. Precedents and other material contained herein are intended to be used thoughtfully, as nothing in the work relieves readers of their responsibility to consider it in the light of their own professional skill and judgment.

Upcoming Programs

[Hot Topics in Administrative Law](#)

May 26, 2009

[Ontario’s New Human Rights System: Lessons from its First Year](#)

June 11, 2009

SECTION NEWS

Message from the Chair



*Andrew Wray**

This is my last message as Chair of the Administrative Law Section of the OBA. Over the last two years, I have been fortunate to head a very talented executive that has produced outstanding CLEs and thoughtful submissions that have improved the administrative law landscape in Ontario and Canada. I wish much success to our incoming Chair, John Higgins, who I know will do an excellent job.

The following is a summary of upcoming events hosted by our section. On May 26, 2009, Christopher Bredt will chair our dinner program entitled *Hot Topics in Administrative Law* with speakers Professor Lorne Sossin, Leslie McIntosh and Raj Anand. On July 11, 2009, I am co-chairing a half-day program entitled *Ontario's New Human Rights System: Lessons from its First Year* with Jo-Anne Pickle, member of the Constitutional, Civil Liberties and Human Rights Section and Kevin Robinson from the Labour and Employment Law Section. Carol Prest is also coordinating our tribunal Chairs' *Meet and Greet Reception* which is scheduled for September 2009. In addition, we are preparing for our half-day OBA Institute 2010 program which will be chaired by John Higgins and Ed Montigny and that is entitled *Second Guesses: Appeals, Judicial Reviews and Reconsiderations*. Additional programs are also in the planning phases. We strongly encourage you to join us at these interesting programs.

Moving forward, I will continue to actively participate in our section's activities as Past Chair. I have recently been asked to represent our section on the Practice Advisory Committee of the Ontario Human Rights Tribunal ("HRTO"), a role that I am delighted to take on. I invite you to provide me with your comments or questions regarding issues of concern and interest to the HRTO's "user community" prior to our first meeting on June 10, 2009.

The biggest recent development on the administrative law front is the Supreme Court of Canada's decision in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12. I invite you to read our feature article, *Khosa: Extending and Clarifying Dunsmuir* authored by Christian Vernon and myself.

If you have any questions or comments on our section's activities, or would like to get involved on our section's executive, do not hesitate to contact me or John Higgins.

* *Andrew Wray is a partner at Pinto Wray James LLP, (416) 703-2067, awray@pintowrayjames.com.*

Pursuing Human Rights Claims Within Non-Human Rights Tribunals - January 27, 2009

*Ed Montigny**

Recently, court and tribunal decisions combined with reforms to the human rights process in Ontario have introduced major changes to the manner in which human rights claims are pursued in this province, raising numerous questions for practitioners, claimants, respondents and Tribunal members alike.

Many of these questions were explored on January 27, 2009 at the Administrative Law Section dinner program “Pursuing Human Rights Claims Within Non-Human Rights Tribunals”. The event was co-chaired by Kathy Liard, Executive Director of the Human Rights Legal Support Centre, and Ed Montigny, Sole Practitioner and Administrative Law Section Executive member.

The panel was composed of Lesli Bisgould, (Barrister, Clinic Resource Office, Legal Aid Ontario), Kate Stephenson, (Director of Legal Services, Human Rights Legal Support Centre) and Jennifer Scott, (Vice-Chair, Child and Family Services Review Board and part-time member of the Human Rights Tribunal of Ontario). The panel represented a wide range of experience from the perspective of both counsel and tribunal members.

Lesli Bisgould reviewed decisions such as Werbeski/Tranchemontagne and their impact upon how human rights cases are pursued. Kate Stephenson discussed various factors to consider when determining when a non-human rights tribunal may be the best forum in which to pursue a human rights claim, as well as outlining the potential pros and cons associated with each option. Jennifer Scott offered a critical perspective suggesting reasons why non-human rights tribunals may not always be a better forum for the hearing of human rights claims, suggesting that the range of human rights claims that should be properly before non-human rights tribunals may be more limited than has been assumed. After the formal presentations, there was a most useful general discussion and debate among the panel. Finally a number of questions from the floor indicated that the issues raised stimulated considerable interest among the audience.

The key point that emerged from the session was that a number of relevant issues remain unresolved and that practice and procedure in this area are still developing.

Audio recording of the program can be accessed here: [Pursuing Human Rights before Non-Human Rights Tribunals \(1/28/2009\)](#)

* *Ed Montigny, Sole Practitioner, Legal Researcher, (416) 484-1756, eamontigny@sympatico.ca.*

Ethics, Administrative Law and Good Government – the Realm of Integrity Commissioners – May 6, 2008

*Meaghan K. McCluskey**

This article was submitted for publication in June 2008.

On May 6, 2008, a joint presentation of the OBA's Administrative Law Section, Municipal Law Section and the Association of Municipal Managers, Clerks and Treasurers of Ontario (AMCTO) wielded a dynamic conversation about the role of oversight officers within municipalities. On one side of the conversation were David Mullan, the incumbent Integrity Commissioner for the City of Toronto and George Rust-D'Eye, a partner with Weirfoulds LLP and a certified specialist in municipal law. Challenging those two speakers with a barrage of questions were Chris Williams, a partner and municipal law practitioner with Aird & Berlis LLP and Greg Levine, a barrister and solicitor who has written on the law of government ethics.

Both Rust-D'Eye and Mullan had the opportunity to address the room before delving into the question period. Rust-D'Eye used his time to speak about the role of municipal councillors and the lack of ethical guidance for those councillors. With municipalities being recognized by the province as a level of government, and having increased scope of powers commensurate with being a level of government, Rust-D'Eye is concerned that there is no guidance in either the *Municipal Act* or the *Municipal Conflict of Interest Act* that would govern the councillors' ethical conduct or shed light on the councillors' role when wielding greater powers. Rust-D'Eye raised the need for a knowledgeable independent source that councillors can approach when seeking advice on the applicability of the code of conduct to their actions. While that source may be an Integrity Commissioner, Rust-D'Eye highlighted the importance of the source being proactive, providing advice before a breach of the code of conduct has occurred rather than merely identifying breaches after the fact.

David Mullan shared his views on the role of Integrity Commissioners generally, citing his own experience as Integrity Commissioner for the City of Toronto. Mullan identified four tasks an Integrity Commissioner engages in: 1) providing advice to councillors on the code of conduct; 2) investigating complaints; 3) reporting violations of the code of conduct with recommendations; and 4) engaging in educational outreach to council. The provision of advice to councillors is the benchmark Mullan uses to determine if the office is fulfilling its mandate of councillors seeking advice and understanding the code of conduct before acting. In Mullan's experience, business was slow at the beginning, however, more frequently councillors are seeing a benefit in having a previously-obtained formal opinion of the Commissioner on which they can rely if later a complaint is raised. Even so, there is a discrepancy between the advice sought from Mullan (generally around what are acceptable "gifts" or "benefits") and where the complaints arise (breaching confidentiality, improperly influencing staff, or acting in a discreditable manner toward a constituent). Resolving these complaints becomes a challenge because city council may refuse to accept Mullan's report and implement recommendations against their peers. Despite this challenge, Mullan believes that for a municipal government to be accountable, the power to police their own members and ultimately be responsible for breaches of the codes of conduct must lie with council.

Williams started the interrogation by asking whether the Integrity Commissioner's lack of ability to level harsh sanctions suggests that the office has no teeth. Mullan responded that public airing of violations of the code

of conduct is a sanction and that he does not believe the sanctions in the *Act* are the limit of what council can impose. Further, he believes that council should be the ones who impose a sanction, regardless of whether that makes his office toothless. Rust-D'Eye finds the discrepancy between the severity of sanctions under the *Municipal Conflict of Interest Act* and those for breaches of the code of conduct problematic.

Following Mullan's comment on the Commissioner not imposing sanctions directly, Levine asked whether council should be required to make a ruling on the Commissioner's report. Mullan agreed that council dismissing his reports without holding a debate is inappropriate because it shirks council's responsibility over its members' conduct, as well as challenges the credibility of the Commissioner.

The *City of Toronto Act, 2006* mandated the implementation of five officers to ensure transparency and accountability. Other municipalities must create a Closed Meeting Officer, but the implementation of the other four offices is in the municipality's discretion. In light of this, Williams posed the question as whether the province, on one hand, is giving municipalities power, indicating they are mature responsible governments, while on the other hand, mandating a supervisory structure and subjecting the municipalities to the *Municipal Conflict of Interest Act*, is "patronizing" to municipalities. Mullan, Rust-D'Eye and Levine were all in agreement that the province found a good balance between transparency and the exemptions to transparency in light of the powers that were delegated. Mullan expressed concern as a private citizen of a lack of party discipline and a move toward a strong mayor/council system without such oversight controls. Levine pointed out that municipalities can choose to implement the offices and these safeguards are ones the public would expect, and in that way it is not patronizing.

Williams persisted, insisting that the fact that Toronto is the largest municipality and has no discretion on implementing these offices, is patronizing to the city. Mullan and Levine agreed that the history of those offices, being borne out of scandal, is such that Toronto essentially asked for those offices. Levine went further to say that the province should have made the offices mandatory for all municipalities.

Levine then had the final question for the panel, wondering how to ensure the independence of those officers when the *Act* only requires the officer to "act in an independent manner"? Mullan feels that although the internal mechanisms for day-to-day independence are in place, the *Act* should go farther to protect the officers by making appointments for five-year terms and not be easily removable, similar to other administrative bodies and agencies. Rust-D'Eye responded by highlighting that although these offices were created to give municipalities ways of resolving their conflicts on the municipal purse rather than clogging the courts, there still remains a route for an independent judicial inquiry when needed.

The floor was then open to audience members for questions. Some of the interesting points that arose are that confessions to an Integrity Commissioner might not be privileged because of the Commissioner's report being made public at the end of an investigation and that conflict of interest proceedings are expensive and some method of de-legalizing these processes needs to take place to make those proceedings more available to members of the public. Finally, the ombuds-type role was identified as a very important piece of the puzzle; Levine relied on his experience with the BC Ombudsman to say that hundreds of complaints against municipalities are made and that citizens are not equipped to attack the problem themselves. Mullan agreed, stating that he receives staggering numbers of calls on ombuds-type questions and that councillors are often seen as ombudsperson surrogates who, according to Rust-D'Eye, are ill-equipped to function in such a role given the lack of access to records and that no legislation explaining their role exists.

* Meaghan K. McCluskey is a privacy research lawyer with Nymity Inc. and articulated with the Information & Privacy Commissioner/Ontario. She can be reached at Meaghan.McCluskey@nymity.com.

Section Executive 2008-2009

Chair: **Andrew Charles Wray**,
Wray James LLP
(416) 703-2067 x 267

Past Chair: **Carole A. Prest**,
Workplace Safety & Insurance Appeals Tribunal
(416) 314-8848

Vice-Chair: **John R. Higgins**,
Information & Privacy Commissioner/Ontario
(416) 326-3941

Secretary: **Edgar-André Montigny**
(416) 484-8232

Newsletter Editor: **Soussanna Karas**,
Legal Counsel,
Travel Industry Council of Ontario
(905) 624-6241

Program Coordinator: **Michael W. Nicol**,
Ontario Municipal Board
(416) 212-0852

AGR Liaison: **C. Kenning Marchant**,
The Marchant Practice
(905) 274-1150

CLE Liaison: **Robert H. Ratcliffe**,
Ministry of Attorney General-
Crown Law Office Civil
(416) 326-4128

Regional Coordinator: **Martin Gregoire Masse**,
Lang Michener LLP
(613) 232-7171

Member-At-Large: **Christopher D. Bredt**,
Borden Ladner Gervais LLP
(416) 367-6165

Member-At-Large: **Jeff G. Cowan**,
WeirFoulds LLP
(416) 947-5007

Member-At-Large: **Laverne Jacobs**,
University of Windsor Faculty of Law
(519) 253-3000 x2970

Member-At-Large: **Gregory J. Levine**
(519) 858-2222

Editor:
Soussanna Karas

OBA Editor:
Vickie Rose
Graphic Designer:
Simon Bluestein

Member-At-Large: **Mary C. O'Donoghue**,
Information & Privacy Commissioner/Ontario
(416) 326-3922

Member-At-Large: **Marc H. Spector**,
Shekter, Dychtenberg LLP
(416) 867-8049

Member-At-Large: **Michael Zacks**,
Ministry of Labour
(416) 314-8735

OBA Public Affairs Liaison: **Jonathan Clancy**,
Ontario Bar Association
(416) 869-1047

Coordinator, Sections: **Terrine Glover**,
Ontario Bar Association
(416) 869-1047 x339