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Administrative Law Section
Section du droit administratif

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As I write this, I am reflecting on a CLE event I was fortunate to co-chair at this year's OBA Institute. Our section's program, co-chaired by Ed Montigny, was called *Second Guesses: Reconsiderations, Judicial Reviews and Appeals*, and featured practitioners Joanne Leatch, Freya Kristjanson and Sara Blake, Justices Stratas and Evans of the Federal Court of Appeal, and Justice Then of Ontario's Divisional Court. It was one of the better-attended events at this year's Institute, and attendees were rewarded with penetrating and helpful insights presented by this engaging panel of speakers. Later in the newsletter you will find a story by Thomas Rajan describing the program.

Earlier this year, on January 21, 2010, the section hosted "An Evening with the Chairs," a wine and cheese event that provided an opportunity to meet and greet the chairs of nine tribunals, including Michael Gottheil, newly minted Executive Chair of Ontario's new cluster of land tribunals. This program also proved to be quite popular. Those in attendance heard Mr. Gottheil share his vision for the newly clustered tribunals, and encouraging words from Ian Strachan, Chair of the Workplace Safety and Insurance Appeals Tribunal and the President of the Society of Ontario Adjudicators and Regulators (SOAR), and from Gary Stanley of the Council of Canadian Administrative Tribunals (CCAT). This edition of our newsletter includes an article on the program by Christian Vernon.

This issue also contains a second article by Amy Spady outlining our program on the role of the Ombud, held last November.

The section has also been active on the advocacy front. Late last year, the Ontario government passed its tribunal governance bill, the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, which was introduced as Schedule 5 to Bill 212. The OBA had previously made a submission on a consultation initiative relating to this legislation, but our comments had little if any impact. Now that the bill has passed, we will prepare a further submission outlining suggested improvements. As well, we will hold a dinner meeting in May devoted to an examination of this new legislation.

Editor: [Soussanna S Karas](#)
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Bill 212 contained a number of other schedules, including Schedule 6, a new *Public Inquiries Act*. In response to concerns raised by a number of counsel who have been involved in public inquiries, substantial amendments were made to this new *Act* prior to the passage of Bill 212, aimed at ensuring the continued independence of public inquiries.

In closing, we have just received the happy news that past executive member Lorne Sossin has been appointed Dean of Osgoode Hall Law School, commencing on July 1. Prof. Sossin brings a wealth of experience to this role. To name only one of his many accomplishments, he served as the Associate Dean at the University of Toronto Law School from 2004 to 2007. The Executive extends its congratulations to Prof. Sossin, and also to Osgoode Hall Law School.

**John Higgins, Senior Adjudicator and Manager of Adjudication, Office of the Information and Privacy Commissioner/Ontario*

Second Guesses: Reconsiderations, Judicial Reviews and Appeals

*Thomas Rajan**

“Be brief, be clear, and be gone” when both preparing and presenting your argument for reconsiderations, judicial reviews and appeals, according to advice from Sara Blake of the Ministry of Attorney General, Crown Law Office. The blunt and pithy slogan best exemplified the approach recommended by both practitioners and adjudicators of administrative “second guesses”.

Taking clients through these “second guesses” can be a difficult process even for experienced counsel. The variety of legislative frameworks and appellate forums provide for a dizzying administrative landscape that the distinguished speakers shed light upon at this OBA Institute 2010 half-day session.

Chaired by John Higgins, Senior Adjudicator at the Information & Privacy Commissioner of Ontario, and Ed Montigny, staff lawyer at ARCH Disability Law Centre, the session included presentations by Ms. Blake along with Joanne Leatch of the Social Benefits Tribunal and Freya Kristjanson of Cavalluzzo Hayes Shilton McIntyre & Cornish LLP. Justices David Stratas and John Evans of the Federal Court of Appeal and Justice Edward Then of the Superior Court rounded out the discussion with views from the bench on the topic.

Ms. Leatch spoke about reconsiderations generally, and at the Social Benefits Tribunal (SBT) specifically. She emphasized the importance of understanding the statutory and regulatory framework that governs each particular administrative tribunal. In the SBT’s case, the legislation permits reconsideration requests within 30 days, which the tribunal has the discretion to extend up to one year. Ms. Leatch also addressed the distinction between powers of reconsideration and the common law doctrine of *functus officio* (“task performed”) which prevents administrative decision maker from rewriting a decision once

it has completed its statutory duty. Ms. Leatch referenced *Chandler v. Alberta Association of Architects*¹ for the direction from the Supreme Court on the details of the doctrine. She also discussed *Jacobs Catalytic Ltd. V. International Brotherhood of Electrical Workers*² in which the doctrine was applied to find that the Ontario Labour Relations Board was not entitled to issue supplementary reasons.

The majority of SBT cases, approximately 85%, are the Ontario Disability Support Program (ODSP) appeals on the issue of whether the individual is a person with a disability as defined in the *ODSP Act*. So the SBT is cognizant of the fact that it is working with the most vulnerable citizens in the province, often with disabilities, when looking at reconsideration requests. This once again points to the importance of being comfortable with the uniqueness of each administrative body when applying for reconsideration.

The SBT does not provide reasons when granting a reconsideration request, and provides only brief reasons when denying a request for reconsideration. This policy stood up to a procedural fairness challenge recently in *Barnes v. Social Benefits Tribunal*.³

Ms. Blake discussed the difference between an appeal and judicial review. The powers of the reviewing body and timelines for appeal are most often outlined in the enabling statute of the administrative body who released the decision under appeal. Appeals are also governed by rule 61 of the *Rules of Civil Procedure*. An application for judicial review may be made only if the governing statute does not provide a right of appeal. Judicial review is governed by standard of review analysis, the *Judicial Review Procedure Act*, and rule 68 of the *Rules of Civil Procedure*.

Ms. Kristjanson identified some of the differences between proceedings at Federal Courts and Ontario's Divisional Court. Jurisdictionally, Federal Courts have specific constitutional jurisdiction over substantive matters such as navigation and shipping, intellectual property and tax. The courts also have general power to review the decisions of federal boards, commissions and other tribunals exercising federal power. One important practice note was that the Federal courts tend to weigh Federal Court and Federal Court of Appeal decisions more heavily than those of other jurisdictions. While an Ontario court might consider an extra-provincial decision as very persuasive, Federal courts tend to prefer their own jurisprudence.

Justice Stratas discussed tips for getting leave to appeal and arguing an appeal from an adjudicator's perspective. While it may seem that there are many appeals being heard, only 25% of applicants to the Ontario Court of Appeal successfully receive leave, and that number drops to a meagre 8% at the Supreme Court level. So in order to catch the judges' attention it is important to make your case seem as broadly applicable and interesting as possible.

Justices Evans and Then gave several tips on preparing factums and oral arguments. They included being very aware of the record of the proceeding and where documents are, facing the weaknesses in your arguments and facts rather than ignoring them, and using a roadmap to keep judges focused.

The main message of most of the tips on practice from Ms. Blake, Ms. Kristjanson, and the Justices was the importance of brevity and clarity in both written and oral argument. In writing a factum, for example, keep to a minimum of issues and don't feel compelled to use the maximum page allotment. A well-written 20-page factum is often much better than most that use 30 pages. The judges reminded everyone that they may be reading dozens of facts a week and by 30 pages it is only human to lose interest and focus. Similarly, in oral argument, focus on the contentious issues (often just one at that point, or at the most two) rather than rehashing your factum.

The session was well received by a capacity audience that attended. The varied perspectives of the speakers and insightful tips made for an enjoyable morning.

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¹ [1989] S.C.J. No. 102

² [2009] O.J. No. 4501

³ 516/08; Divisional Court; decision released July 15, 2009

Evening With The Chairs

*Christian Vernon**

The OBA's Administrative Law Section hosted its inaugural "Evening with the Chairs" program on January 21, 2010. This wine and cheese reception, chaired by Carole Prest of the Workplace Safety and Insurance Appeals Tribunal, saw many esteemed members of the administrative law bar rubbing shoulders with the leading adjudicators in the province.

This well attended program featured a "who's who" of administrative law practitioners and adjudicators from across the province. In attendance were: Ian Strachan (Chair, Workplace Safety and Insurance Appeals Tribunal), Gary Stanley (Chair, Ontario Highway Transport Board), Kevin Whitaker (Chair, Ontario Labour Relations Board), Dr. Lillian Ma (Chair, Landlord and Tenant Board), Murray Chitra (Chair, Ontario Civilian Police Commission), Gary Yee (Chair, Social Benefits Tribunal), Paul Sommerville (Board Member, Ontario Energy Board), David Wright (Interim Chair of the Human Rights Tribunal of Ontario), and Michael Gottheil (Executive Chair of the Environment and Land Tribunals Ontario), among many others.

Chair Ian Strachan spoke in his capacity both as Chair of the Workplace Safety and Insurance Tribunal, and as the President of the Society of Ontario Adjudicators and Regulators (SOAR). Chair Strachan

updated the attendees on the work that SOAR was doing in advancing administrative justice through education programs. He also provided some valuable insights on merit-based appointment processes and the possible future role of formal accreditation for adjudicators in administrative tribunals.

Executive Chair Michael Gottheil shared his unique experience as the new head of what may be the world's first "cluster" of administrative tribunals. Attendees of this program learned first-hand what Executive Chair Gottheil envisions the role of Executive Chair to be, and they also gained an important understanding of how the various constituent boards of the Environment and Land Tribunals might work together more efficiently and more effectively. He stressed that the concept of "clustering" tribunals is not simply a question of saving resources, but was also a matter of delivering better and more effective service to the various constituencies that each tribunal serves.

Chair Gary Stanley spoke in his dual capacities as Chair of the Ontario Highway Transport Board, and as a member of the Board of Directors of the Council of Canadian Administrative Tribunals (CCAT). He updated the attendees on the work that the CCAT has been doing to advance administrative law across Canada. In particular, Chair Stanley spoke about the education initiatives that CCAT had been working on, including an online decision writing program, and other exciting programs.

If the 2010 program was any indication, 2011's "Evening with the Chairs" will be a 'don't miss' event for Ontario administrative law practitioners.

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Administrative Law Cases at the Supreme Court of Canada

Winter 2010 (Current to February 26, 2010)

Martin G. Masse and Corinne Brûlé***

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

Leave to Appeal Dismissed

JURISDICTION OF TRIBUNALS

Northstar Lumber, a Division of West Fraser Mills Ltd. v. United Steelworkers of America, Local No. 1-424, Labour Relations Board and Attorney General of British Columbia (B.C.C.A., April 22, 2009) (33214)

The Applicant terminated the employment of a member of the Respondent union. The union grieved and an arbitrator held that the Applicant had just cause to discipline the employee, but that dismissal was too severe. The arbitrator substituted a five-month suspension. The Applicant appealed. The B.C. Labour Relations Board upheld the arbitral award. It dismissed an application for leave to apply for reconsideration. The B.C.S.C. dismissed an application for judicial review, holding in part that it does not have jurisdiction to quash a labour arbitrator's award. The Applicant appealed and filed a Notice of a Constitutional Question, alleging that s. 99 of the *Labour Relations Code*, violates s. 99 of the *Constitution Act 1867*, because it improperly transfers the superior court's core power to review an inferior tribunal for jurisdictional error to the Labour Relations Board. The B.C.C.A. dismissed the appeal.

“The application for leave to appeal...is dismissed with costs to the respondent Attorney General of British Columbia.”

AUDI ALTERAM PARTEM

City of Montréal v. Jacqueline Leduc, Commission des relations du travail and Michel Denis (Que. C.A., June 15, 2009) (33325)

The City of Montréal notified the Respondent Ms. Leduc that her contract as city clerk was going to end. She complained to the Commission des relations du travail under s. 72 of the Quebec *Cities and Towns Act*. The City of Montréal made a motion to dismiss, arguing that the Commission had no jurisdiction to hear the complaint because Ms. Leduc's contract was simply expiring. This was therefore not a dismissal for the purposes of s. 71 C.T.A., but the end of a contract for a fixed term. The Commission took note of the City's motion to dismiss, denied Ms. Leduc's requests to call witnesses and dismissed the complaint on the basis that Ms. Leduc's contract was for a fixed term set by legislative provision. The Commission concluded that her employment was ending due to the expiry of the contract. On judicial review, the Superior Court determined that Ms. Leduc had been unable to call any witnesses despite her requests to the Commission and that the *audi alteram partem* had therefore been violated. It set aside the Commission's decision and referred the matter back to be decided by a different commissioner. The C.A. dismissed the motion for leave to appeal on the basis that Ms. Leduc should be able to present her evidence and that her evidence might help in deciding the merits of the case.

“The application for leave to appeal...is dismissed with costs to the respondent Jacqueline Leduc.”

TIME EXTENSIONS

Dwight W.M. Gaskin v. Canada Revenue Agency, Dan Butler and Public Service Labour Relations Board (Fed. C.A., April 30, 2009) (33262)

The Applicant has applied for leave to appeal from the Federal C.A. order dismissing his request for an extension of time to seek judicial review of the Public Service Labour Relations Board that dismissed his complaint.

“The motion for an extension of time to serve and file the application for leave to appeal...is granted. The application for leave to appeal is dismissed with costs.”

UTILITY RATES

City of Calgary v. ATCO et al (Alta. C.A., May 8, 2009) (33269)

When the Respondent, ATCO Gas and Pipelines Ltd. wanted to sell property that it was no longer using, the Alberta Energy and Utilities Board approved the sale and directed that the funds be put into a deferral account for the Board to later determine whether the funds should be taken into consideration in setting gas rates. Although the property had been included in ATCO's rate base, it was never actually used to provide utility service. ATCO submitted that the Board could not impose a condition on the sale of an asset that has not and will not serve a utility function. It submitted that this issue was already decided in its favour by the S.C.C. in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 ("*Stores Block*"). The Board cited *Stores Block* in support of the conditional approval of the sale. The sale of the property did not proceed and ATCO obtained leave to appeal. The C.A. allowed the appeal and the part of the Board's order conditioning approval of the sale of the subject property was ordered vacated.

"The application for leave to appeal...is dismissed with costs to the respondent ATCO Gas and Pipelines Ltd."

Utilities Consumer Advocate v. ATCO Gas and Pipelines Ltd.- and -Alberta Utilities Commission and Alberta Energy and Utilities Board (Alta. C.A., June 30, 2009) (33366)

ATCO Gas and Pipelines Ltd. filed a general rate application with the Alberta Energy and Utilities Board seeking approval of its revenue requirements for the 2008 and 2009 test years. The application included a proposal to exclude from the rate calculations, certain salt cavern assets which had historically been included in ATCO Gas's rate base but which ATCO Gas stated were not and would not for the foreseeable future be used for the regulated transmission service. The Board found that any removal of an asset from the rate base constituted a "disposition" requiring prior Board approval pursuant to s. 26 of the *Gas Utilities Act*, and ordered ATCO Gas to include the assets in its application and rate calculations. When this decision was reconfirmed by an order of the Alberta Utilities Commission (the "Commission"), ATCO Gas appealed both orders. The C.A. allowed the appeals in part.

"The application for leave to appeal...is dismissed with costs to the respondent ATCO Gas and Pipelines Ltd."

Leaves to Appeal Granted

ARBITRATIONS

Vernon Joseph Smith v. Alliance Pipeline Ltd. (Fed.C.A., April 8, 2009) (33203)

The Respondent constructed a pipeline across a portion of Mr. Smith's farmland located in Alberta. Despite a series of agreements between the parties with respect to the construction of the pipeline, a dispute arose regarding the reclamation of a portion of the land used for the pipeline. Mr. Smith began the reclamation work and sought compensation. The matter proceeded to arbitration. The first arbitration lost its quorum. Mr. Smith was largely successful in the second arbitration. Alliance appealed under s. 101 of the *National Energy Board Act*, claiming that the second panel had exceeded its

jurisdiction and that it had erred in law by awarding Mr. Smith his costs incurred in the Alberta Queen's Bench litigation and in those proceedings commenced before the first panel. The appeal was dismissed. The appeal was allowed by the Federal C.A.

"The application for leave to appeal...is granted with costs in the cause."

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Administrative Law Cases from the Court of Appeal for Ontario

Current from February 1, 2009 to February 15, 2010

*Mabel Lai**

Recent Decisions

Gore et al. v. College of Physicians and Surgeons of Ontario, 2009 ONCA 546

Rosenberg, Feldman and Epstein J.J.A.

July 7, 2009

Gore, Jain and Judah were general practitioners who practiced invasive and high-risk cosmetic surgery despite having no formal surgical qualifications. The Registrar initiated an investigation under the *Health Professions Procedural Code*. The investigators asked to observe their surgical practice. Gore, Jain and Judah applied for judicial review, arguing that the governing legislation did not authorize such an observation. The application was dismissed by the Divisional Court. They appealed. **Appeal dismissed.**

Investigative powers must be interpreted in a manner that ensures that investigators have sufficiently effective means at their disposal to gather all relevant information. It is not determinative that the power to compel observation does not exist in the *Public Inquiries Act*. There is no principled basis for distorting the ordinary meaning of "inquire into and examine the practice" to exclude the means of investigation that in some circumstances are most likely to uncover the truth and therefore best protect the public.

Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900 et al., 2009 ONCA 420

Moldaver, Feldman and Cronk J.J.A.

May 22, 2009

In 1992, Imperial introduced random breathalyzer and urinalysis testing of employees in safety-sensitive positions. A collective agreement containing a management rights clause was negotiated in 1996. In 2000, this court upheld the breathalyzer testing but declared the urinalysis testing to be unreasonable. In 2003, Imperial began oral fluid testing. The union grieved. The Board allowed the grievance in part; random tests performed without reasonable cause violated the Collective Agreement. The Divisional Court dismissed Imperial's application for judicial review. Imperial appealed. **Appeal dismissed.**

The Board's final award is generally reviewed on a reasonableness standard, subject to two qualifications. First, where the Board exceeds its jurisdiction by amending, rather than applying, the collective agreement, the standard of review is correctness. Second, questions of natural justice and procedural fairness do not involve standard of review considerations.

The Board did not rely on facts not in the evidentiary record. References to other incidents of testing were obtained from the arbitral decisions furnished by the parties. Imperial had full opportunity to respond to these cases. While it would have been preferable for the Board to explicitly state that their decision was informed by the jurisprudence but based solely on the evidence, it is clear that the Board did not err in their reasoning.

The Board reached a reasonable interpretation of the collective agreement. The broad language of the article did not support the conclusion that the agreement merely mirrored the minimum standards of human rights legislation. Their reasons are clear and intelligible, and their conclusion is within the range of possible and defensible interpretive outcomes.

Igbinosun v. Law Society of Upper Canada, 2009 ONCA 484

Weiler, Gillese and Watt JJ.A.

June 16, 2009

Igbinosun was convicted of professional misconduct and disbarred. The underlying events occurred in 1999. The matter was deferred pending criminal proceedings and adjourned for various reasons over the next 7 years. On September 18, 2006, counsel requested an adjournment to accommodate his schedule. His request was refused and he removed himself from the record. The hearing proceeded the next day. Igbinosun did not attend. The Hearing Panel gave a half-day's notice to Igbinosun regarding the penalty hearing, which proceeded the next afternoon. Igbinosun appealed unsuccessfully to the Appeal Panel. The Divisional Court set the decision aside and remitted the matter to a newly constituted panel, but refused to stay the proceedings for delay. LSUC appealed the former; Igbinosun appealed the latter. **Appeals dismissed.**

The Appeal Panel came to contradictory conclusions. The path to either conclusion was unclear from their reasons. In refusing the adjournment, the panel failed to consider the lack of prejudice to the prosecution and failed to balance the public interest in expeditious proceedings against the very serious prejudice to Igbinosun. The Divisional Court concluded that the refusal to grant a brief adjournment was a denial of natural justice. They did not err in principle and the decision is entitled to deference.

Natural justice requires that reasonable notice of a proceeding be given to all parties. The notice must include the purpose of the proceeding and advise that failure to attend may result in an ex parte hearing. It was unreasonable for the panel to give Igbinosun a half-day's notice of the penalty hearing. There was no demonstrated urgency. The misconduct notice did not advise Igbinosun of the extent of

his jeopardy. Further, he would not reasonably expect that the penalty phase would begin immediately after the liability phase.

Igbinosun never appealed the Hearing Panel's refusal to stay the proceedings for delay; he instead attacked the ruling collaterally before the Appeal Panel by alleging bias. He did not appeal the bias ruling to the Divisional Court. There is therefore no injustice in refusing to allow him to re-argue the matter of delay in the new hearing.

***Abdoulrab v. Ontario (Labour Relations Board)*, 2009 ONCA 491**

Simmons, Blair and Juriansz J.J.A.

June 16, 2009

Abdoulrab was a former employee of Catelectric-Dip Corporation. His employment was terminated shortly before the company went bankrupt. He did not receive severance and termination pay. He filed a claim with the Employment Standards Branch of the Ministry of Labour, alleging that three other companies were related employers within the meaning of s. 4 of the ESA. An employment standards officer concluded that these companies should be jointly and severally liable. The Ontario Labour Relations Board overturned the decision. Abdoulrab unsuccessfully applied for judicial review. He appealed. **Appeal dismissed.**

It is improper to conceive of reasonableness as permitting the Board to deviate from the correct decision within some margin of error. Reasonableness recognizes there is no correct outcome, only a range of acceptable outcomes. Accordingly, the Divisional Court did not err by failing to first articulate the correct interpretation of the provision.

The Board's reasoning was clear and understandable. First, the companies supported Catelectric-Dip rather than consuming assets that otherwise would have been available to satisfy the debt. Second, Catelectric-Dip was in dire financial straits and would not be able to satisfy the debts no matter what the conduct of the companies. These findings provided a justifiable, intelligible, and transparent basis for the Board's conclusion.

***Marianhill Inc. v. Canadian Union of Public Employees, Local 2764*, 2009 ONCA 525**

O'Connor A.C.J.O., Simmons and Lang J.J.A.

June 30, 2009

An arbitrator was appointed to interpret the collective agreement. At issue was whether part-time employees were entitled to holiday pay for unworked statutory holidays. He found that the agreement was ambiguous, considered extrinsic evidence, and resolved the ambiguity in favour of the union. Marianhill appealed. The Divisional Court found that the language of the agreement clear and unambiguous, and allowed the appeal. The union appealed. **Appeal allowed.**

The standard of review was reasonableness because the issue was ambiguity, not whether the agreement had been amended. The arbitrator's reasons were transparent and intelligible. It was open to the arbitrator to consider extrinsic evidence both to determine whether there was an ambiguity and, if so, to resolve the ambiguity accordingly. The interpretation fell within the range of acceptable outcomes.

***Taub v. Investment Dealers Assn. of Canada*, 2009 ONCA 628**

Feldman, Armstrong and MacFarland JJ.A.

August 28, 2009

The Investment Dealers Association commenced disciplinary proceedings against Taub. He challenged their jurisdiction on the basis that he was no longer a member. The IDA found that their jurisdiction arose from their contractual relationship with Taub. Taub unsuccessfully appealed to the Ontario Securities Commission. His application for judicial review was successful. The IDA and the OSC appealed. **Appeal allowed.**

The issue before the OSC was a question of law that arose from its home statute and fell squarely within its expertise. While the Divisional Court correctly held that reasonableness was the appropriate standard, the majority effectively conducted its own analysis *de novo* and thus erred.

The reasons of the OSC were clear and understandable. The result fell within the reasonable range of outcomes. While the IDA was a recognized self-regulatory body, this recognition did not alter the contractual nature of the relationship between the IDA and its members. Even if the *Securities Act* limits the jurisdiction of the IDA, the limit is more likely to apply to the timing of the misconduct than the timing of the discipline.

***Inforica Inc. v. CGI Information Systems and Management Consultants*, 2009 ONCA 642**

Sharpe, LaForme and Watt JJ.A.

September 11, 2009

Inforica commenced arbitral proceedings against CGI, pursuant to an arbitration term in their agreement. The arbitrator ruled that he had jurisdiction to make an order for security for costs. Inforica successfully applied to Superior Court to set aside the order. CGI appealed. **Appeal allowed.**

Judicial intervention in the arbitral process is strictly limited to situations contemplated by the Act. A judge can intervene under s. 17(8) only where the arbitrator rules on his “own jurisdiction to conduct the arbitration” – in other words, his jurisdiction over the substance or subject matter of the case. The order did not fall within this provision. Similarly, the order was not an “award” within the meaning of s. 46(1), because it did not dispose of part or all of the dispute on the merits. The application judge thus had no jurisdiction to deal with the matter. Her order is a final order for the purposes of appeal.

***Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670**

Goudge, Sharpe and Armstrong JJ.A.

September 23, 2009

Tony Clifford was a member of the OMERS pension plan. He and his wife, Sylvia Clifford, separated in 1996 and divorced in January 2004. Mr. Clifford died without a will in 2005. Ms. Clifford was the named beneficiary of the plan. However, Mr. Clifford moved in with Ms. Campbell in 1999. She applied to OMERS as his common law partner. OMERS found in favor of Ms. Campbell. Ms. Clifford unsuccessfully appealed to the Tribunal. She applied for judicial review. The Divisional Court held that the Tribunal’s reasons were insufficient and quashed the decision. Ms. Campbell appealed. **Appeal allowed.**

The standard of review for sufficiency of reasons is correctness. The court must determine whether, in the context of the particular case, the reasons were sufficient to meet the tribunal's legal obligations. The approach is a functional one; the reasons must let the individual whose rights, privileges or interests are affected know why the decision was made and permit effective judicial review. In this case, the reasons explain why the Tribunal reached the conclusions that they did. It must be remembered that many such decisions are made by non-lawyers. Where the issue is straightforward and falls within the expertise of the agency, the use of imperfect language will not render the reasons insufficient.

Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353, 2009 ONCA 749
Simmons, Blair and Epstein JJ.A.
October 29, 2009

A dispute arose between Jacobs and the union about the work required to repair fire damage to a petroleum plant. The union grieved. The Board found for the union but gave minimal reasons. The union requested that they provide "fuller reasons". The Board released supplementary reasons. Jacobs unsuccessfully applied for judicial review on the grounds that the Board lacked jurisdiction to redraft its reasons. **Appeal allowed.**

The common law doctrine of *functus officio* prevails unless the governing legislation allows otherwise. In this case, the Board cannot revisit their decisions – reasons or results – without a reconsideration of the case and the attendant procedural protections. There are good policy reasons for prohibiting supplementary reasons. First, it incentivizes fuller reasons at the outset. Second, it prevents the appearance of results-based reasoning. Third, it promotes finality and removes the problem of uncertainty among the parties.

Simmons J.A. (concurring) held that the Board had a general power to give supplementary reasons. It is questionable whether the *functus doctrine* applies to reasons, as opposed to results. The appropriate approach is that set out in *R. v. Teskey*. If, as in this case, the supplementary reasons give rise to a reasonable apprehension of results-oriented reasoning, they should not be considered on judicial review. The first reasons were clearly inadequate.

Mavi v. Canada (Attorney General), 2009 ONCA 794
Laskin, Simmons and Lang JJ.A.
November 12, 2009

In order for a permanent resident or citizen to sponsor the immigration of a family member, they must undertake to provide for the family member's essential needs. Mavi sponsored a family member who subsequently received social assistance from Ontario. The legislation provided that these payments were debts owing to the Crown by the sponsor. Mavi applied for a declaration that his debt was discharged owing to exceptional circumstances. The application judge held that there was no enforcement discretion and dismissed the application. Mavi appealed. **Appeal allowed in part.**

Both the old *Immigration Act* and the new *Immigration and Refugee Protection Act* provide that sponsorship debts "may be recovered" by the government. While the term "may" will in some circumstances be merely enabling, when read in the context of the immigration regime as a whole, "may" confers discretion on whether to recover debts. This discretion has at least two aspects: the discretion to cure a default by some amount less than the total debt, and discretion to defer

enforcement of the debt. Government policies that mandate enforcement behavior are an impermissible fetter on this discretion.

The government owes the sponsor a common law duty of fairness. They must provide a process by which sponsors may make submissions on their relevant circumstances; they must consider those submissions; and they must inform the sponsor that their submissions have been considered and of the decision. However, the government is not required to notify a sponsor when a sponsored family member is receiving social assistance. Undertakings made under the old legislation are enforceable under these new procedures.

Ontario (Commissioner, Provincial Police) v. MacDonald, 2009 ONCA 805
Sharpe, Gillese and LaForme JJ.A.
November 13, 2009

MacDonald and Jevons were charged with professional misconduct under the *Police Services Act*. They moved for a stay of proceedings for abuse of process. Nine days into the hearing, the prosecutor moved for the recusal of the adjudicator, a former provincial court judge. The motion was dismissed. The Commissioner unsuccessfully applied for judicial review. He was granted leave to appeal to this court. MacDonald and Jevons cross-appealed. They argued that the adjudicator had to be named on the application for judicial review, and challenged the Commissioner's standing. **Appeal dismissed. Cross-appeal dismissed.**

There is no statutory requirement that an adjudicator be named as a respondent on an application for judicial review. The issue of standing was not properly before this court, as MacDonald and Jevons did not appeal from the decision that disposed of this issue.

It was not necessary to address standard of review because the allegation involved the denial of procedural fairness and natural justice. The Divisional Court did not err by considering the "reasonableness" of the adjudicator's conduct. The reasonableness of the impugned conduct is a relevant factor. The Divisional Court found that an informed person viewing the matter realistically and practically – and having thought the matter through – would not conclude there was any apprehension of bias on the part of the adjudicator. The events in this case fell far short of the type of conduct that would give rise to a reasonable apprehension of bias.

Bot Constrution v. Ontario (Ministry of Transportation), 2009 ONCA 879
MacPherson, Sharpe and Cronk JJ.A.
December 11, 2009

The MTO issued a Request for Tender for highway construction work. The tender required each bidder to declare the value of imported steel, such that a 10% preference for Canadian steel could be applied in the decision-making process. The tender was awarded to Cavanagh. Bot, the second-lower bidder, applied for judicial review. They argued that Cavanagh's bid was non-compliant. The tender specified the use of "rolled steel beams", which were not available in Canada. Cavanagh intended to use Canadian steel welded to the same specified dimensions. The Divisional Court allowed the application for judicial review and remitted the matter for reconsideration. The MTO appealed. **Appeal allowed.**

The standard of review is reasonableness. The MTO has expertise in tendering processes for road construction contracts. Cavanagh advised that the contents of its bid were honest and accurate; that the steel would meet the requisite specifications for structural strength and performance; and that the amount of steel required was small. Further, even if this steel was considered “imported” for the purpose of evaluation, the order of the bids would not change. These facts reveal that the MTO’s decision “falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law”.

***Hydro One Inc. v. Ontario (Superintendent of Financial Services)*, 2010 ONCA 6**

Simmons, Cronk and MacFarland JJ.A.

January 11, 2010

The merger of two former affiliates of Hydro One resulted in the loss of 126 jobs. 73 employees were members of the Management Compensation Plan. 53 were represented by the Society of Energy Professionals. They applied to the Superintendent of Financial Services to order a partial wind-up of the pension plan under s. 69(1)(d) of the *Pension Benefits Act*. The Superintendent held that the number of pension plan members was not “significant” as required by the Act. They appealed. The Financial Services Tribunal allowed the appeal with respect to the MCP, applying a “subset” analysis that considered the number of terminated employees with the number of active employees. Hydro unsuccessfully appealed to the Divisional Court. They appealed further. Appeal dismissed.

The words in question, “a significant number of members of the pension plan”, suggest that regard must be had to the pension plan as a whole. However, the lack of precision indicates a legislative intent that the inquiry is to be flexible and context-specific. The Act is protectionist public interest legislation, and must be given a liberal interpretation. The Superintendent must be able to assess the materiality of the number of terminations having regard to the full circumstances surrounding the reorganization and the pension plan. The significance inquiry may therefore be based on a subset analysis.

The reasonableness of a subset analysis is case-specific. Several factors should be considered, for example, whether the pension plan distinguishes between different groups of employees; whether the terminations represent an identifiable subset of the workforce; the size of the subset relative to the workforce; whether the reorganization affected only specific targeted employees; whether the terminations represent proportionately older members of the pension plan; whether the terminations were voluntary; whether a partial wind-up would threaten the continued viability of the entire plan; and any other circumstances indicating that the proposed wind-up could jeopardize the security of pension benefits for continuing plan members. It is proper for the Tribunal to consider whether the terminated employees were unionized and any compensation they may have received.

Decisions on Reserve

***Toronto Hydro-Electric System Ltd. v. Ontario Energy Board (2008)*, 93 O.R. (3d) 380 (Div. Ct.)**

Lederman, Kiteley and Swinton JJ.

Heard: October 9, 2009

Toronto Hydro is an electricity distributor licensed by the OEB. The OEB ordered as a condition of rate-setting that any dividend paid by Toronto Hydro to the City of Toronto had to be approved by a majority of its independent directors. Toronto Hydro argued that the OEB lacked the jurisdiction to make such an order.

Kitely J. (Swinton J. concurring) held that the decision was reviewable on a standard of correctness. The Act did not expressly give the OEB the power to dictate conditions of this nature on a rate hearing, nor can the OEB cannot claim such authority by necessary implication. Lederman J. (dissenting) held that the standard of review was reasonableness. The OEB had express authority to attach this condition to the fixing of rates. Alternatively, the common law doctrine of jurisdiction by necessary implication applies because the power claimed is practically necessary to ensure the achievement of the statutory mandate. The OEB appealed.

Law Society of Upper Canada v. Neinstein (2007), 85 O.R. (3d) 446 (Div. Ct.), supplementary reasons at (2008), 241 O.A.C. 199 (Div. Ct.)

Matlow, Swinton and Murray JJ. (Matlow J. did not take part in the supplementary decision.)

Heard: November 30, 2009

The Law Society of Upper Canada alleged that Neinstein had sexually harassed three women between 1998 and 1998, thereby engaging in professional misconduct. The discipline hearing proceeded in October and November 2002. The Hearing Panel released its reasons in November 2003, finding against Neinstein on two of the allegations. Neinstein was disbarred in June 2004. He appealed successfully to the Appeal Panel, which stated in obiter that 12 months suspension would have been a fit penalty. LSUC appealed to the Divisional Court. In March 2007, the Divisional Court allowed the appeal and restored the findings of professional misconduct. However, the penalty was reduced to 3 months suspension. Neinstein was granted leave to appeal to this court on April 2, 2009. LSUC cross-appealed on the issue of penalty. The grounds of appeal relate to the adequacy of the reasons given by the Hearing Panel.

Appeals Scheduled for Hearing

Ontario (Director, Disability Support Program) v. Tranchemontagne, on appeal from (2009), 95 O.R. (3d) 327 (Div. Ct.).

To be heard: March 10, 2010

Tranchemontagne and Werbeski suffered from alcoholism. They claimed benefits under the *Ontario Disability Support Program Act* on the basis of disability, which could potentially provide them with long-term income support. They claimed to be unsuited for the Ontario Works (OW) program, which was intended to provide temporary financial support to non-disabled persons pending employment. Section 5(2) of the ODSPA renders ineligible individuals solely impaired by alcoholism. The Social Benefits Tribunal held that the exclusion was discriminatory and contrary to s.1 of the *Ontario Human Rights Code*. Accordingly, individuals solely impaired by alcoholism were entitled to benefits under the ODSPA. The Director unsuccessfully appealed to Divisional Court. Leave to appeal to this court was granted on August 26, 2009.

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The Fairness Advocate: Ombudsmanship and the pursuit of procedural fairness

*Amy Spady**

“The fairer the process is, the fairer the decision will be.” This motto, accredited to Professor Paul Weiler and quoted by Laura Bradbury of the Workplace Safety and Insurance Board’s Fair Practices Commission, encapsulated the message of the Administrative Law Section Professional Development session entitled “Fairness Now – Administrative Justice, Ombudsmanship and Institutions”.

On November 24, 2009, a stimulating discussion of ombudsmanship and procedural fairness followed dinner at the OBA Conference Centre in Toronto. A panel of three speakers provided their perspectives on the role of ombudsman. Fiona Crean spoke from her experience as a municipal ombudsman for the City of Toronto. Laura Bradbury presented in her capacity as the Workplace Safety and Insurance Board’s Fair Practices Commissioner. Nora Farrell spoke about her ombuds role with Ryerson University’s Office of the Ombudsperson.

Introducing the panelists, program chair Greg Levine acknowledged that the term “ombudsman” is no longer representative of those who fill the role. Notably, the three speakers of the evening were all women. The nomenclatural debate, however, was left for another day.

While all three of the panelists ascribed to the ombuds title, each noted the structural characteristics that set her ombuds role apart. Fiona Crean was appointed by Toronto City Council as a “legislative ombudsman”. Hers is an investigative role into the actions of the municipal government, and the complaints of people who are affected by those actions. As a result, Ms. Crean is essentially responsible to the people, the citizens of Toronto.

Laura Bradbury, on the other hand, responds to those who have a procedural fairness complaint with the WSIB. She addresses these complaints by examining the decision-making process, rather than the fairness of the decision itself. She described her ombuds role as one of incorporating natural justice and procedural fairness into the complex administrative scheme of the WSIB.

For Nora Farrell, the position of ombudsman is a hybrid between the classic ombuds role and emerging new forms of ombudsmanship. She receives complaints from post-secondary students about the university’s decision-making processes, and reports to a committee of stakeholders. Unique to Ms. Farrell’s position is the concept of “conflict coaching”, which involves counselling complainants on how to behave well in a bad situation so that complainants will be prepared for the procedural road ahead.

Despite the structural differences between the ombuds roles of the three panelists, the similarities between their positions far outweigh the discrepancies. Each panelist spoke of her dual role of complaint investigation and resolution, with a focus on fair process. Each identified the same fundamental hallmarks of ombudsmanship: confidentiality, impartial review, independence, accessibility, and advocacy for fairness, rather than for the individual.

The panelists provided valuable insight into how an ombudsman conceptualizes his or her function. Ms. Crean described her view of ombudsmanship as an “elegant alternative to the courts”. She clarified that she did not mean elegant in the sense that the ombudsman is extravagant or expensive, but elegant in the same sense as the term is used in engineering or jurisprudence. In this context, elegance denotes a graceful process or, as one definition of elegance offers, “a quality of neatness and ingenious simplicity in the solution of a problem”.

Ms. Bradbury and Ms. Farrell appeared to share this conceptualization of ombudsmanship. Ms. Bradbury stated that she often recommends giving the WSIB the first opportunity to resolve a complaint. This enables the ombudsman to be more nimble, and improves the overall integrity of the administrative system in which decisions are made. As ombudsperson at Ryerson, Ms. Farrell identifies ways in which she can enable each party to understand the position taken by the opposing side. She noted that the ombudsperson has a responsibility to be educative, to help people understand fairness, and to provide guidance on what is appropriate conduct throughout the complaints process.

The educative role of the ombudsman was a common thread weaving through each of the panelists’ presentations. Emphasis was placed on the importance of educating complainants, respondents and the public about fair process. Ms. Bradbury noted that fairness can be fostered through awareness sessions that educate people about how to identify issues and come up with solutions. Ms. Farrell discussed the concept of “preventative ombudsmanship”, where education is used as a tool to promote fairness in decision-making processes from the outset.

Another striking similarity between the panelists’ roles is the systemic quality of their work. For Ms. Crean, the investigation into a complaint is really about getting to a systemic issue. An ombudsman can help to eliminate power imbalances, reduce friction, and look outside the box for solutions to the problem. Ms. Bradbury described how the system can be improved as a whole by gaining insight into the circumstances that give rise to procedural complaints in the first place. She provided the example of the Fair Practices Commission’s investigation into the WSIB’s occupational disease policy. The investigation resulted in a new database and new policies on occupational disease, as well as a reduction in the number of cases in that area. From a systemic perspective, Ms. Bradbury stated that in her experience complainants are often satisfied with a resolution if it does something to prevent the same problem from happening to someone else in the future. Ms. Farrell made a similar observation, noting that the ombudsman must investigate trends in order to address the body of the problem, rather than merely the tip of the iceberg.

Asked to provide her vision of ombudsmanship, Ms. Bradbury concluded that her vision is to foster the understanding that a fair process is the key to a fair decision. This statement reflected the tenor of the evening’s presentations. At the end of the discussion, advocacy for procedural fairness emerged as the unifying characteristic of ombuds work. The take-home message was one that administrative law practitioners know well: without procedural fairness, there can be no fair decisions. Yet the perspective of the ombudsman sheds light on the innovative ways in which the connection between fair process and fair decisions can be more fully realized. Perhaps this is why ombudsmen are becoming more and more common in organizations and institutions across the province. Ombudsmen are fulfilling the role of fairness advocate. This is a role that will likely become increasingly integral to administrative law.

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Soirée d'hommage à / An Evening to Honour MICHEL BASTARCHE

Le Comité des langues officielles de l'ABO, de concert avec les sections de l'ABO du droit autochtone, du droit administratif, du droit constitutionnel, des droits civils et des droits de la personne, du droit de l'éducation et du droit du travail et de l'emploi, vous invitent à une soirée pour rendre hommage à l'honorable **MICHEL BASTARACHE**, ancien juge de la Cour suprême du Canada.

Mardi 13 avril 2010

Cocktail : 17h30

Souper : 18h

Programme : 18h45

Centre de conférence de l'ABO, 20, rue Toronto 2e étage

[Formulaire d'inscription](#)

The Official Languages Committee of the OBA, together with the OBA sections of Aboriginal Law, Administrative Law, Constitutional Law, Civil Liberties & Human Rights, Education Law, and Labour & Employment Law, invite you to an evening to pay tribute to the Honourable **MICHEL BASTARACHE**, former Justice of the Supreme Court of Canada.

Tuesday, April 13, 2010

Reception: 5:30 pm

Dinner: 6:00 pm

Program: 6:45 pm

OBA Conference Centre, 20 Toronto Street 2nd Floor

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