
Our third dinner meeting in recent months was held in October on *Hot Topics in Administrative Law*, addressing issues of credibility, the potential for judicial review of the awarding of contracts in a government RFP, and the impact of the Supreme Court of Canada decision in *Conway* on tribunals' power to grant *Charter* remedies. This newsletter includes an article by Aidan Johnson outlining the presentation.

Upcoming dinner programs will cover capacity issues in tribunal proceedings (February) and an update on the clustering of tribunals, when we will discuss the objectives of this initiative and whether progress is being made in meeting them (May). As well, we will participate in the annual Human Rights update, a CLE slated for June.

As if that wasn't enough to keep us busy, section Vice-Chair Ed Montigny is also heading up an OBA Working Group on the needs of parties with capacity issues.

**John Higgins, chair*

Adjudicative Tribunals: The New Act A Six Minute Tour and Expert Commentary

*Carolyn Slon **

On May 20, 2010, the OBA Administrative Law Section hosted "Adjudicative Tribunals: The New Act – A Six Minute Tour and Expert Commentary" an informative event about the new *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, S.O. 2009, c. 33, Sched. 5. Certain provisions of this Act came into force on April 7, 2010. The rest of the Act will come into force on a day to be named by proclamation of the Lieutenant Governor.

As set out in section 1 of this Act, its purpose is to "... ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making." As this legislation has significant implications for the administrative law environment in Ontario, many administrative law practitioners, government lawyers, tribunal members and chairs were in attendance to hear the commentary from the panel of expert speakers.

The first speaker for the event was Ron Ellis, Q.C., a prominent administrative justice critic, who provided a brief "tour" of the Act. He provided the audience with an overview of the structure of the Act and discussed the three main parts of the Act dealing with (1) public accountability documents (ss. 3 to 13); (2) appointments to adjudicative tribunals (s. 14); and (3) tribunal clustering (ss. 15 to 19). Of these three parts of the Act, only the sections regarding tribunal clustering are in force.

After providing this overview, Mr. Ellis moderated a panel of three experts representing the perspectives of tribunal chairs, administrative law advocates and academe to get their views on this legislation. Gary Yee, Chair of the Social Benefits Tribunal, provided comments from the tribunal perspective, Andrew Roman, a partner at Miller Thomson LLP, provided comments from an advocate's perspective, and Lorne Sossin, Dean of Osgoode Hall Law School, provided comments from an academic perspective.

The panellists all provided insightful comments regarding the application of the Act, its benefits and some challenges that might arise in its application.

With respect to the sections of the Act dealing with public accountability documents, the panellists recognized that the Act's requirement to provide these documents (such as a consultation policy (s. 4), service standard policy (s. 5), ethics plan (s. 6), and business plan (s. 12) to name a few) would have a positive impact, enhance transparency for tribunals, and assist in establishing relationships with tribunal stakeholders. Some tribunals have already been preparing such public accountability documents and the requirements in the Act would not represent a significant change for some tribunals. However, the panellists also recognized that the preparation (and subsequent amendment) of public accountability documents requires resources and may be challenging for smaller administrative tribunals. It was suggested that this could be an opportunity for the Society of Ontario Adjudicators and Regulators to get involved to assist with creating precedents for tribunals to use. The panellists also discussed the independence of tribunals, and that while the Act provides that a tribunal's responsible minister will have a role in approving accountability documents, tribunals will need to ensure that principles of independence and impartiality are maintained throughout this process.

Regarding the subject of appointment of members to administrative tribunals, the panellists examined the process set out in section 14 of the Act. The Act sets out a competitive, merits based process and the criteria to be assessed when selecting tribunal members. The chair of the tribunal will recommend candidates to the minister. However, the panellists debated whether this new section may impact the independence of tribunals as the responsible minister for a tribunal will have a final say in the appointment process.

The panellists also discussed the clustering provisions of the Act, which are now in force. So far, one cluster has been formed, the Environment and Land Tribunals Ontario. The panellists discussed the rationale and merits of clustering tribunals. For instance, clusters can provide a platform for tribunals with similarities to share services, avoid overlaps and benefit from economies of scale. This in turn can simplify the process for tribunal stakeholders, because instead of dealing with separate tribunals they can now deal with one tribunal cluster. According to the panellists, they expect that in the future there will be more clustered tribunals to come and it will be exciting to watch how Ontario's administrative tribunal landscape will be transformed by the introduction of new tribunal clusters. Many attendees at the event also posed questions to the speakers and there was a vigorous discussion about tribunal clustering.

Overall, the expert speakers at this event provided a thorough review and critique of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*. As more sections of this Act are proclaimed into force in the future, it is certain that the administrative law community will be monitoring the Act's application and impact on tribunals in Ontario.

* Carolyn Slon is legal counsel at the Ontario Securities Commission, 20 Queen Street West, 19th Floor, Toronto, phone: 416-593-2364, e-mail: cslon@osc.gov.on.ca.

The views being expressed in this article are the views of the author and do not necessarily represent the views of the Commission.

Hot Topics in Administrative Law

Aidan Johnson*

How and when can the tendering process for government contracts be judicially reviewed? To what standard are the courts to hold the reasons of administrative bodies when their decisions are appealed? When Review Boards hear the cases of potentially dangerous psychiatric patients, can they grant remedies through the *Charter of Rights and Freedoms*?

These questions and others were asked and explored on October 22nd, 2010, at the Ontario Bar Association panel “Hot Topics in Administrative Law”. The panel was chaired by Robert Ratcliffe, Legal Counsel at the Ministry of the Attorney General, at the OBA headquarters in Toronto. As speakers at the event, some of the province’s top lawyers shared their views on key recent cases in which they had a hand. Each case has somehow transformed the law.

Bot Construction v. Ontario: The State’s Commercial Dealings Can Be

Judicially Reviewed

Chris Bredt, senior litigation partner at Borden Ladner Gervais, spoke first. Bredt’s topic: *Bot Construction v. Ontario (Ministry of Transportation)*, a recent decision by the Ontario Court of Appeal. The case has essentially re-defined the law of judicial review for commercial decisions by the state.

Bot Construction had submitted a bid to the Transportation Ministry. The bid was on a project for which the Ministry was accepting tenders – an expansion to the part of Highway 417 near Arnprior, Ontario. The contract went to a rival company whose bid had not complied with all the tender specifications.

Convinced that the Ministry had not complied with its own rules for the tendering, Bot asked the Superior Court of Justice for judicial review. But Ontario counter-argued that no review could be available for its decisions in commercial dealings.

“The Divisional Court relied on a decision by Justice McLachlin (as she then was), holding that judicial review was available for government tendering decisions in appropriate circumstances,” Bredt said. “In the case before it, the Court held that the Ministry’s decision to accept a non-compliant bid was not reasonable – and so that Ministry decision was set aside.”

The Court ordered the Ministry to re-consider the bids according to the pre-stated rules, or to initiate a whole new tendering process.

On appeal, the Court of Appeal reversed the lower court’s order. It disagreed with the Divisional Court on the issue of whether the Ministry’s decision that the bid was compliant was unreasonable. It ruled that the Ministry’s selection and internal review process had been reasonable and fair. But it did not take up the question of whether the lower court lacked jurisdiction to review.

“The Court of Appeal expressly declined to comment on the Divisional Court’s reasoning that judicial review was available,” Bredt said. “Because of that, the lower court ruling that tendering decisions are subject to commercial review wasn’t touched.”

Thus, as a result of *Bot*, Ontario gets to keep its selected company for the Highway 417 expansion. But the province's compliance with its own rules in commercial matters may now be subject to possible judicial scrutiny.

Law Society v. Neinstein: A High Standard for the Reasons of Tribunals

Following Bredt on the panel was Tom Curry, partner at Lenczner Slaght. Curry presented on *Law Society of Upper Canada v. Neinstein*. In this ruling, the Ontario Court of Appeal nullified the Law Society's disbarment, ten years ago, of Gary Neinstein. Neinstein had been accused of sexual harassment. The Court returned the matter to the Law Society for an entirely new process.

In its assessment of the original Law Society Hearing Panel decision, the Court concluded that the Panel's stated reasons "come perilously close to constituting no reasons at all." The Court thus clarified the need for a high standard of quality and, if necessary, quantity – breadth and depth of analysis – in the official rulings released by administrative tribunals.

Significantly, the Court of Appeal rejected an argument from Neinstein that the Law Society hearing was illegitimate because chaired by ex-Bencher George Hunter. Subsequent to the Neinstein proceedings, Hunter was revealed to have been engaged in sexual improprieties with a client himself, at the time that the hearing was happening. The Court ruled that fact "irrelevant". What mattered was the panel's reasons.

Curry suggested that a key implication of the ruling is the non-lawyer volunteers who serve on administrative panels may need to know more about the law. Accordingly, a further implication is that the Law Society will be held to an even higher standard when it comes to its own legal proceedings.

R. v. Conway: When Tribunals Can Grant Remedies from the Charter

The panel was concluded by Jessica R. Orkin, constitutional and criminal lawyer of Marlys Edwardh Barristers Professional Corporation. Orkin spoke on *R. v. Conway*, the Supreme Court decision released in summer 2010 that redefined not only the constitutional powers of the Review Boards that hear psychiatric patient cases, but also the broad relationship between administrative panels and the *Charter*.

In this case, psychiatric patient Paul Conway appealed a finding by the Ontario Review Board that it lacked jurisdiction to grant him an absolute discharge through *Charter* s. 24. Conway had been subjected to environmental hazards and other problems at the Ontario provincial institution where he was made to live that might seem to constitute *Charter* right infringements.

In her ruling, Justice Abella established a two-part test for deciding if *Charter* remedies can be granted by a particular administrative tribunal:

1. Determine if the tribunal is a court of competent jurisdiction. If "authorized to decide questions of law" and not banned by statute from *Charter* jurisdiction, then it is.
2. If the tribunal is a court of competent jurisdiction, determine if granting the remedy sought is "within the Board's statutory mandate and functions". If the remedy is within the tribunal's mandate, it can be granted.

Unfortunately for Conway, however, Justice Abella concluded that the Review Board's mandate does not permit it to grant absolute discharges to patients it deems dangerous.

Orkin recalls that Justice Abella asked during her questioning at the Supreme Court whether Conway's legal team was asking her to re-write the law. The team assured her that they were not. Nonetheless, the Justice's ruling can be interpreted in some ways as exactly that – if not a re-writing, then a re-configuration, of the law of administrative panels, in terms of their relationship to the *Charter*.

Ratcliffe concluded by remarking on the irony of the fact that the speakers had each lost as counsel in the case that she or he had presented – a contrast to the significant constitutional gains made through the lawyers' submissions to the deciding courts.

"Our speakers seem to have past the post-trial loss stages of mourning and anger," the chair said, "and come around to the stage of thinking they actually won."

His meaning, of course, was that in at least one real way they did.

**Aidan Johnson is an articling student at Borden Ladner Gervais LLP.*

Administrative Law Cases at the Supreme Court of Canada

Spring – Fall 2010 (March 1 2010 to October 30 2010.)

*Martin G. Masse and Corinne Brûlé**

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

Leaves To Appeal Dismissed

ADMINISTRATIVE LAW IN QUEBEC: REVIEW OF LEGAL AID DECISIONS

Albert Duterville v. François Wullaert, et al (Que. C.A., May 23, 2007) (33416)

The Applicant Albert Duterville alleged being a victim of several injustices and applied for Quebec legal aid so he could assert his rights. He then made a motion for judicial review requesting that counsel be appointed for him and seeking a review of four decisions of the review committee of the Commission des services juridiques refusing his applications for legal aid. The Superior Court dismissed the motion for judicial review. The C.A. dismissed the appeal.

"The motion for *certiorari* and the motion for an extension of time to serve and file an application for leave to appeal...are dismissed. In any event, had such motions been granted, the application for leave to appeal would have been dismissed."

ADMINISTRATIVE LAW: JUSTICIABILITY

Friends of the Earth v. Minister of the Environment, Governor in Council (Fed. C.A., October 15, 2009) (33469)

The Applicant, a not-for-profit environmental organization, alleged the Respondent Minister failed to comply with the duty imposed upon him under s. 5 of the *Kyoto Protocol Implementation Act*, to prepare an initial climate change plan to fulfill Canada's obligations under Article 3.1 of the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*. The Applicant also alleged the Respondent Governor in Council did not observe ss. 8 and 9 of the *Act* by failing to publish proposed regulations in the *Canada Gazette* with accompanying statements and by failing to prepare a statement within 120 days setting out the greenhouse gas emission reductions reasonably expected to result from each proposed regulatory change and from other proposed mitigation measures. With respect to s. 7 of the *Act*, the Applicant alleged that the Respondent Governor in Council failed in its duty to make, amend or repeal regulations necessary to ensure that Canada would meet its obligations under Article 3.1 of the Kyoto Protocol. The Applicant argued that the language of ss. 5, 7, 8 and 9 of the *Act* is unambiguous and mandatory. The Applicant claimed that the Respondents had refused to carry out the legal duties imposed upon them by Parliament, thereby acting outside of the rule of law. The Respondents asserted that the statutory duties were not justiciable. The Federal Court dismissed the application. The C.A. dismissed the appeal.

"The application for leave to appeal...is dismissed with costs."

ADMINISTRATIVE LAW: UNEMPLOYMENT INSURANCE

Tina Mehan v. Attorney General of Canada (Fed. C.A., September 29, 2009) (33472)

The Applicant filed for employment insurance benefits and provided a Record of Employment. She completed reports and claimed payment of benefits for many months during which time an investigation by the Employment Insurance Commission was ongoing. The Commission found that the Applicant did not actually work as a tree planter for Dewan Enterprises Ltd., a corporation operated by her relative, as had been stated in the application for benefits. It cancelled the Applicant's benefit period, imposed penalties and imposed a notice of violation for knowingly making false or misleading statements. The Board of Referees denied benefits pursuant to the *Employment Insurance Act*. The Office of the Umpire dismissed the appeal. The Federal C.A. dismissed the appeal.

"The application for leave to appeal...is dismissed with costs."

ADMINISTRATIVE LAW: UNEMPLOYMENT INSURANCE

Neelam Mehan v. Attorney General of Canada (Fed. C.A., September 29, 2009) (33478)

Similar summary to the above

"The application for leave to appeal...is dismissed with costs."

ADMINISTRATIVE LAW IN QUEBEC: CONTRACT INTERPRETATION

Agropur Coopérative v. Conseil des industriels laitiers du Québec (Que. C.A., November 3, 2009) (33531)

The Fédération des producteurs de lait du Québec (the Fédération) signed two marketing contracts (the agreement), one with the Conseil des industriels laitiers du Québec (the Conseil) and the other with Agropur. For about 10 years, the Fédération calculated historical volumes for the purpose of supplying

Agropur and the Conseil by adding Ultima Foods to the Agropur group of factories, contrary to schedule 3 of the agreement. In the summer of 2006, the Fédération realized its error and redid its calculations. The correction gave Agropur access to more milk, to the detriment of the Conseil's members. The Conseil was unhappy with this and insisted the calculation method used prior to 2005-2006 be reinstated to take account of Ultima's historical volumes. The Fédération refused, arguing it had to comply with the terms of the agreement. The Conseil then filed a grievance and designated the Régie des marchés agricoles et alimentaires du Québec as the arbitrator. It asked that the Fédération's decision be revoked and that schedule 3 of the agreement be corrected to include Ultima. The Régie ruled partly in favour of the Conseil and ordered the Fédération to base its calculations on the ones used prior to 2005-2006. Agropur was not satisfied with this and filed a motion for judicial review, arguing that the Régie had exceeded its jurisdiction by amending the agreement. The Quebec Superior Court granted the motion for judicial review. The C.A. allowed the appeal.

"with costs to the respondent Conseil des industriels laitiers du Québec"

ADMINISTRATIVE LAW: OCCUPANCY LOADS FOR NIGHT CLUBS

Victoria Social Club Ltd. dba The Social Club v. General Manager, Liquor Control and Licensing Branch (B.C.C.A., November 3, 2009) (33489)

The Applicant Social Club held a liquor licence permitting the sale of liquor in its night club which had an occupant load of 350 persons as a condition of the licence. The Licensing Branch believed the Club had exceeded its occupant load, issued a notice of enforcement and stated the proposed penalty was a five-day suspension. Among the documents attached to the notice of enforcement action was a two-page history which (1) related to the licensed premises, (2) included a list of previous contravention notices and complaints, and (3) noted their outcome. (None had been pursued or proven.) At a hearing, the adjudicator heard evidence and submissions with respect to both the alleged contravention and the penalty in the event that a contravention was found. He found that the licence had been contravened when the occupant load had been seriously exceeded and imposed a five-day suspension. The B.C.S.C. dismissed an application for judicial review. The B.C.C.A. dismissed the appeal.

"The application for leave to appeal...is dismissed with costs."

ADMINISTRATIVE LAW: EI & CPP CONTRIBUTIONS

William Shawn Davitt v. Minister of National Revenue (Fed. C.A., December 8, 2009) (33552)

The Applicant Mr. Davitt requested rulings under s. 90(1)(f) of the *Employment Insurance Act* and s. 26.1(1)(e) of the *Canada Pension Plan*. He alleged EI premium rates discriminated against Canadians born after 1960 and constituted an unlawful tax. He also alleged the CPP contribution rates discriminate on the basis of age and that the CPP is managed as a "Ponzi scheme" in violation of the *Criminal Code*. He requested refunds for all his EI premiums and CPP contributions paid for the year 2006, and asked that the premiums and contributions payable for that year be reduced to zero. The Canada Revenue Agency ruled that Mr. Davitt was employed in insurable and pensionable employment in 2006. Mr. Davitt appealed to the Agency's Chief of Appeals, but was unsuccessful. He then filed two Notices of Appeal in the Tax Court of Canada. In addition to the grounds advanced and the relief sought in his initial requests for rulings, Mr. Davitt sought punitive damages of \$11,000,000 pursuant to s. 24 of the *Charter*. The Respondent moved to strike the notices on the ground that the court did not have jurisdiction to provide the remedies sought by Mr. Davitt. Webb J. of the Tax Court found Mr. Davitt was attacking the

premium rate set pursuant to the *Employment Insurance Act* and the contribution rate set out in the *Canada Pension Plan*. In his view, the Tax Court of Canada does not have jurisdiction to review those rates in the context of an appeal from requests for rulings under s. 90(1)(f) of the *Employment Insurance Act* and s. 26.1(1)(e) of the *Canada Pension Plan*, because those rates are not, themselves, matters which can be the subject of ruling requests under ss. 90(1) and 26.1(1). The Federal C.A. affirmed the decision. It further found that there were no valid grounds to direct an allegation of reasonable apprehension of bias toward Webb J.

"The application for leave to appeal...is dismissed with costs."

ADMINISTRATIVE LAW & TELECOMS: LIMITATIONS ISSUE - COURT OR CRTC

MTS Allstream Inc. v. Telus Communications Company (Alta. C.A., November 10, 2009) (33516)

At issue between the parties was the question of whether the court had jurisdiction to determine whether the Alberta *Limitations Act* applied to limit refunds owed to MTS by Telus pursuant to a February 2007 CRTC decision. In that decision, the CRTC held that Telus had overbilled MTS and others for Basic Service Extension Feature charges. According to Telus terms of service, provincial limitations statutes applied to customer claims for refunds for overpayments. MTS applied to the court for a declaration that Telus could not rely on the *Limitations Act* to refuse to refund any of the charges referred to in the CRTC decision. Telus's position was that a portion of the refund claimed by MTS was statute-barred in Alberta. Telus also raised the issue of the court's jurisdiction to hear the matter. The Court of Queen's Bench of Alberta held that the Court had concurrent jurisdiction with the CRTC to decide whether the limitation of actions legislation applied. The C.A. allowed the appeal, and held that the decision on the meaning of the CRTC's previous ruling is to be made by the CRTC.

"The application for leave to appeal...is dismissed with costs."

ADMINISTRATIVE LAW: (FEDERAL) JUDICIAL REVIEW

Elliott Moglica v. Attorney General of Canada (Fed. C.A., February 2, 2010) (33591)

The Applicant Mr. Moglica applied for a job as an Internal Enforcement Officer with the Canadian Border Services Agency (CBSA). Prerequisites for this position included successful completion of a two-part "knowledge exam" and an interview. He failed the first part of the knowledge exam. The CBSA officials did not mark the second part, and the interview was not conducted. Mr. Moglica was eliminated from the pool of candidates. Mr. Moglica asked the Director of the Investigations Branch of the Public Service Commission of Canada (PSC) to investigate the rejection of his candidacy, alleging procedural irregularities and discrimination. The Director refused to investigate the allegations of procedural irregularities. She found no breach of the applicable legislation, regulations, policies, or terms and conditions of delegation. With respect to the alleged discrimination, the Director found that the Canadian Human Rights Commission (CHRC) was the appropriate forum to hear that complaint. Mr. Moglica brought an application for judicial review to the Federal Court but was unsuccessful. Applying *Baragar v. Attorney General of Canada*, 2008 FC 841, Phelan J. found that the applicable standard of review was reasonableness. Upon applying that standard, Phelan J. concurred with the Director's conclusion that the CHRC was the appropriate forum to deal with the discrimination allegations. Phelan J. also found that the allegations of procedural irregularities had no merit. In his view, the evidence on record shows that the Director "turned her mind to the relevant considerations and reached a

reasonable conclusion" (para. 14). The Federal C.A. dismissed Mr. Moglica's appeal on the ground that Phelan J. had correctly identified and applied the applicable standard of review.

"The application for leave to appeal...is dismissed with costs."

ADMINISTRATIVE LAW IN QUEBEC: EVIDENCE DE NOVO

Vergers Leahy inc. v. Fédération de l'UPA de Saint-Jean- de-Valleyfield et al (Que. C.A., December 14, 2009) (33565)

Reasoned decisions made by the Commission de protection du territoire agricole were contested before the Administrative Tribunal of Quebec, which decided to hear expert evidence *de novo* and then reversed the Commission's decisions. Following an appeal confirming that approach, the Commission applied for judicial review. The Quebec Superior court set aside the decision of the Administrative Tribunal of Quebec based on evidence *de novo* and the decision of the Court of Quebec confirming ATQ's decision. The C.A. dismissed the appeal.

"The application for leave to appeal...is dismissed without costs."

ADMINISTRATIVE LAW IN QUEBEC: EVIDENCE DE NOVO

Municipality of Saint-Pie, Regional County Municipality of Les Maskoutains v. Commission de protection du territoire agricole du Québec and Fédération de l'UPA de Saint-Hyacinthe et al (Que. C.A., December 14, 2009) (33566)

Similar summary as above.

"The application for leave to appeal...is dismissed without costs."

ADMINISTRATIVE LAW: ALLEGED DISCRIMINATION

Abdur-Rashid Balogun v. Her Majesty the Queen and Minister of National Defence (Fed. C.A., January 27, 2010) (33595)

In 2001, Balogun a black African Muslim man with several university degrees, applied to become a Canadian Forces Reserve officer. He experienced delays and administrative confusion in the processing of his application. In 2002 he was advised that although he met the requirements for the position, his credit check had revealed a number of bad debts that had to be dealt with. His position was that the debts were not his or that the credit reports had been falsified. His application was placed on temporary hold. In February of 2004, he complained to the Canadian Human Rights Commission that the difficulties and delays in the application process were the result of discrimination based on his race, religion and national/ethnic origin. The Commission Investigator determined that the delay in processing his application was not connected to any prohibited ground of discrimination and that therefore, the complaint should not be referred to a tribunal. The Commission accepted the Investigator's recommendation and dismissed the complaint. Balogun applied for judicial review of that decision based on issues with the investigation process, procedural fairness, and whether the credit check constituted a *bona fide* military occupational requirement. The Federal Court Trial Division dismissed the application, and the Fed. C.A. dismissed the appeal.

"The application for leave to appeal...is dismissed with costs."

ADMINISTRATIVE LAW: WORKERS COMPENSATION

Workplace Safety and Insurance Appeals Tribunal v. Maqsood Amin (Ont. C.A., February 3, 2010) (33630)

The Respondent sought medical attention at a hospital emergency department for pain in his right hand, arm and back, which he attributed to his work as a lathe operator. The emergency department notes diagnosed the Respondent as having a repetitive strain injury, as did his family doctor. The Applicant Tribunal concluded the Respondent had experienced a minor repetitive strain injury as a result of his employment, based upon the emergency hospital report and the medical report of the family doctor. However, the Tribunal confirmed the decision of the Appeals Resolution Officer that granted the Respondent benefits that terminated on August 5, 2004. The Respondent applied for judicial review of the Tribunal's decision, and its reconsideration decision, both of which acknowledged a work-related injury, but denied the Respondent's entitlement for any loss of earnings beyond August 5, 2004. Judicial review was allowed. The C.A. dismissed the appeal.

"The application for leave to appeal...is dismissed with costs in accordance with the Tariff."

ADMINISTRATIVE LAW: STANDARD OF REVIEW IN PROFESSIONAL DISCIPLINE

Anthony A. Salway v. Association of Professional Engineers and Geoscientists of British Columbia (B.C.C.A., February 24, 2010) (33646)

Salway is a professional geoscientist and a member of the Association of Professional Engineers and Geoscientists of British Columbia (the "Association"), a self-regulating body that governs the conduct of its members. In November 2005, Salway was retained by clients to prepare a report that would assist them in obtaining subdivision approval for their property. At the time, Salway was subject to a disciplinary panel's order, requiring that he have his professional services peer reviewed by another geoscientist. The report he delivered to the clients in February, 2006 was not peer reviewed. Over the next few months, the clients e-mailed or wrote to Salway on three occasions concerning this deficiency but Salway did not respond. The clients filed a complaint with the Association. The Association delivered a Notice of Inquiry to Salway, alleging that he had demonstrated unprofessional conduct in his neglect or refusal to provide a timely response to communications from the clients. A Panel comprised of three engineers conducted a hearing into the allegation and Salway was reprimanded for unprofessional conduct. The B.C.S.C. allowed an appeal and the decision of the disciplinary panel and set aside the penalty. The C.A. allowed the appeal.

"The application for leave to appeal...is dismissed with costs."

ADMINISTRATIVE LAW: JUDICIAL REVIEW

Laurent Lisio, et al v. Danielle Bellemare, in her capacity as Chief Coroner, et al (Que. C.A., May 5, 2010) (33779)

On June 28, 2003, Michel Berniquez, who was intoxicated, neglected to pay for a drink before getting involved in a street fight in Montréal-Nord. The police brought him under control, and an ambulance was called shortly thereafter. Mr. Berniquez died of cardiac arrhythmia. More than a year later, Coroner Ferland concluded that the death was accidental. On September 28, 2004, Chief Coroner Bellemare ordered a public inquest into the circumstances surrounding the death. Ms. Kronström was to preside at the inquest, which was to begin at the end of 2006. The preparations, in which counsel for

the City and the police participated, lasted throughout 2005 and 2006. During that time, proceedings took shape and decisions were made, such as the Attorney General's decision not to lay criminal charges. In September 2006, the police brought an action in nullity against the decision to hold an inquest or, in the alternative, against the inquest itself.

"The application for leave to appeal...is dismissed with costs to the respondents Danielle Bellemare, in her capacity as Chief Coroner, and Andrée Kronström."

LEAVES TO APPEAL GRANTED

ADMINISTRATIVE LAW: DELAY

Information and Privacy Commissioner v. Alberta Teachers' Association (Alta. C.A., January 27, 2010) (33620)

Ten individuals complained to the Applicant Information and Privacy Commissioner that the Respondent Alberta Teachers' Association disclosed, in contravention of the *Personal Information Protection Act*, their personal information by publishing their names and other information about them in a publication called the "ATA News". The adjudicator found that the Association had disclosed the complainants' personal information contrary to ss. 7 and 19 of the *Act*. On judicial review, the adjudicator's decision was quashed on the basis that the Commissioner lost jurisdiction for failing to comply with the time lines set out in s. 59(5) of the *Act*. The C.A., in a majority decision, upheld that decision.

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

Administrative Law Cases from the Court of Appeal for Ontario

Current from February 15, 2010 to October 30, 2010

Recent Decisions

Law Society of Upper Canada v. Gary Neinstein, 2010 ONCA 193
Doherty, Gillese and Lang JJ.A.

March 16, 2010

The LSUC Hearing Panel found the appellant sexually harassed two complainants between 1988 and 1998, and ordered him disbarred. He appealed to the LSUC Appeal Panel, which allowed the appeal, set aside the findings of misconduct and ordered a new hearing. LSUC appealed to the Divisional Court. The majority allowed the appeal, restored the findings of misconduct and reduced the penalty to a three-month suspension. Neinstein appealed. **Appeal allowed.**

Where there is a right of appeal, the reasons must provide a sufficient window into the decision to allow for meaningful appellate review to the extent contemplated by the permitted scope of the appeal. Reasons that describe both *what* is decided and *why* that decision was made are susceptible to effective

appellate review. Where the reasons adequately explain the “what” and the “why”, other shortcomings will not render the reasons so inadequate as to justify appellate intervention. In this case, the reasons relating to the first complainant’s allegations do not address the “why” component required in reasons for judgment: they are a combination of generalities, unexplained conclusory observations, material omissions and uncertainty as to the legal principles applied to the credibility analysis. Taken together, these inadequacies render the reasons in respect of the first complainant’s allegations so inadequate as to prevent meaningful appellate review. The matter is remitted to a differently constituted hearing panel.

Snopko v. Union Gas Ltd., 2010 ONCA 248
Sharpe, MacFarland and Watt JJ.A.

April 7, 2010

The appellants are landowners whose lands form part of an underground natural gas storage pool operated by the respondent Union Gas Ltd. (“Union”). The appellants brought an application before the Ontario Energy Board seeking just and equitable compensation from Union pursuant to s. 38 of the *Ontario Energy Board Act, 1998* (the “Act”). Before the hearing, the landowners and Union settled all claims that were, or could have been, raised at the hearing. The Board approved this settlement. Consistent with the terms of an undertaking given by Union to the Board, Union extended to all landowners who did not receive full standing at the Board, including the appellants, an offer to be compensated on the same terms as provided for in the Board’s order. Each of the appellants accepted.

Four years later, the appellants filed a statement of claim alleging breach of contract, negligence, unjust enrichment and nuisance, and seeking several million dollars in damages. The respondent brought a motion for summary judgment to dismiss the claims, arguing that the claims are statute-barred under the *Limitations Act* and that the Superior Court has no jurisdiction to hear matters governed by the Act. The motion for summary judgment was granted and the claim dismissed on jurisdictional grounds. Snopko appealed. **Appeal dismissed.**

The Board has jurisdiction to order the payment of just and equitable compensation to the owners of the property overlaying a storage area. Section 38(3) of the Act provides that no civil proceeding may be commenced in order to determine that compensation. It is the substance not the legal form of the claim that should determine the issue of jurisdiction. If the substance of the claim falls within the ambit of s. 38 of the Act, the Board has jurisdiction, whatever legal label the claimant chooses to describe it. The claims advanced by the appellants in the statement of claim all arise from Union’s operation of the gas storage pool. In substance, these are all claims falling within the language of s. 38(2) of the Act.

Toronto Hydro-Electric System Ltd. v. Ontario Energy Board, 2010 ONCA 284
Feldman, Lang and MacFarland JJ.A.

April 20, 2010

As a condition of its rate decision for 2006, the Ontario Energy Board imposed a duty on Toronto Hydro-Electric System Limited (“THESL”) to obtain the approval of a majority of its independent directors before declaring any future dividends payable to its affiliates. THESL appealed the imposition of this condition. The majority of the Divisional Court held that the Board exceeded its jurisdiction and erred in law when it imposed the dividend condition. The Board appealed. **The appeal was allowed.**

Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers by entering into an area of inquiry

outside of what the legislature intended. If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling statute includes a broad grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal. In this case, the legislation reflects a clear intent by legislators to use both a subjective and open-ended grant of power to enable the Board to engage in the impugned inquiry in the course of rate setting. Further, it is apparent that, as part of its rate-setting function, the Board was entitled to consider the history of THESL's dividend payments. This was part of the inquiry into whether and how to control outgoing cash flows from THESL in order to ensure adequate capital. This line of inquiry goes to the heart of the Board achieving its statutory objectives.

The appropriate standard of review is reasonableness. There are two inquiries in a reasonableness analysis. The first inquiry of the reasonableness analysis is into the existence of justification, transparency and intelligibility within the decision-making process. The Board's reasons provide an intelligible explanation for the condition. The reasons disclose a concern relating to "prices and the adequacy, reliability and quality" of service and explain how the chosen remedy will help to alleviate this concern. The second inquiry is concerned with whether the decision falls within a range of possible, acceptable outcomes. It is in this part of the analysis where this court should address THESL's argument that the imposed condition violated corporate law principles. In the context of a regulated corporation, the order does not violate corporate law principles. It leaves the discretion to declare a dividend in the hands of THESL's directors, albeit with an additional check by THESL's independent directors. A regulated utility must operate in a manner that balances the interests of the utility's shareholders against those of its ratepayers. If a utility fails to operate in this way, it is incumbent of the OEB to intervene in order to strike this balance and protect the interests of the ratepayers.

Gratton-Masuy Environmental Technologies Inc. v. Ontario, 2010 ONCA 501

Cronk, MacFarland and Karakatsanis JJ.A.

July 12, 2010

The appellants provide on-site sewage treatment systems in Ontario. The respondent, the Building Materials Evaluation Commission, is a statutory body continued under s. 28(1) of the *Building Code Act, 1992*. The Commission granted authorizations under the Act to the appellants for the use of their filter-based sewage treatment units with a soil absorption system, to treat effluent. The Commission later sought to amend these authorizations. This decision was judicially reviewed and the court concluded that the Commission had failed to provide the appellants with adequate notice and a meaningful opportunity to be heard. Following this decision, the Commission commenced a second review of the authorizations, creating an *ad hoc* subcommittee to meet with the appellants to discuss the authorizations. The subcommittee prepared a report which was submitted to the Commission.

The appellants did not agree with the conclusions of the subcommittee and brought an action against the Commission, commission members (including the subcommittee members), and the Crown. The appellants claimed: (1) declaratory relief quashing certain resolutions of the Commission relating to the authorizations; (2) injunctive relief prohibiting the Commission from acting on the subcommittee report pending the final disposition of the action; and (3) as against the individual respondents and the Crown, general, special and punitive damages in the approximate amount of \$8.25 million for alleged misfeasance in public office.

The respondents moved for an order dismissing the action, as the Commission lacked legal capacity to be sued, or, in the alternative, for an order striking the statement of claim in its entirety. The Superior

Court of Justice granted the respondents' motion in part, striking out the appellants' claims as against the individual respondents except for the subcommittee members and dismissed the motion in all other respects. On appeal, the Divisional Court dismissed the appellants' action against the Commission, and struck the statement of claim as against the subcommittee members and the Crown. Gratton-Masuy appealed. **The appeal was dismissed.**

Certain non-corporate bodies are not, by the terms of the statute incorporating them or by necessary implication, liable to be sued in an action for damages. However, these are legal entities in that their actions may be reviewed in proceedings brought against them by way of the extraordinary remedies of *certiorari*, *mandamus* and prohibition. The Commission is such a body: it is a non-corporate entity not expressly liable to suit by the terms of its Act; it has no power to contract, hold property, or engage in commercial activity; and no legislative intent to confer legal capacity can be inferred.

Consistent with *Smith v. New Brunswick (Human Rights Commission)*, the appellants' action, including the claim for declaratory relief, must be denied. When proceedings for a declaration are brought by way of action, the statutory body must have sufficient legal personality to be sued in its own right. The fact that the actions or proceedings of a statutory entity are subject to review by way of the extraordinary remedies does not mean that the same entity is legally capable of being sued in an action for damages.

It is plain and obvious that the appellants' statement of claim does not disclose a reasonable cause of action against the subcommittee members. The facts pleaded by the appellants could not lead to a finding of bad faith or malice. The pleading fails to set out the material facts required to support the pleas of bad faith, malice and bias. Absent those material facts, s. 31(1) of the Act bars the appellants' action against the subcommittee members.

***Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593**

Simmons, Rouleau and Cronk JJ.A.

September 16, 2010

The respondents were denied Ontario Disability Support Program (ODSP) benefits as a result of the type of disability that they had – alcoholism. Each man's alcoholism was so severe that he satisfied the criteria in s. 4 of the *Ontario Disability Support Program Act* (ODSPA), but each had been refused disability benefits on the basis of s. 5(2) of the ODSPA, which disqualified anyone whose disability was solely due to substance dependence.

The respondents applied to the Social Benefits Tribunal (SBT) and challenged this disqualification under s. 1 of the *Ontario Human Rights Code* (OHRC). The SBT found that the respondents had established a *prima facie* case of discrimination and rejected the Director's arguments that the purpose of s. 5(2) was to assist the specific group to which it applied, and that it was therefore non-discriminatory.

The Divisional Court agreed with the SBT on appeal, but in light of the Supreme Court's 2008 decision in *R. v. Kapp*, the Divisional Court proposed a new test for determining whether a claimant had established a violation of section 1 of the OHRC: (1) whether the complainant has demonstrated a *prima facie* case of discrimination that creates a distinction based on a prohibited ground under the Human Rights Code; and (2) whether the respondent can prove, on a balance of probabilities, that the distinction does not create a disadvantage by perpetuating prejudice or stereotyping, or that a statutory defence applies. **The appeal was dismissed and the decision of the SBT upheld.**

While the appeal was dismissed on other grounds, the court concluded that the test for finding discrimination under s. 1 of the Human Rights Code proposed by the Divisional Court should not be followed, as it overlooks the requirement that claimants prove disadvantage, implies that it is unnecessary for the claimant to show that the disadvantage perpetuates prejudice or stereotyping, and reverses the burden of proof by requiring that the responding party rebut a claim of discrimination. There is no principled reason for adopting a different meaning of discrimination in the context of the OHRC than that which exists in the *Charter* context. The test for finding discrimination is the test set out in *Andrews v. Law Society*, and most recently defined in *R. v. Kapp* as: Does the law create a distinction based on an enumerated or analogous ground, and does the distinction create a disadvantage by perpetuating prejudice or stereotyping? After *Kapp*, it is no longer necessary to find that the claimant has suffered a loss of human dignity. There was no error in the decision of the SBT and the appeal is dismissed.

***Penner v. Niagara (Police Services Board)*, 2010 ONCA 616**

Laskin, Moldaver and Armstrong JJ.A.

September 27, 2010

The appellant was arrested for causing a disturbance in a courtroom during a trial. He filed a complaint under the *Police Services Act* alleging that his arrest was unlawful and that the two arresting officers used unnecessary force on him. At the officers' disciplinary proceedings, the hearing officer dismissed the complaint, holding that the appellant had been lawfully arrested and that no unnecessary force had been used.

The appellant appealed to the Ontario Civilian Commission on Police Services, which largely overturned the hearing officer's decision. The officers then applied for judicial review of the Commission's ruling and their application was granted. The Divisional Court overturned the Commission's ruling and restored the hearing officer's decision.

Shortly after filing his complaint, the appellant commenced a civil action against the two officers and the Niagara Regional Police Services Board, alleging unlawful arrest, unnecessary use of force, false imprisonment and malicious prosecution. After the Divisional Court's decision, the respondents moved under rule 21.01(1) to strike these allegations from Mr. Penner's statement of claim on the basis of issue estoppel. The motion judge granted the motion and the appellant appealed. **The appeal was dismissed.**

Issue estoppel prevents the re-litigation of an issue that has already been decided in a previous proceeding, and it applies to decision made both by courts and by administrative tribunals. To make out issue estoppel, the respondents must show that: i) the same question was decided in the disciplinary proceedings; ii) the decision said to create the estoppel is final; and iii) the parties to the judicial decision are the same persons as the parties to the proceedings in which the estoppel is raised. The appellant concedes the second requirement is met. Even if these requirements are made out, the court retains a residual discretion to refuse to apply issue estoppel if doing so would be unfair or work an injustice.

The 'same question' requirement is met in this case, as the hearing officer determined the questions of unlawful arrest and unnecessary use of force that are raised by the appellant in his civil action. The 'same parties' requirement is also met in this case. The appellant was a party to the disciplinary proceedings by virtue of s. 69(3) of the *Police Services Act*, as were the two officers. The appellant was

also an active participant; he had the right to retain counsel, he testified, he cross-examined witnesses, and he made submissions on legal issues. He also participated in the appeal and the application for judicial review.

In determining whether to apply its residual discretion not to apply issue estoppel, the court should consider whether there is something in the circumstances of the case such that the usual operation of the doctrine of issue estoppel would work an injustice.

The catalogue of considerations is open-ended, especially when the findings relied on for the estoppel are made by an administrative tribunal. The determination of whether a court should exercise its discretion involves a qualitative assessment of the relevant considerations, not a mathematical one, and the court must examine the strength and importance of each factor. In this case, applying issue estoppel would not be unfair or unjust. Accordingly, the appeal is dismissed.

***BCE Place Limited v. Municipal Property Assessment Corporation*, 2010 ONCA 672**

Rosenberg, Armstrong and Juriansz JJ.A.

October 15, 2010

The respondent Municipal Property Assessment Corporation (“MPAC”) assessed the combined current value of several Toronto bank towers (“the Towers”) at approximately \$5 billion. The appellant owners of the Towers challenged these assessments before the Assessment Review Board (“the Board”). The parties disagreed about the proper interpretation of “current value” as defined in s. 1 of the *Assessment Act*:

“[C]urrent value” means, in relation to land, the amount of money the *fee simple, if unencumbered*, would realize if sold at arm’s length by a willing seller to a willing buyer. [Emphasis added.]

In the owners’ view, the word “unencumbered” required a valuation of the buildings without regard to the leases of its current residents; i.e., as if they were empty, and the Board agreed. MPAC and the City of Toronto appealed to the Divisional Court. The Divisional Court held that, when applied to income-producing properties, the value should be calculated without reference to leases at other than market value. It was not, however, to be based on the wholly artificial notion that the buildings were vacant at the time of assessment. The owners appealed. **Appeal allowed in part.**

The Divisional Court was correct in determining that the standard of review in this case is correctness. Considering the first stage of the *Dunsmuir* analysis, the Divisional Court has already found that the standard of review on questions of law is correctness, even where the Board is interpreting its home statute. If that is incorrect, and the second stage of the *Dunsmuir* analysis is required, the standard is still correctness. There was no privative clause and the Board did not apply any specialized expertise, but rather approached the question as would a court.

The Board’s decision on the interpretation of the phrase “fee simple, unencumbered,” was incorrect. A comparison of the definition of “market value” in the old Act and “current value” in the new Act supports the Divisional Court’s position that the 1997 amendments direct the assessor to ignore encumbrances, such as leases that are not at market rents, but not to assume that an income-producing property was vacant at the date of assessment.

In 2003, the respondent Mr. Vlachos was found not criminally responsible for shooting and killing his friend at a gym. Mr. Vlachos was suffering from persecutory delusory disorder. He was placed under the jurisdiction of the Ontario Review Board ("ORB") and, with the assistance of medication, made remarkable progress. In 2008, he was granted a conditional discharge.

In 2009, Mr. Vlachos' psychiatrist recommended an absolute discharge, but CAMH posited that he still represented a significant threat to the public because his past dealings with criminal organizations remained unclear. The ORB ordered an independent assessment of the extent of Mr. Vlachos' past criminal involvement and how this affected his risk to the public. The assessment accepted that Mr. Vlachos' prior descriptions of criminal involvement were the result of delusions, but also concluded that there was a serious risk of his committing acts of violence if he relapsed into his delusions.

Despite the assessment, a 4-1 majority of the ORB decided to grant Mr. Vlachos an absolute discharge. The majority noted that Mr. Vlachos had been symptom-free for at least four years and was willing to undergo intramuscular injections of his medication, so there was certainty that he would comply with his treatment plan. The likelihood of him suffering a relapse was not great. CAMH appealed the disposition order. **Appeal allowed.**

Majority (Weiler J.A.):

The decision of the ORB is unreasonable. The uncertainty surrounding Mr. Vlachos', which was the main reason why the ORB denied an absolute discharge in 2008, was not clarified by the assessment. Yet the majority granted an absolute discharge this time, despite finding that the assessment had not clarified Mr. Vlachos' past criminal involvement. The ORB's decision did not say why the unresolved concerns that they had expressed in both 2008 and June 2009 were no longer relevant to the assessment of Mr. Vlachos' risk to the public. The logical process by which the majority's conclusions were drawn contains a gap. This constitutes a reasoning error.

Dissent (MacPherson J.A.):

The ORB's reasoning process was as follows: (1) the assessment was not able to establish the nature and degree of Mr. Vlachos' criminal activity, if any, when he was a young man; (2) the ORB accepted the assessment's conclusion that Mr. Vlachos was "likely involved in a fringe way" with people engaged in criminal activities; (3) these previous criminal associations constituted anti-social activity that was relevant to the assessment of Mr. Vlachos' risk to the public; (4) an assessment of his overall situation after years of successful treatment supports the conclusion that the risk he poses is sufficiently minor to permit an absolute discharge.

It is possible to disagree with the result that flows from this reasoning. However, it is incorrect to say that there is an impermissible "gap" in the majority's reasoning process. Their reasoning is sound and does not reveal any defect in logic.

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