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Terminating the Employment of Public Office Holders

How has *Dunsmuir* Changed the Law?

*Marcia Jones**

Introduction

On January 15, 2008, the Government of Canada rescinded the designation of Linda Keen as President of the Canadian Nuclear Safety Commission (CNSC).¹ In announcing the decision to remove Ms. Keen, the Minister of Natural Resources stated that she had not “demonstrated the leadership expected” in the circumstances surrounding the extended shutdown of the Nuclear Research Universal Reactor at Chalk River, Ontario² and consequently, public confidence in the executive leadership of federal institutions had been “seriously eroded.”³ Nevertheless, Ms. Keen continues to maintain her status as a permanent member of the CNSC. She has filed an application for judicial review of the Government’s decision to revoke her designation as President.⁴

The controversial decision to remove Ms. Keen from the office of President raises more general questions as to the circumstances under which the Governor in Council can terminate the employment of a public office holder of a board, tribunal or commission such as the CNSC. Traditionally, there have been two major factors governing the removal of public office holders: (1) the terms and conditions of the appointment framework; and (2) the administrative law duty of procedural fairness. However, because of the Supreme Court of Canada’s decision in *Dunsmuir v. New Brunswick*,⁵ issued on March 7, 2008, the second factor – the administrative law duty of procedural fairness – will no longer apply in most cases involving the dismissal of a public office holder. Instead, the dismissal of a public office holder will be viewed through the lens of contract law. In the words of the majority of the Court, a dismissal will generally be treated as “a typical employment law dispute.”⁶ Nonetheless, *Dunsmuir* does leave open the possibility that the administrative law duty of fairness will apply in certain cases.

This article provides an overview of the principles governing the removal of office holders. It then provides a brief analysis of how *Dunsmuir* affects the law in this regard.



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Terms and Conditions of the Appointment

The first major factor governing the removal of an office holder is the appointment framework. The terms and conditions of appointment may be specified in the governing legislation, the Order-in-Council providing for the appointment, and any contractual or other supplementary documents. For instance, the legislation which provides for the appointment might specify that the appointee holds office “at the pleasure” of the Governor in Council, meaning that the person can be dismissed for virtually any reason.⁷ In the January 2008 decision of *Pelletier v. Canada (Attorney General)*,⁸ the Federal Court of Appeal described at pleasure appointments as being “open to termination at the will of the Government.”⁹ The Court described the termination of appointment of such an office holder in the following words:

...[N]o legislation restrains the powers of the appropriate Minister. What we have is a decision of cabinet, taken at the discretionary instigation of a Minister, aimed at removing a person appointed during pleasure (a person whose status is, by definition, precarious).¹⁰

Thus, section 24(1) of the federal *Interpretation Act*¹¹ provides that “words authorizing the appointment of a public officer to hold office during pleasure include, in the discretion of the authority in whom the power of appointment is vested, the power to ... terminate the appointment of or remove or suspend the public officer.”¹²

If the legislation is silent on the issue, the appointment is also generally deemed to be held at pleasure. The *Interpretation Act*, for instance, provides at section 22(1) that a public officer appointed under the authority of an enactment is deemed to be appointed for pleasure only, unless it is otherwise expressed in that enactment or in the terms of the appointment. This type of situation was considered in the case of *Houle v. Canada (Minister of Labour and Immigration)*.¹³

Houle was appointed as a member of the Immigration Appeal Board. He was then designated Vice-Chairman of the Board. Pursuant to the governing legislation, membership on the Appeal Board was to be held during good behaviour, subject to being revoked by the Governor in Council for cause. The legislation also authorized the Governor in Council to designate one of the members of the Board to be Vice-Chairman, but it did not indicate whether or not the designation to Vice-Chairman was also held during good behaviour.

Houle’s designation as Vice-Chairman was subsequently revoked; however, he did maintain his status as a member of the Board. Upon the joint application of Houle and the Government of Canada, the Federal Court was requested to determine the question of law as to whether the Governor in Council had the authority under the legislation to rescind the designation at pleasure, that is, without cause. The Court found that the Governor in Council did indeed have the authority to revoke the designation at pleasure. The Court held that if Parliament had wanted the designation of Vice-Chairman to be revocable only for cause, it would have specified this in the legislation. The fact that Parliament did not do so indicated to the Court that it intended for the designation to be held at pleasure. This decision was affirmed by the Federal Court of Appeal.¹⁴

However, in some cases, the governing legislation may specify that the appointment is held “during good behaviour” and be revocable only for cause. “Cause” for removal has been judicially interpreted to include bad behaviour,¹⁵ unfitness to continue serving in the position,¹⁶ and conduct that does not meet the standard of integrity necessary to maintain public confidence in the institution in question.¹⁷

Procedural Fairness

Traditionally, the second major factor governing the removal of public office holders has been the administrative law duty of procedural fairness. This has been the case since at least 1979, when the Supreme Court of Canada ruled in *Nicholson v. Haldimand-Norfolk Regional Bd. Of Commrs. of Police*¹⁸ that the safeguards of natural justice

must be observed in the dismissal of public office holders, regardless of whether the act of dismissal constitutes an administrative function on the part of the employer or a judicial or quasi-judicial function. In 1990, in the case of *Knight v. Indian Head School Div. No. 19*,¹⁹ the Court abolished the common-law principle that dismissal from public offices held “at pleasure” is at the unfettered discretion of the employer. It held that the duty of fairness presumptively governs such dismissals, unless this is explicitly or by necessary implication excluded by legislation or contract. The Court also elaborated on the circumstances under which a duty of fairness would be imposed. The content of the duty of procedural fairness is determined in accordance with the factors set out in the *Knight* case and further refined in subsequent Court decisions such as *Baker v. Canada (Minister v. Citizenship and Immigration)*.²⁰ At a minimum, procedural fairness generally requires that the holder of an office be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed.²¹

The procedural safeguards that are required in dismissal proceedings depend (among other things) on the appointment framework that applies to the office holder. In the *Pelletier* case, the Federal Court of Appeal commented that the decision to remove an “at pleasure” public office holder attracts only minimal procedural fairness requirements, even where misconduct is alleged. “We are here in the heart of the political sphere,” wrote the Court, “which is a sphere that courts, aside from ... minimal procedural fairness requirements ... avoid interfering in.”²² The Court ruled that the office holder was entitled to an informal hearing to attempt to change the mind of the responsible Minister, but that the Minister owed him no explanation as to why he refused to alter his decision in the end. Contrast this to the case of *Vennat v. Canada (Attorney General)*,²³ where the Federal Court ruled that an appointee holding office during good behaviour was entitled to a “personalized inquiry” by the Governor in Council before any decision was made to terminate his employment, as well as sufficient reasons for the decision.²⁴

However, with the Supreme Court of Canada’s decision in *Dunsmuir*, most public appointees will no longer be entitled to administrative law procedural fairness. This case is discussed in further detail below.

Dunsmuir: Factual Context

In February 2002, Dunsmuir was hired on a six-month probationary term as a Legal Officer with the New Brunswick Department of Justice. Shortly thereafter, he was appointed by Order-in-Council to the offices of clerk of the Court of Queen’s Bench and the Clerk of the Probate Court of New Brunswick.

In August 2004, the employer determined that Dunsmuir was not right for the position. It cancelled an upcoming performance review and terminated his employment with six months’ notice or pay in lieu thereof. The termination with notice was effected pursuant to section 20 of the *Civil Service Act*, which provided that termination of employment was governed by “the ordinary rules of contract.” The letter of termination informed Dunsmuir that his particular skill set did not meet the needs of the employer. It also stated that cause was not alleged. Following the end of the six-month notice period, Dunsmuir was removed from his statutory office by order of the Governor in Council.

Dunsmuir grieved the dismissal and the matter was referred to adjudication. Based on certain provisions of the *Public Service Labour Relations Act*, the adjudicator made a preliminary ruling that he had the jurisdiction to determine whether or not the dismissal was disciplinary in nature, even though it was made with six months’ notice or pay in lieu thereof, and cause for dismissal was not alleged. The adjudicator’s preliminary ruling was quashed on judicial review. At the Court, there were three concurring judgments, all of which were primarily concerned with reformulating the standards of judicial review in Canada and determining the appropriate standard of review for the adjudicator’s preliminary ruling.

More relevant for public office holders, however, is the Court’s unanimous²⁵ decision that no public law duty of procedural fairness was owed to Dunsmuir. This flowed from the second part of the adjudicator’s decision.

Despite his preliminary ruling, the adjudicator determined that the termination was not disciplinary, but based on the employer's concerns about Dunsmuir's work performance and his suitability for the positions he held. However, he found that Dunsmuir's rights to procedural fairness had been breached, and by way of remedy declared the termination was void *ab initio* and ordered Dunsmuir reinstated to the date of dismissal. In coming to this decision, the adjudicator relied on the *Knight* case for the relevant legal principles regarding the right of "at pleasure" appointees to procedural fairness. The adjudicator also held that in the event his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

Procedural fairness in dismissal proceedings

In a stunning break from years of administrative law jurisprudence, the Court repudiated the notion that public employees are generally entitled to procedural fairness in dismissal proceedings. The Court held that the *Knight* case was wrongly decided to the extent that it minimized the impact of employment contracts in dismissal proceedings. The Court noted that the majority in *Knight* relied on an old distinction between office holders and contractual employees as an important criterion for establishing whether a duty of fairness applied. However, the Court in *Dunsmuir* abolished the distinction between public office holders and contractual employees, on the basis that this distinction is difficult to make in practice and can no longer be justified in principle.

The Court first noted that most public office holders, like Dunsmuir, enjoy contractual protections against arbitrary dismissal, which calls into question the need for an additional right to procedural fairness. Furthermore, the Court ruled, where the employment relationship is contractual, the public authority is acting like any other employer in exercising its private law rights to dismiss the employee. The employee, in turn, has remedies in private law for the dismissal. The Court concluded that where a dismissal decision is made within the public authority's powers and is taken pursuant to a contract of employment, a duty of fairness does not apply.

In reaching its decision, the Court relied heavily on its 1999 decision in *Wells v. Newfoundland*.²⁶ In this case, a public office holder who held office during "good behaviour" for a fixed term was held to have a tenured position that entitled him to compensation when his position was eliminated by legislation. The Court held that Wells had a contract and was entitled to damages based on the loss of the chance to serve the full term of that contract. Major, J. for the Court emphasized that most civil servants have contractual relationships with their government employers, as there are negotiations leading to employment, as well as enforceable obligations on both sides. He declined to resolve the case on the basis of administrative law principles, since the contract of employment provided the remedy for the office holder. Nonetheless, in disposing of the case, Major, J., emphasized that the Crown is required to observe the principles of natural justice in its contractual dealings with its employees.

In the case of *Dunsmuir*, the Court went a step further, holding that the duty of fairness does not typically apply where contractual remedies are available. Applying this principle to Dunsmuir, the Court noted that Dunsmuir was protected by contract and was able to obtain contractual remedies in relation to his dismissal, including an increase in the notice period from six to eight months by the adjudicator. The Court concluded that the employer was within its rights under the *Civil Service Act* to dismiss him without a hearing with pay in lieu of notice. The public law duty of procedural fairness was not applicable.

Although the Court was clear in *Dunsmuir* that contractual law will govern most cases of dismissal, it did rule that the administrative law duty of procedural fairness will apply in some cases. It set out two situations where the duty will apply (leaving open the possibility that there may be others):

- (1) Where a public employee is not protected by a contract of employment, including judges, ministers of the Crown and others who fulfill constitutionally-defined state roles. Similarly, where the employee is "truly subject to the will of the Crown", the duty will apply. This type of case might arise where the office is held at the pleasure of the Governor in Council or where the terms of the office expressly provide for summary dismissal.

(2) Where the duty of fairness “flows by necessary implication” from the statute that governs the employment relationship. The Court gave the example of a House of Lords case in which the applicable statute provided that the dismissal of a teacher could only take place upon three weeks’ notice of the motion to dismiss. The House of Lords found that this necessarily implied a right for the teacher to make representations at the meeting where the dismissal motion was being considered; otherwise, there would have been no reason for Parliament to require advance notice.

Commentary

The duty of procedural fairness deals only with the process by which the government exercises its right to terminate an appointment, rather than the substance of the decision itself. The right to procedural fairness frequently does not provide much of a remedy for a public office holder, since the employer may exercise its right to dismiss the person provided it observes the proper procedures. Furthermore, because the content of the duty of procedural fairness depends on a myriad of factors and is variable, there is often uncertainty as to what steps the employer is required to take in order to lawfully dismiss the public office holder. Where employees already have contractual remedies, it seems unnecessary to add another layer to the analysis, particularly so where it may not provide much of a remedy for them in the end. For these reasons, *Dunsmuir* represents a welcome step forward.

Under the *Dunsmuir* decision, “at pleasure” appointees will generally be entitled to procedural fairness in dismissal proceedings, since they often have little protection against removal. Nonetheless, the right to procedural fairness will likely continue to provide something of an illusory remedy for such individuals. Quite apart from the issue of remedy, however, is the issue of whether “at pleasure” appointments should continue to subsist in Canada, at least with respect to certain positions. The question of whether Cabinet should have the discretion to dismiss public office holders for any reason it sees fit is certainly worth debating.

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¹ Natural Resources Canada, “Government of Canada rescinds the designation of President of the Canadian Nuclear Safety Commission (CNSC) and appoints interim president,” News release, Ottawa, January 15, 2008.

² The Reactor, operated by Atomic Energy of Canada, Ltd. (AECL), a Crown corporation, stopped production for scheduled repairs on November 18, 2007. Although it was expected to restart within five days, the CNSC, which is responsible for setting licensing, health and safety rules for the country’s nuclear facilities, refused to allow the reactor to restart after finding it had been operating without a backup emergency power system for cooling pumps for 17 months. In December, emergency legislation passed by Parliament bypassed the CNSC’s objections and allowed AECL to restart the reactor for 120 days in order to alleviate a medical isotope shortage caused by the reactor’s shutdown.

³ Natural Resources Canada, *supra* note 1.

⁴ Nelligan O’Brien Payne LLP, “Linda Keen seeks Federal Court review of her decision to terminate her role as President of the CNSC”, Media Release, February 15, 2008.

⁵ *Dunsmuir v. New Brunswick*, 2008 SCC 9 [hereinafter *Dunsmuir*].

⁶ *Dunsmuir*, *supra* note 5, par. 115.

⁷ See David J. Mullan, *Administrative Law*, Irwin Law, Toronto, 2001, p. 167. And see *Pelletier v. Canada (Attorney General)* [2008] F.C.J. No. 4 (F.C.A.) [hereinafter *Pelletier*].

⁸ *Pelletier*, *supra* note 7.

⁹ *Ibid.*, par. 32.

¹⁰ *Ibid.*, par. 55.

¹¹ R.S.C. 1985, c. I-21.

¹² The term “public officer” is defined in section 2(1) of the *Interpretation Act* as any person in the federal public administration who is authorized under an enactment to exercise a power, or to do or enforce the doing of any thing, or upon whom a duty is imposed by an enactment.

¹³ *Houle v. Canada (Minister of Labour and Immigration)* [1987] F.C.J. No. 164 (T.D.); affirmed 17 F.T.R. 159 (1988) (F.C.A.) [hereinafter *Houle*].

¹⁴ *Ibid.*

¹⁵ *Wells v. Newfoundland*, [1999] S.C.J. No. 50, par. 56 [hereinafter *Wells*].

¹⁶ *Ibid.*, par. 17.

¹⁷ *Wedge v. Canada* [1997] F.C.J. No. 872, pars. 30-33.

¹⁸ [1979] 1 S.C.R. 311.

¹⁹ *Knight v. Indian Head School Div. No. 19*, [1990] 1 S.C.R. 3 [hereinafter *Knight*].

²⁰ [1999] 2 S.C.R. 817.

²¹ *Vennat v. Canada (Attorney General)*, [2007] 2 F.C.R. 647 (T.D.), par. 72 [hereinafter *Vennat*].

²² *Pelletier*, *supra* note 7, par. 59.

²³ *Vennat*, *supra* note 21.

²⁴ *Ibid.*, par. 216.

²⁵ The majority reasons for judgment were delivered by Bastarache and LeBel JJ (with McLachlin C.J. and Fish and Abella JJ. concurring). Concurring reasons for judgment were written by Binnie J and another set of concurring reasons were written by Deschamps J. (Charron and Rothstein JJ. concurring). The concurring judges all agreed with the majority’s reasoning and disposition of the issue of procedural fairness; all judges were, therefore, unanimous on this aspect of the case.

²⁶ *Wells*, *supra* note 15.

Message from the Chair

*Andrew Wray**



In its recent *Dunsmuir v. New Brunswick* decision released on March 7, 2008, the Supreme Court of Canada once again confirms its intent to keep the practice of law interesting and dynamic for administrative law lawyers.

In the *Dunsmuir* case, the Supreme Court of Canada simplified judicial review in two specific and important ways with the laudable goal of simplifying judicial review in Canada. First, in *Dunsmuir*, the Court did away with the patent unreasonableness standard and limited future standard of review analysis to two standards: correctness and reasonableness (simpliciter). Second, the Court appears to be doing away with the long-standing “pragmatic and functional approach” in favour of the more simplified “standard of review analysis”. As administrative law practitioners, we will now have to wait to see how the simplification of standard of review analysis in Canada will unfold in practice. This new standard of review analysis from *Dunsmuir* will be the central focus at our Annual Judicial Review Update on September 18, 2008 and we invite you to join us for this interesting and exciting dinner program.

The *Dunsmuir* case also provides an in-depth analysis of procedural fairness in the context of the dismissal of public office holders. This is the subject of the feature article in this newsletter titled, “Terminating the Employment of Public Office Holders: How has *Dunsmuir* changed the law?” by Marcia Jones.

Our Section continues to focus its energy on providing high quality continuing education programs that keep OBA members and the profession in general, up to date on current developments in administrative law.

On February 5, 2008, we started the year with our Institute 2008 program entitled, “Practice before Administrative Tribunals: What Works?” This half-day program was co-chaired by John R. Higgins (Office of the Information & Privacy Commissioner/Ontario) and Robert H. Ratcliffe (Ministry of Attorney General-Crown Law Office Civil). The program was well-attended and offered practical advice on best practices before administrative tribunals. If you were not able to attend, you can order a copy of the program materials by contacting the OBA publications department or clicking on the following link: (<http://www.softconference.com/oba/publication.aspx?userID=226292705218587462008115400&code=08ADM0205c>)

I also invite you to join us for the following upcoming programs:

On Monday, April 28, 2008, the OBA Administrative, Environmental and Aboriginal Law Sections are co-hosting a dinner program, entitled “So You’re Appearing Before an Administrative Tribunal on an Aboriginal Law Matter: Practical Tips and Strategies” which I am co-chairing with Annie Thuan (Lang Michener LLP).

On Tuesday, May 6, 2008, the OBA Administrative Law Section is hosting a dinner program on, “Municipal Law/Administrative Law - Ethics, Administrative Law and Good Government” co-chaired by Carole Prest (Workplace Safety and Insurance Appeals Tribunal) and Hal Watson (O’Connor MacLeod Hanna LLP).

On Wednesday, June 11, 2008, join us for a half-day OBA-LSUC joint program on “Representing Clients in Ontario’s New Human Rights System”, which I am co-chairing with Jeffrey M. Andrew (Cavalluzzo, Hayes, Shilton, McIntyre & Cornish LLP) and David A. Wright (Vice-Chair, Human Rights Tribunal of Ontario).

On Thursday, September 18, 2008, join us for our Annual Judicial Review Update, co-chaired by John R. Higgins (Office of the Information & Privacy Commissioner/Ontario) and Robert H. Ratcliffe (Ministry of Attorney General-Crown Law Office Civil). This program is still in the planning stage, but given the recent, important changes to administrative law, we expect it to be a very interesting and informative session.

I hope to see you soon at one of our upcoming programs.

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Administrative Law Cases at the Court of Appeal for Ontario

*Benissa Yau, Evan van Dyk, David De Groot**

Current to February 29, 2008.

Recent Decisions

Oliveira v. Director, Ontario Disability Support, 2008 ONCA 123, on appeal from (2005), 205 O.A.C. 356 (Div. Ct.)

The appellant, Ms. Oliveira, is a person with a disability who shares joint custody of her three young children with her ex-spouse on an alternating week basis. She receives income support under the *Ontario Disability Support Program Act*, 1997, S.O. 1997, c. 25, Sch. B (“ODSP Act”). The ODSP Act is the Ontario government’s scheme for delivering social assistance to deserving applicants. Income support is calculated on a monthly basis and has three components: (1) a shelter allowance, intended for expenses such as rent, heat and hydro; (2) benefits, such as drug and dental coverage; and (3) basic needs, for expenses such as food and toiletries. The amount paid varies with the number of persons in a “benefit unit” that is, “a person and all of his or her dependants on behalf of whom the person receives or applies for income support”.

The Tribunal awarded the appellant full shelter allowance, full benefits allowance, but only 50% of the basic needs allowance. The reduction in the basic needs allowance was made because the appellant shared joint custody with her ex-spouse and therefore, as determined by the Tribunal, she did not have sole responsibility to provide for the children’s basic necessities full time. In addition, the parties’ separation agreement provided that all costs incurred while the children are in one parent’s care are to be borne solely by that parent. The Divisional Court dismissed her appeal.

The appellant argued that the Tribunal erred by finding that the children were “dependent” only part of the time, stating that there is no authority under the *Ontario Disability Support Program Act*, 1997, or its regulations to make this finding. She noted that since the children are dependent half of the time, she should be entitled to the full basic needs allowance. The appellant further submitted that there is no mechanism in the *Act* or the regulations for calculating income support in the manner prescribed by the Tribunal.

The appellant’s appeal was dismissed. The joint custody arrangement in place here was not contemplated by the *Act* or the regulations. In such circumstances, the Tribunal has the authority to go beyond its enabling statute. Here, in the absence of specific statutory direction, the legislation governing benefits had to be adjusted. The approach adopted by the Tribunal embodied fairness and flexibility, properly accounting for the appellant’s economic reality and particular circumstances. The Tribunal recognized that the appellant should receive her full shelter cost because she had to pay for shelter 12 months of the year, regardless of the custody arrangement. The Tribunal also awarded full benefits after hearing evidence that the appellant’s ex-spouse did not have benefits and to ensure that the children had appropriate medical coverage. However, the basic needs allowance, which extends to cover expenses such as food and toiletries, is a variable cost fully dependent on when the appellant has custody of the children. The Tribunal’s determination ensures effective service to the appellant in accordance with the purpose of the *Act* found in section 1. Overall, the Tribunal properly exercised its jurisdiction to order payment of 50% of the amount of the basic needs component of income support under the *Act*.

Street v. Ontario Racing Commission, 2008 ONCA 10, on appeal from [2007] O.J. No. 3908 (S.C.J.)

The appellant, Kenneth Street, was thrown while exercising a race horse at Woodbine Race Track and was paralyzed. Contrary to regulations promulgated by the governing body, the Ontario Racing Commission, his employer did not have Worker's Compensation coverage. He sued the trainer who had hired him, the owners of the horse, the Ontario Jockey Club (which owns Woodbine) and the Ontario Racing Commission for damages equal to the amount of benefits he would have received. His claim succeeded only against the trainer. He appealed the dismissal of his claim against the Commission and the Jockey Club.

The appeal was dismissed. In this case, a duty of care must be established with reference to the *Anns/Cooper* test. Although the appellant's loss was foreseeable if the Racing Commission's regulations were not followed, there are residual policy factors that suggest a duty of care should not be imposed. The Racing Commission owes a duty to the public at large which are incompatible with the imposition of a private law duty of care to specific individuals. Nor was the Jockey Club under an obligation to the appellant to enforce the Racing Commission's rules.

Carsons' Camp Ltd. v. Municipal Property Assessment Corporation, 2008 ONCA 17, on appeal from (2006), 49 R.P.R. (4th) 288 (S.C.J.)

Carsons' Camp is a campground on the shores of Lake Huron. In addition to campsites for regular campers, the campground contains a number of sites that are rented out to individual trailer owners from May 1 to October 15 of each year. The Municipal Property Assessment Corporation determined that 229 of the trailers located on Carsons' property were placed there with sufficient permanency to be considered part of Carsons' land for the purpose of assessment under the *Assessment Act*. Despite conceding permanency, Carsons' argued that the value of the trailers should nonetheless not be included in its property tax assessment by virtue of a 1997 amendment to the *Act*.

In the *Act*, "land" is broadly defined to include "all buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to land". This broad definition of "land" has existed since its introduction in 1904, and it means that certain items not considered fixtures at common law could nonetheless be considered part of the land for the purpose of valuation, so long as they are placed upon or affixed to land with some degree of permanency.

In 1997, the *Act* was amended to change the basis for valuation from "market value" to "current value". Prior to 1997, "market value" was defined as "the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer". Since 1997, "current value" is defined to mean, "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".

Carsons' argued that this change in wording to include the term "fee simple" in the definition of "current value" indicates an intention to exclude from assessment anything that would not be considered land at common law. They further argued that the failure to change the definition of "land" to coincide with this more limited interpretation was simply an oversight. The application judge agreed, as he was unable to reconcile the expanded definition of "land" and the definition of "current value". He concluded that the 229 trailers could not be assessed and taxed as land because they did not form part of the "fee simple" of Carsons' property.

The appeal was allowed. Justice Rouleau held that there was nothing on the record to suggest that the legislature intended to change what is to be included in the assessed value of land. If the legislature had intended to do so, it would have changed the definition of land in the *Act* to make it coincide with the common law definition of land. This was not a mere oversight. The change from "market value" to "current value" and reference to

“fee simple” were not included to change what is to be included in the assessed value, but merely contemplates identifying what is land according to the expanded definition, then assessing the value of the land assuming a fee simple ownership interest without encumbrance of all that comes within the definition.

There are strong policy reasons for interpreting the Act this way. The dominant owner of the freehold is easily identified. This approach makes it easier to assess the total value of the land, while also preventing manipulation of assessed value by changing the ownership of parts of the land. Further, the freehold owner controls what is included in the assessed value because he or she controls what is placed on the land and on what terms.

Carsons’ cross-appealed, taking the position that the assessment of the 229 trailers is an indirect tax that is beyond the legislative competence of the province. The cross-appeal was dismissed. The tax at issue has all the hallmarks of a true land tax, which is within the competence of the province. The fact that the tax may be recouped from a third party does not change the nature of the tax and make it indirect; on the contrary, landlords almost always recoup realty taxes from tenants in some manner.

Carsons’ further argument that taxation of the trailers is not authorized by statute and therefore contravenes s. 53 of the *Constitution Act* was also rejected. The *Act* authorizes the levy of realty taxes against the owner of the freehold for the assessed value of land as broadly defined in the statute. Once a trailer comes within the definition of land, it is included in the assessed value without regard to the ownership of the trailer. Both prior to and following the 1997 amendments, the *Act* provides the statutory basis for the taxes in question.

Ontario Provincial Police v. the Cornwall Public Inquiry, 2008 ONCA 33, on appeal from (2007), 229 O.A.C. 238 (Div. Ct.).

The Cornwall Public Inquiry was set up to inquire into and report on allegations of abuse of young people in Cornwall, and the response of the justice system and other public institutions to the allegations. The Commissioner decided to admit the testimony of a woman and her mother about abusive, insensitive and unprofessional treatment she allegedly received at the hands of an officer of the Ontario Provincial Police after they took a complaint from her that she had been sexually assaulted by two teenage boys.

The police appealed, supported by the Attorney General, arguing that the Order in Council establishing the Commission restricts its subject matter to allegations of abuse of youth in the Cornwall area by persons who were in positions of trust or authority, and which were reported to a public institution a considerable time after the abuse occurred. The Divisional Court upheld the Commissioner’s decision.

The appeal was allowed. Justice Moldaver held that the Divisional Court erroneously employed a deferential approach to reviewing the Commissioner’s decision on the inquiry’s subject matter. A reviewing court owes a commissioner of a public inquiry no deference on this issue, since a commissioner commits jurisdictional error by defining the commission’s subject matter incorrectly.

The Commissioner in this case misconstrued the Order. He failed to consider the context and circumstances leading to the Commission’s creation. As the OIC’s use of the terms “historical” and “abuse” are equivocal, the Commissioner was entitled to and should have looked beyond the document’s text for assistance in interpreting its meaning. The order’s preamble and the Hansard reveal that the legislature appointed the inquiry in response to a specific factual matrix. It is therefore evident that the legislature’s intent in appointing the inquiry was focused on this factual context.

The Commissioner’s analysis erroneously focused on the general language concerning allegations of abuse in the first sentence of the OIC’s preamble, and ignored the second sentence, which narrows the scope of the first

sentence. He improperly read in isolation one paragraph of the OIC instead of reading it harmoniously with reference to the document as a whole, and failed to interpret the OIC in a manner that was reasonable and within the contemplation of the legislature. Instead, the Commissioner took a view of his mandate that runs the risk of standing the inquiry's main focus on its head and creating an unmanageable mega-inquiry that would diminish the Commission's ultimate value.

Properly construed, the OIC empowers the Commissioner to look into and report on institutional responses—past, present and future—relating to allegations of historical abuse of young people in the Cornwall area by persons in authority or positions of trust that include the allegations investigated in Project Truth, as well as any similar allegations. The evidence at issue in this case therefore does not come within the subject matter assigned to the Commissioner by the OIC, and the Commissioner exceeded his jurisdiction in hearing it on that basis.

Decisions on Reserve

City of Toronto Economic Development Corporation v. Showline Ltd. et al; City of Toronto Economic Development Corporation v. Information and Privacy Commissioner, on appeal from [2006] O.J. No. 4615 (Div. Ct.). Heard November 9, 2007.

The City of Toronto Economic Development Corporation (TEDCO) is a corporation wholly owned by the City of Toronto. All 11 members of TEDCO's board of directors are appointed by City Council. The directors appoint and remove the corporate officers. TEDCO owns land in the waterfront area for the purposes of fostering rehabilitation and development. In 2003, TEDCO sought proposals to build a film sound stage in the Port Lands. Showline Ltd. sought access to information about TEDCO's operation. TEDCO refused to produce it, arguing that it operates at arm's length from the City of Toronto and is not subject to the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA). Showline applied to the Information and Privacy Commissioner for a ruling that the information should be produced.

The Commissioner held that TEDCO was subject to the MFIPPA. According to the Commissioner, information statutes should be broadly interpreted. In this case, section 2(3) of the MFIPPA states that a wholly-owned corporation is part of the municipality and subject to the Act if all of its officers are appointed by or under the authority of City Council. In this case, since the directors are all appointed by City Council, and they are the directing minds who appoint the officers, the officers are appointed under the authority of City Council and the corporation is subject to the Act. TEDCO applied for judicial review to the Divisional Court.

A majority of the Divisional Court held that the term "officers" should have the same meaning in the MFIPPA as it does in Ontario's *Business Corporations Act*. According to this definition, TEDCO's "officers" are not appointed directly by City Council. To bring TEDCO within the wording of s. 2(3) of the MFIPPA, the power to appoint officers would have to be specifically conferred on the City of Toronto. In dissent, Justice Chapnik, came to the opposite conclusion. She held that the legislation ought to be given a "large and liberal interpretation" to achieve its ends. Accordingly, there was no reason to use the definition of "officers" from the OBCA. Even if that definition was used, however, the fact that City Council appoints all the directors who in turn appoint the officers suggests that the officers are appointed under the authority of City Council.

Showline Ltd. and the Commissioner appeal the Divisional Court's decision, and submit that the Court of Appeal should hold that TEDCO is deemed to be part of the City of Toronto under s. 2(3) of MFIPPA.

Canadian Alliance of Pipeline Landowner's Association et al. v. Enbridge Pipelines Inc. and TransCanada Pipelines Limited, on appeal from [2006] O.J. No. 4999 (S.C.J.). Heard December 18, 2007.

The Canadian Alliance of Pipeline Landowners' Associations ("CAPLA") is an umbrella organization that represents agricultural landowners with respect to energy pipelines. Enbridge Pipelines Inc. and TransCanada Pipelines Limited have easements to operate pipelines on the land of CAPLA members. Recent environmental regulations designed to protect aging pipelines have limited agricultural landowners' abilities to use and enjoy their land. CAPLA initiated two proceedings. First, they brought a motion requesting class certification for all agricultural landowners in Canada who have owned lands subject to pipeline easements from and after June 1, 1990. Second, the Appellants filed a notice of arbitration with the Minister of Natural Resources. The Minister dismissed the notice of arbitration. Following the Minister's decision, Justice MacDonald granted summary judgment, on the grounds of *res judicata*, in the class action proceeding. CAPLA appeals this order.

The administrative law issue in this appeal is whether CAPLA's claim is properly before the courts as a common law dispute over easements, or whether CAPLA should be estopped from appealing Justice MacDonald's order because the matter should be addressed by the *National Energy Board Act's* arbitration scheme and the reasoning in *Balisky v. Canada (Minister of Natural Resources)*, [2003] F.C.J. No. 341 (C.A.).

Flora v. General Manager, Ontario Health Insurance Plan, on appeal from [2007] O.J. No. 91 (Div. Ct.). Heard January 21, 2008.

In 1999, Mr. Flora was diagnosed with liver cancer. After consulting several Ontario doctors, he was told that he was not a suitable candidate for a liver transplant and was given six months to live. Mr. Flora explored his options in other countries. His research led him to Cromwell Hospital in London, England, where he underwent chemoembolization and living-related liver transplant ("LRLT") from his donor brother. Mr. Flora sought reimbursement through Ontario Health Insurance Plan ("OHIP"). OHIP denied his request. He therefore sought a review of the decision by the Health Services Appeal and Review Board. A majority of the Board confirmed OHIP's decision on the basis that the treatment was not generally accepted in Ontario as appropriate for a person in the same medical circumstances as Mr. Flora and so the treatment was not an insured service.

The Divisional Court dismissed Mr. Flora's appeal. The Board's decision was reasonable. The Board carefully examined the medical evidence and accepted the evidence of the Ontario specialists that LRLT was not appropriate for a person in Mr. Flora's medical circumstance. The court did not agree that appropriateness of a treatment should be determined based only on potential benefit to a patient. Medical decision-making also requires consideration of resource allocation, a naturally limited supply of donor organs, survival outcomes and ethical considerations. The test of whether a given treatment is "appropriate" is a factual one depending on the evidence. The court rejected Mr. Flora's s. 7 *Charter* argument that the regulation under the *Health Insurance Act* which imposes a limit on funding for medical treatment obtained outside of the country is inconsistent with the *Charter*. Mr. Flora's s. 7 rights were not engaged because the regulation did not create an impediment to individuals in securing out-of-country treatment. Section 7 does not create a positive obligation on the part of the government. Further, the Supreme Court of Canada has explicitly stated that there is no constitutional right to state-funded health care.

Mr. Flora appeals the decision, arguing that the correct standard of review that should have been applied by the Divisional Court is one of correctness, not reasonableness, and that in any case, the Board's decision was unreasonable. He also pursues his argument that the regulation in question is inconsistent with the *Charter*.

Ontario Racing Commission v. O'Dwyer, on appeal from [2006] O.J. No. 4367 (S.C.J.). Heard January 29, 2008.

Mr. O'Dwyer is a 56 year-old man who has been involved in Standardbred Horse Racing throughout his life. Since 1977, he had been licensed by the Ontario Racing Commission ("Commission") in various capacities. From 1990 until 2002, he served as an official at the Rideau Carleton Raceway ("Raceway") in Ottawa.

In 2003, a few weeks before the season was to begin, Mr. O'Dwyer was informed by the General Manager of the Raceway, Ron Barr, that the Raceway could not hire him for the season because the Commission would not renew his license. Mr. O'Dwyer then telephoned Bill Fines in Toronto, who was the Superintendent of Racing, to inquire about the licence. He was informed that he was under investigation for secret ownership of a horse owned by his stepdaughter.

In the usual course, the Raceway would submit a list of officials for the season, and the Commission would then approve or disapprove of the list. In 2003, the Raceway was late in submitting its list to the Commission. Based on a preliminary investigation report, Mr. Fines took it upon himself to speak to Mr. Barr. Mr. Fines telephoned Mr. Barr for the purpose of informing him that if Tom's name were placed on the list of officials it would not be approved by the Commission and that the Raceway would have to find another starter. As a result of the call, Tom was deprived of his work as starter and patrol judge at the Raceway. Subsequent to Tom's termination, there were various communications between himself, his counsel and the Commission, but Tom was unable to receive any concrete answers or a resolution of his licence status.

At the trial of Mr. O'Dwyer's action against the Commission, the trial judge found that the Commission was playing games with Mr. O'Dwyer; they gave him unsatisfactory answers and never resolved the issue they raised about secret ownership even though the case against Mr. O'Dwyer was woefully lacking. Further, the trial judge found that Mr. Fines knew he did not have the statutory authority to make the telephone call to Mr. Barr, and also knew that it was likely to injure Mr. O'Dwyer. He granted Mr. O'Dwyer damages in the amount of \$50,000 for intentional interference with economic relations, inducing breach of contract and misfeasance in public office.

The Commission appeals on various grounds, including the argument that the telephone call was not an illegal act. The Commission has a great breadth of jurisdiction in governing, directing, controlling and regulating horse racing. Mr. Fines testified that his job required him to speak to track management on a regular basis regarding all issues at the racetrack. In this case, an important contextual factor in assessing the legality of the phone call is the fact that Rideau-Carleton was two weeks late in its application.

Mills v. Workplace Safety and Insurance Appeals Tribunal, on appeal from the Superior Court of Justice. Heard February 1, 2008.

Mr. Mills hurt his back in 1979 while working as a driver at a dairy. He was attempting to load a freezer onto a truck when the tailgate collapsed. He filed a Workers' Compensation report, took two weeks off (but received no benefits) and returned to work, eventually to regular assignments. In 1988, he was laid off and worked at a grocery store and as a truck driver until 1993. In 1990, Mills' family doctor referred him to an orthopaedic specialist, Dr. Jacqmin, because of complaints of back pain. In 1991, he was treated for severe back pain and diagnosed with a disc protrusion. In 1993, Mills filed a request with the Workers' Compensation Board (the "Board") to have his medical appliances (for at-home traction) paid for and for a permanent disability benefit. Mills' medical record made no mention of back pain from 1979 to 1990. His family doctor is now deceased, but Mills testified that he told his doctor not to note his complaints of back pain in his record for fear it would interfere with his truck driver's licence; he had been told by his doctor that there was nothing to be done about the pain anyway.

The Board found that Mr. Mills did sustain a lumbar strain in the 1979 incident, but that based on the preponderance of evidence, it was a minor incident and not causally related to the present back problems. The Board's decision was upheld on the same grounds four years later, in 1997, by an Appeals Officer.

The Tribunal also found that there was no causal connection between the 1979 accident and the current disability. Although Dr. Jacqmin gave his view that the degenerative disease diagnosed in 1991 was caused by the 1979 accident, this is not supported by the record – specifically, that no disc disease was found in 1979, that he continued to work in the same job for nine of the next 12 years, and that he regularly underwent medical examinations with no back problems recorded. He also continued to enjoy sports and activities not compatible with a history of back pain. A request to reconsider the Tribunal's decision was refused.

The Divisional court allowed Mr. Mills' application for judicial review and ordered that he is entitled to a permanent disability assessment. The standard of review is patent unreasonableness. There were several errors in fact-finding made by the Tribunal. Taken together, they influenced the findings of the Tribunal that the current problems were not causally connected to the accident. For example, the Tribunal relied on the erroneous assumption that every person experiencing pain will seek a medical solution, despite the evidence of Mr. Mills explaining why he did not; his evidence was not found to be unreliable or incredible. As well, there is no evidence to support the conclusion that the activities engaged in by Mr. Mills were inconsistent with his history of back pain. Further, there was no reason to reject Dr. Jacqmin's medical evidence on causation; there was no other evidence to refute his conclusion. While the Tribunal is entitled to reject medical opinion which is contrary to the evidence or which conflicts with other medical evidence, that was not the case here. The finder of fact substituted his personal opinion for the medical evidence.

The Tribunal appeals on the basis that the Divisional Court had applied a standard of correctness rather than patent unreasonableness.

Canadian General-Tower Limited v. United Steel Workers, Local 862, on appeal from [2007] O.J. No. 1973 (Div. Ct.). Heard February 7, 2008

As a result of a downturn in business, Canadian General-Tower Ltd. eliminated a shift of operation and gave 23 employees lay-off notices. The laid-off employees maintained their recall rights, but Canadian General began to offer career transitioning counselling and issued records of employment. The United Steel Workers, Local 862 met with Canadian General to discuss whether the laid-off employees were entitled to supplementary unemployment benefits. Canadian General decided that no benefits were payable as the employees had been permanently laid-off. The Union filed a grievance. Forty-five to 49 weeks after they were laid-off, 22 of the 23 employees were recalled. The labour arbitrator heard the dispute after these events.

The labour arbitrator decided that the laid-off employees were entitled to supplementary unemployment benefits. He held that *London Machinery v. CAW*, [2004] O.J. No. 4185 did not establish that recall rights are expunged after the 35 weeks. As well, he held that the federal government's *Employment Insurance Regulations* only provided helpful guidance and were not legally binding. Finally, the arbitrator stated that since rights of recall are always subject to the vagaries of business, Canadian General could not suggest that the laid-off employees had no hope of ever returning. Canadian General applied to the Divisional Court for judicial review.

The Divisional Court dismissed the application. It held that the matter in question went to the heart of the expertise of labour arbitrators, and that the appropriate standard of review was patent unreasonableness. While the arbitrator erred in his comment that the *Employment Insurance Regulations* are not law, the arbitrator's error did not produce a patently unreasonable result. Rather, the arbitrator appropriately considered the factual background to the layoffs, analyzed the evidence before him and concluded that the employees in question were

experiencing a “temporary stoppage of work”. The Divisional Court concluded that the arbitrator’s determination that a “temporary layoff” must be defined with reference to the recall rights under the collective agreement and the actual experience of the parties was not patently unreasonable. Canadian General appeals to the Court of Appeal.

On appeal, Canadian General submits that the Divisional Court erred by not holding: the *Employment Insurance Act* not the *Employment Standards Act* governs the Supplementary Unemployment Benefits Plan; the arbitrator’s decision on this issue is subject to a standard of review of correctness; and the arbitrator’s decision was incorrect based on *London Machinery v. CAW* and the federal regulations and guidelines to the *Employment Insurance Act*.

Appeals Scheduled for Hearing

Debbie Sheldrick v. Director of the Ontario Disability Support Program of the Ministry of Community and Social Services, on appeal from [2007] O.J. No. 1276 (Div. Ct.)

In 2003, Ms. Sheldrick applied for disability benefits under the *Ontario Disability Support Program Act, 1997* (“ODPSA”). She relied on a variety of medical ailments to support her application. First, following an accident, her left third finger was amputated, and she continues to experience “pins and needles” in her finger and intermittently in her arm. Second, she suffers from tremors in her hands, neck and head. The tremors are treated by medication, which causes her to be confused and sleep a lot. Third, she experiences neck pain, which is treated with a heating pad. Finally, she says she has had anxiety/depression all her life, which is also treated with medication. Despite the above ailments, Ms. Sheldrick cares for herself and her disabled husband.

The Director of the Disability Support Program (the “Director”) denied Ms. Sheldrick’s request. Ms. Sheldrick appealed to the Social Benefits Tribunal. The Tribunal confirmed the Director’s decisions. It held that while Ms. Sheldrick’s ailments compromised her ability to function and were recurrent and expected to last more than one year, there was insufficient evidence to conclude that the impairments were “substantial physical or mental impairments”. Accordingly, Ms. Sheldrick did not qualify for benefits under s. 4(1) of the ODPSA. Ms. Sheldrick appealed to the Divisional Court.

The Divisional Court reversed the Tribunal’s decision and declared that Ms. Sheldrick was entitled to income support. The Divisional Court based its opinion on the evidence of two doctors who concluded that Ms. Sheldrick was unable to work because of her ailments.

The Director appeals the Divisional Court’s decision on three grounds. First, the Divisional Court failed to apply the two part test required by s. 4(1) of the ODPSA. Second, the Divisional Court gave undue weight to the two doctors’ opinions. Third, even if the Divisional Court was correct, the Divisional Court should have referred the matter back to the Tribunal.

Bryce Mulligan, Mathew Hunter and Hsia-Pai Patrick Wu v. Laurentian University, on appeal from [2007] O.J. No. 3135 (Div. Ct.)

In 2006, Bryce Mulligan, Mathew Hunter and Hsia-Pai Patrick Wu applied to the two-year Masters of Science in Biology Program at Laurentian University. All three students wanted Dr. Persinger to act as their supervisor, and he agreed to do so. When the students chose Dr. Persinger, they knew that he had lost his animal research privileges. Also at the time they applied, the three students were plaintiffs in a civil claim against the University related to their inability to perform animal research, under the supervision of Dr. Persinger, during their undergraduate degrees at the University. The Biology Program recommended the three students’ admission to

the graduate program. The Oversight Committee, two of whose members were defendants in the students' civil claim, was concerned about whether the students would have sufficient financial support because Dr. Persinger was not able to provide funding. In response, the students obtained letters guaranteeing financial support from their parents; the letters were provided to the Oversight Committee. The Oversight Committee denied the students' applications based on the Department's funding regulation.

Almost eight months later, the students applied for judicial review of the decision. They sought an order requiring the University to admit them for the upcoming academic year, and a declaration that the Department's funding regulation was of no force and effect and does not prescribe any admission requirement. The students also argued the Oversight Committee's decision was the product of bias.

The Divisional Court dismissed the application for judicial review. It held that the *Laurentian University of Sudbury Act* did not attract the remedies of *certiorari* and *mandamus*. Rather, judicial interference was only available if the applicants could demonstrate that there had been a flagrant violation of the rules of natural justice. On the issue of the degree of procedural fairness, the Divisional Court held that Laurentian's admissions procedure required only minimal procedural fairness. The applicants did not establish that they were treated with manifest unfairness or that they were the victims of bias.

The students appeal the Divisional Court's decision on several grounds. First, the Divisional Court failed to recognize that enacting an admission requirement under the *Laurentian University of Sudbury Act* is a "statutory power of decision". Second, the Court failed to recognize that the Policy was not binding because it was not passed by the University's Senate. Third, the Court erred in imposing the high threshold of "manifest unfairness" in reviewing admissions decisions. Finally, the Court failed to evaluate the evidence of bias.

Joe Rodrigues v. Workplace Safety and Insurance Appeals Tribunal, on appeal from [2007] O.J. No. 3371 (Div. Ct.)

Mr. Rodrigues worked as a roofer before a fall left him permanently disabled and unable to work. During his employment, Mr. Rodrigues was paid an hourly wage, and his employer contributed to a multi-employer pension plan and a multi-employer benefit plan. After his injury, Mr. Rodrigues applied for and received future economic loss benefits from the Workplace Safety and Insurance Board. These benefits were based on Mr. Rodrigues' "earnings", which included "any remuneration capable of being estimated in terms of money but does not include contributions under section 25..." (i.e. his hourly wage). Pursuant to s. 25(4) of the *Workplace Safety and Insurance Act*, the pension and benefit plans paid Mr. Rodrigues' contributions for one year. When the year expired, the plans ceased making these contributions. Mr. Rodrigues' applied to have his future economic loss benefits adjusted based on the value of his employer's pension and benefits contributions prior to his injury. The Claims Adjudicator denied his request. The Appeals Resolution Officer upheld this decision. Mr. Rodrigues appealed to the Workplace Safety and Insurance Appeals Tribunal.

The Tribunal noted that the *Act* requires the Tribunal to apply Board policy. In this case, Operational Policy 4.1 applied. This Policy included a comprehensive list of payments defining "earnings". Importantly, benefit and pension payments were not on the list. The Tribunal also noted that the listed payments were all taxable benefits, whereas pension and benefit payments are not taxable. Accordingly, the Tribunal concluded that an employer's pension and benefit contributions could not be included when calculating an applicant's "earnings". Mr. Rodrigues appealed to the Divisional Court.

The majority of the Divisional Court allowed the appeal. It held that the legislative history of the *Act* demonstrated that the exception for pension and benefit payments in the definition of the term "earnings" was designed to prevent both the employer and the WSIB from paying for an employee's pension and benefit payments. The

failure to consider this legislative history was an error of law, which deprives the decision of deference. In dissent, Swinton J. held that the Tribunal's decision was not patently unreasonable and the decision was within the Tribunal's specialized jurisdiction.

The Tribunal raises the following issues on appeal: how much deference is owed to the Tribunal's interpretation of a central provision of its governing statute; did the failure of the Tribunal to consider the legislative history of its governing statute render its decision clearly irrational; and, what is the proper interpretation of "earnings" under s. 2(1) of the Act.

Toronto Police Services Board v. Information and Privacy Commissioner for Ontario and James Rankin, on appeal from [2007] O.J. No. 2442 (Div. Ct.)

Mr. Rankin is a reporter for the Toronto Star. In 2002, he wrote a series called "Race and Crime", which reported that the Toronto Police's criminal investigation activities were racially motivated. The series was based on data Mr. Rankin had obtained from police databases pursuant to a request under the *Municipal Freedom of Information and Protection of Privacy Act*. Before providing him with the data, the police removed all personal information to protect the privacy of the suspects. A storm of controversy erupted when the series was published. The police asserted that the statistics were misconstrued since the databases contained duplicate entries for the same suspects. In 2003, Mr. Rankin made a second request to update his information. This time, to prevent the problem of duplicate entries, Mr. Rankin requested that the police replace suspects' names with randomly generated unique identifiers. The police denied the second request on the basis that since the records did not exist in the requested format, they were not "records" as defined in the *Act*. Mr. Rankin appealed the police's decisions to the Information and Privacy Commissioner.

The Commissioner granted the appeal and held that since the requested records were "capable of being produced", they qualified as "records" under the *Act*. The Commissioner also concluded that since an institution was permitted to charge a fee for developing a computer program to produce electronic records, the police were obliged to do so if it did not unreasonably interfere with their operations. The Toronto Police brought an application for judicial review of the Commissioner's decision.

The Divisional Court allowed the application. During oral argument, the Court told counsel for the Commissioner that it did not need to hear from him since the standard of review was already settled as being reasonableness. Later, in its written reasons, the Court held that the Commissioner's decision was unreasonable because he had failed to consider whether the required computer program was "normally used by the institution" as required by the *Act* (an issue not discussed by either party). As well, since the Divisional Court found that the police did not "normally use" the relevant computer program, they did not refer the matter back to the Commissioner. Both Mr. Rankin and the Commissioner appeal the Divisional Court's decision.

On appeal, the following issues have been raised. First, did the Divisional Court err in applying a standard of review of correctness when the appropriate standard of review is reasonableness? Second, did the Divisional Court err in quashing the Commissioner's order on a basis that was not raised? Third, did the Divisional Court err in its interpretation of the *Act*? Fourth, did the Divisional Court err in not remitting the matter back to the Commissioner for consideration?

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Administrative Law Cases at the Supreme Court of Canada

*Sebastian Spano**

Current to March 27, 2008.

Recent Decisions

Dunsmuir v. New Brunswick, 2008 SCC 9

Under the *Public Service Labour Relations Act*, R.S.N.B., 1973, c. P-25, non-unionized civil servants in New Brunswick may initiate a grievance to an adjudicator in respect of a discharge, suspension or other employment matter. The Appellant, a non-unionized Legal Officer employed with the Department of Justice, was terminated from his employment with four and one half months pay in lieu of notice. The adjudicator assigned to hear the grievance ruled in a preliminary decision that he had jurisdiction to inquire into the reasons for the discharge and whether there was cause. The Province argued that as the Appellant was not discharged for cause, it was irrelevant whether there were sufficient grounds for discharge and, therefore, the adjudicator's jurisdiction was limited to assessing the reasonableness of the notice period. In a second decision, the adjudicator ruled that, as an "at pleasure" appointee, the employee was owed a duty of procedural fairness, which was not provided. The dismissal was ruled void *ab initio* and the employee was ordered reinstated. On judicial review, the reviewing judge set aside the decision, holding the adjudicator's preliminary decision to a standard of correctness. The adjudicator was held to have no jurisdiction to determine whether procedural fairness had been accorded. The adjudicator also erred in reinstating an "at pleasure" appointee. The Court of Appeal held that the appropriate standard of review was reasonableness, but the adjudicator's decision failed to meet that standard.

The appeal was dismissed with joint reasons by Bastarache and LeBel JJ. (McLachlin C.J. and Fish and Abella JJ. concurring), concurring reasons by Binnie J., and concurring reasons by Deschamps J. (Charron and Rothstein JJ. concurring). There ought to be only two standards of review: correctness and reasonableness. An exhaustive review is not always required to determine the standard of review. Constitutional questions will necessarily be subject to a correctness standard, as will determinations of true questions of jurisdiction or *vires*. Questions of general law that are of "central importance to the legal system as a whole and outside the adjudicator's specialised area of expertise" are subject to the correctness standard as well as questions regarding the jurisdictional boundaries between two or more competing specialized tribunals. The judicial review process should involve two steps: first, determine whether the jurisprudence already establishes the appropriate degree of deference to be accorded a tribunal; second, if the first inquiry does not reveal a satisfactory answer, a pragmatic and functional analysis is to be conducted, focusing on the factors established in *Pushpanathan* to identify the proper standard of review.

The distinction between office holders and contractual employees for the purpose of the public law duty of procedural fairness should be abandoned. The proper approach in determining the nature of the employment relationship is to begin with the assumption that most public employment relationships are contractual. In this case, disputes relating to dismissal should be resolved in accordance with the terms of the contract, whether expressed or implied, and any applicable employment statutes or regulations. No additional public law duty of fairness would apply in these employment relationships. In limited circumstances, a public law duty of fairness will apply: where a public employee is not protected by a contract of employment; and, in the case of a special class of office holder such as a judge, a minister of the Crown and others who "fulfill constitutionally defined state roles." In addition, where the terms of employment of some public office holders expressly provide for summary dismissal or are silent on the matter, the office holder may be deemed to hold office "at pleasure." Procedural

fairness will be required in those cases. Similarly, where a duty of fairness “flows by necessary implication from a statutory power governing the employment relationship,” some degree of procedural fairness will be required depending upon the context and specific wording of the statute.

Decisions on Reserve

Société de l'assurance automobile du Québec v. Cyr, File 31657, appeal from 2660 QCCA 932 (Appeal heard 18 October 2007)

The respondents, a mechanic and his employer, an auto service centre, were engaged under a contract with the Société de l'assurance automobile du Québec, a Crown corporation, to provide vehicle inspections and to issue certificates of mechanical fitness. The mechanic is also accredited by the Société. Following several notices to the mechanic that his inspections were deficient and not in accordance with the guidelines prepared by the Société, his accreditation to perform vehicle inspections and issue certificates was revoked. An application for judicial review was dismissed on the grounds that the relationship between the respondents and the Société was purely contractual and that its decision to revoke the respondent Cyr's accreditation was not a decision in the administrative law sense, but the exercise of a contractual right. A majority of the Quebec Court of Appeal reversed the lower court's decision, holding that the respondent Cyr was entitled to procedural fairness. The Société was also held to be subject to the *Loi sur la justice administrative*, which requires administrative agencies to comply with the principles of procedural fairness.

Ville de Montréal (aux droits de la communauté urbaine de Montréal) c. Commission des droits de la personne et des droits de la jeunesse et autre, File 31551, appeal from 2006 QCCA 612 (Appeal heard 5 December 2007)

An individual's application for a policing position with the Montreal police force (SPCUM) was rejected on the grounds that the good character requirements had not been met, given that she had pleaded guilty to theft some years before the application. She informed the SPCUM that her criminal record had been effectively erased as a result of having been granted a conditional discharge. After the SPCUM confirmed its decision, a complaint was brought before the Commission des droits de la personne et des droits de la jeunesse, which ruled in favour of the complainant and awarded damages of \$5,000. The Quebec Court of Appeal affirmed the decision, holding that the SPCUM had breached s. 18.2 of the Quebec *Charter of Human Rights and Freedoms*, which forbids discrimination in employment on the basis of a prior criminal act not connected to the employment or for which a pardon was received.

Hydro-Québec c. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ), File 31395, appeal from 2006 QCCA 150 (Appeal heard 22 January 2008)

A long-term employee was dismissed from her employment due to a high rate of innocent absenteeism over a period of several years caused by various physical and psychiatric problems. The employer was concerned about the employee's current and future ability to provide the required level of performance and regular attendance. An arbitrator denied a grievance of the dismissal. That decision was upheld on judicial review. On appeal, the Quebec Court of Appeal held that despite the employer's efforts in the past to accommodate the employee's illnesses, it could not be said that it had discharged its duty to accommodate her *currently*, in light of the expert evidence indicating that various accommodations could be made to the employee's work situation to enable her to work with her disability, including a progressive return to work schedule and part-time work.

Association des courtiers et agents immobiliers du Québec, et autre c. Proprio Direct Inc., File 31664, appeal from 2006 QCCA 978 (Appeal heard 30 January 2008)

The respondent real estate broker was found by the discipline committee of the Association des courtiers et agents immobiliers du Québec, the professional governing body for the respondent broker, to have breached the legislation and regulations respecting brokers by contracting with vendors to pay a non-reimbursable fee, whether or not a sale of the property takes place. The decision of the committee was upheld on judicial review. The Quebec Court of Appeal reversed that decision, finding, in the first instance, that the legislation did not prevent the respondent from entering into the fixed fee contracts. In addition, the contracts could not be said to be contrary to the public interest or bring the profession into disrepute on the basis of contravening the Association's code of ethics. The standard of review on the first question (whether the contracts were permitted by the legislation and regulations) was held to be correctness. On the second question (whether the conduct of the respondent was contrary to the Association's code of ethics), the standard of review was reasonableness.

Adil Charkaoui c. Ministre de la Citoyenneté et de l'Immigration et Solliciteur général du Canada, File 31597, appeal from 2006 FCA 206 (Appeal heard 31 January 2008)

After the fourth review of the appellant's detention under an immigration security certificate, the appellant filed a motion for a stay of proceedings alleging various infringements of procedural rights guaranteed under s. 7 of the *Canadian Charter of Rights and Freedoms*, including: the destruction of notes and recordings of his interviews with CSIS; the belated disclosure of certain information; and the receipt by the reviewing judge of new information of which the Minister had no knowledge when the certificate was issued. Although the reviewing judge ended the appellant's detention, the main proceedings for deportation were still pending.

New Brunswick Human Rights Commission v. The Potash Corporation of Saskatchewan Inc., File 31652, appeal from 2006 NBCA 74 (Appeal heard 19 February 2008)

New Brunswick's *Human Rights Code* provides an exemption to the general prohibition against age discrimination in employment if a discriminatory practice or policy is a term or condition of a *bona fide* retirement or pension plan. The effect of the provision is that a retirement age of 65 may be imposed if it is part of a term or condition of a *bona fide* pension plan. This raises the question of the interpretation of the provision, and others like it, in light of the Supreme Court of Canada's judgments in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (*Meiorin*), and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (*Grismer*). To what extent should the *Meiorin* test be incorporated in the determination of a *bona fide* pension plan? Is the approach set out in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, a judgment dealing with discrimination in the insurance context, appropriate in determining the meaning of *bona fide* pension plan? What is the standard of review of the decision of the Human Rights Board of Inquiry?

Honda Canada Inc. operating as Honda of Canada Mfg. v. Kevin Keays - and - Ontario Human Rights Commission, File 31739, appeal from 2006 CanLII 33191 (ON C.A.) (Appeal heard 20 February 2008)

A long-term employee was wrongfully dismissed from his employment following an absence from work due to medical reasons including chronic fatigue syndrome. He returned to work after his long-term disability benefits were terminated, although he continued to experience difficulties performing his work and missed work intermittently. The employment was terminated following a series of failed attempts to reach a work accommodation, the culminating event being the employee's request for clarification of the purpose and methodology of an examination by a doctor proposed by the employer. In addition to damages for wrongful dismissal, including an extended

notice period for bad faith in the manner of dismissal, the employee was awarded punitive damages as a result of discriminatory conduct contrary to the Ontario *Human Rights Code*. The damages were awarded on the basis that conduct contravening a right protected in the *Human Rights Code* meets the requirement for an independently actionable wrong. The trial judge's decision was upheld on appeal, except the quantum of punitive damages, which the majority ruled was excessive. Should discrimination and harassment be treated as separate causes of action? Should human rights statutes be incorporated in individual employment contracts?

Privacy Commissioner of Canada v. Blood Tribe Department of Health, File 31755, appeal from 2006 FCA 334 (Appeal heard 21 February 2008)

An employee of the respondent was dismissed from her employment. Her employment file contained correspondence between the employer and its solicitors. Following the dismissal the employee requested access to the information in her employment file. The contents of the file were eventually disclosed to her except for the correspondence between the employer and its solicitors, the employer citing privilege. The Privacy Commissioner ordered production of the documents over which privilege was claimed pursuant to paragraphs 12(1)(a) and (c) of the *Personal Information Protection and Electronic Documents Act (PIPEDA)*. The Federal Court of Appeal held the Commissioner's decision to a standard of review of correctness. It concluded that the lower court had erred in adopting a purposive and liberal interpretation of paragraphs 12(1)(a) and (c) of *PIPEDA* and in adopting *Access to Information Act* principles in a *PIPEDA* review. The Court reversed the lower court's decision and the Commissioner's order for production of the documents was vacated.

Minister of Citizenship and Immigration v. Sukhvir Singh Khosa, File 31952, appeal from 2007 FCA 24 (Appeal heard 20 March 2008)

The respondent is a permanent resident who came to Canada in 1996 at the age of 14. He was accused of criminal negligence causing death as a result of engaging in an automobile street race. He was not incarcerated and received a conditional sentence of two years less a day that included house arrest, a ban on driving and community service. A removal order was issued against him under s. 36(1)(a) of the *Immigration and Refugee Protection Act* on the basis of serious criminality. The Immigration Appeal Division (IAD) of the Immigration Appeal Board refused to grant special relief from the removal order on the basis of humanitarian and compassionate grounds. The application for judicial review was denied. A majority of the Federal Court of Appeal allowed the appeal and ordered the Board's decision set aside. What is the standard of review of the IAD's decision? The majority held the appropriate standard of review to be reasonableness. Is a pragmatic and functional analysis required where the *Federal Courts Act* prescribes a statutory standard of review?

Appeals Scheduled to be Heard

None

Cases Where Leave Recently Granted

Elaine Nolan, George Phillips, Elisabeth Ruccia, Kenneth R. Fuller, Paul Carter, R.A. Varney and Bill Fitz, being members of the DCA Employees Pension Committee representing certain of the members and former members of the Pension Plan for the Employees of Kerry (Canada) Inc. v. Kerry (Canada) Inc. and Superintendent of Financial Services, File 32205, appeal from 2007 ONCA 416 (Leave granted 31 January 2008)

A defined benefit (DB) pension plan was established for employees of Kerry or its predecessor companies in 1954. The plan has been in a surplus position for many years. The plan's administrative expenses were paid by Kerry

until 1985, when Kerry began paying the expenses from the plan's fund at a cost of \$850,000. Kerry also began taking contribution holidays in 1985 worth some \$1.5 million. The plan was amended in 2000 to introduce a defined contribution (DC) component and to close off the defined benefit to new employees after January 1, 2000. Kerry proposed to use the surplus in the DB part of the plan to pay for the premiums on the DC part of the plan and take contribution holidays in respect of this part of the plan. The proposal was brought before the Superintendent of Financial Services who ruled that Kerry should reimburse the fund for expenses paid from the fund after 1985, but the contribution holidays did not need to be reimbursed. Kerry appealed to the Financial Services Tribunal which ruled that only \$6000 of plan expenses should be reimbursed, that the contribution holidays were appropriate, and that Kerry could use the surplus in the DB part of the plan to pay the premiums in the DC part of the Plan. That decision was largely overturned by the Divisional Court. The Court of Appeal set aside the Divisional Court's judgment. Among the issues considered by the Court of Appeal were: When is it acceptable to use pension plan assets to pay pension plan expenses? Is it permissible to use a surplus in a DB part of a plan to pay service costs in a DC part of a plan? What constitutes proper notice of an adverse amendment to a pension plan? Does a tribunal have the power to order that costs be payable from a pension fund? To what extent are courts entitled to interfere with such a costs order? What is the appropriate standard of review of the Financial Service Tribunal's decision?

Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters, Consolidated Fastfrate Transport Employees' Association of Calgary and the Alberta Labour Relations Board, File 32290, appeal from 2007 ABCA 198 (Leave granted 6 March 2008)

The Applicant, Fastfrate, is a national freight-forwarding business that arranges for local pick-up of customer shipments, consolidates the shipments into one truckload, arranges for inter-provincial shipments, and de-consolidates and delivers or arranges local delivery of those shipments. This is done using third party carriers. No Fastfrate employees or equipment cross provincial boundaries. In April 2004, the Canada Industrial Relations Board (CIRB) certified the Respondent Teamsters as bargaining agent for all Fastfrate employees in Alberta, Saskatchewan and Manitoba, except for sales staff and dispatchers. Included in the certification order was a bargaining unit in Calgary already represented by the second Respondent, the Consolidated Fastfrate Employees' Association of Calgary. The Association obtained a stay of the CIRB order pending a determination by the Alberta Labour Relations Board (ALRB) as to whether the Association is the proper bargaining agent. In dismissing the Association's application, the ALRB held that the Calgary operation fell within federal jurisdiction and was therefore subject to the *Canada Labour Code*. It ruled that Fastfrate's Calgary operation is "part of a single, indivisible inter-provincial undertaking" notwithstanding its use of third party carriers, and therefore a work or undertaking "connecting the Province" with other provinces within the meaning of s. 92(10)(a) of the *Constitution Act, 1867*. The trial judge quashed the ALRB decision. The Alberta Court of Appeal, in a majority judgment, reversed that decision. It held the ALRB's decision to a standard of correctness because a direct constitutional question was required to be addressed. Is a physical connection to the inter-provincial activity a pre-condition to finding a federal work or undertaking? How significant is the functional nature of the operation connecting the provinces as a factor?

Ministre de l'Éducation, du Loisir et du Sport et autre c. Hong Ha Nguyen et autres, File 32229, appeal from 2007 QCCA 1111 (Leave granted 6 March 2008) and ***Ministre de l'Éducation, du Loisir et du Sport et autre c. Talwinder Bindra***, File 32319, appeal from 2007 QCCA 1112 (Leave granted 6 March 2008)

Section 23(2) of the *Canadian Charter of Rights and Freedoms* provides that Canadian citizens any of whose children receive primary or secondary school instruction in English or French have the right to have all their children educated in the official language in which the other children received or are receiving their education. Québec's *Charter of the French Language* was amended in 2002 with the effect that the fact of a child of Canadian citizens having received an English language education at the primary level in an unsubsidized private school is

considered irrelevant in a request by a parent to have that child or any other child receive a public English-language education (s. 73, part 5, paragraph 2). Similarly, the fact of a child having received a special authorization from the Minister, on humanitarian or health grounds, to receive a public English-language education is irrelevant in a request to have a sibling receive such education (s. 73, part 5, paragraph 3). The Tribunal Administratif du Québec dismissed a challenge by a group of parents that these amendments to the legislation violated s. 23(2) of the Charter. A judicial review application of the Tribunal's decision was also dismissed. The Québec Court of Appeal granted the appeal. The Tribunal's decision was held to a standard of correctness given that the proceedings raised constitutional questions, the answer to which would have precedential value.

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Upcoming Program

Representing Clients in Ontario's
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