



Administrative Law

ADMINISTRATIVE LAW SECTION / SECTION DU DROIT ADMINISTRATIF

Judicial Review of Arbitration Awards: A Less Deferential Time?

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A Changing Standard of Review

For decades, courts have held that the appropriate standard of review of a labour arbitrator's decision on an issue at the core of her expertise is "patent unreasonableness". Courts have taken the stance that labour arbitrators are due this high level of deference because they have specialized expertise in a policy-rich area of law. Courts have also been reluctant to interfere in decision-making by arbitrators because the actors in the labour relations system look to labour arbitration as a final and binding process to resolve their disputes without stoppage of work. This deferential standard of review has been unmistakably altered by the Supreme Court of Canada in a number of judgments, the most recent of which, *Voice Construction*¹ and *Lethbridge Community College*,² were issued in April 2004.

These 2 decisions follow judgments in 2003 which, while maintaining an overall deferential attitude, signalled a shift in the Court's historic respect for the expertise of arbitrators. In *City of Toronto v. Canadian Union of Public Employees*, *Loc. 79 (City of Toronto)*,³ the Court reviewed a decision of a labour arbitrator who was faced with an employee terminated upon the basis of a criminal conviction for sexually assaulting a child under his care. The arbitrator decided to allow the union to re-litigate the facts underlying the conviction, eventually finding that the

grievor had not committed the assault. The Court decided that the appropriate standard of review for this re-litigation issue is "correctness" since, in making the decision, the arbitrator would have had to interpret various common law doctrines such as *res judicata*, which is an issue of law outside of the arbitrator's expertise. Barely a month prior to that, in the *Parry Sound* case,⁴ the Court reviewed for "correctness" an arbitration board's decision as to whether the substantive rights and obligations of the *Ontario Human Rights Code* were incorporated into all collective agreements over which the Board had jurisdiction.

Although the Court accorded deference to these arbitration boards by reviewing the overall award (*City of Toronto*) and the decision as to whether the matter was arbitrable (*Parry Sound*) on a "patent unreasonableness" standard, and reinforced the primacy of relative expertise, the Court nonetheless took the view that for interpreting and applying complex common law doctrines and for answering general questions of law—such as whether Human Rights Code obligations are incorporated into collective agreements—the courts are in a better position than arbitrators to decide.

The April 2004 decisions show a marked departure from a long line of previous judgments in assessing the standard of review of labour arbitration awards. In *Voice Construction*, the Supreme Court

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of Canada changed its assessment of the standard of review applicable to arbitrators' decisions on issues lying at the core of their expertise. In that case, the arbitrator had interpreted certain hiring and dispatch provisions of a collective agreement as constituting an express restriction on the employer's right to hire employees. In assessing the standard of review, the Court reaffirmed the existence of three standards: patent unreasonableness, unreasonableness and correctness. Further, the Court reiterated the requirement to assess the standard by using the pragmatic and functional approach, which involves an examination of the four contextual factors outlined in *Pushpanathan*:⁵ "(1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question - law, fact or mixed law and fact."⁶

On the particular issue and circumstances, the Court recognized the relative expertise of the arbitrator with respect to collective agreement interpretation, a specialized question of law. The Court further recognized that the provisions of the *Labour Relations Code (LRC)* providing for labour arbitration are meant to "resolve labour disputes in the most efficacious and least disruptive way" and that this factor suggests deference. However, the Court looked at the privative clause insulating Alberta arbitrators' decisions and concluded that the provisions of the *LRC* do not form a full privative clause. Attempting to balance these factors, the Court decided that "reasonableness" is the appropriate standard of review of the arbitrator's interpretation of the Collective Agreement.

In *Lethbridge Community College*, the Court reviewed a decision of an Alberta labour arbitration board acting pursuant to the *Public Service Employee Relations Act*. The issue in question before the Board was whether it could substitute damages in lieu of reinstatement for a grievor dismissed for non-culpable behaviour. In coming to the conclusion that the appropriate standard for reviewing the Board's decision on this issue was "reasonableness", the Court again emphasized the weakness of the privative clause protecting the Board's decision, indicating that though such a clause does attract some deference, it does "not have the preclusive effect of a full privative clause."⁷ At the same time, the Court recognized that the remaining *Pushpanathan* factors suggest deference, including the fact-intensive nature of the problem before the Board.

What has changed with these two decisions?

First, reviewing the decisions by the arbitrator and the Board on a "reasonableness" standard represents a marked departure from a 20 year history of reviewing decisions within the core of an arbitrator's expertise on a standard of "patent unreasonableness". Decisions of labour arbitrators have always been given great deference. Courts have taken the view that arbitrators are due such deference because they have specialized expertise respecting the labour relations field and they make their decisions in a way that is sensitive to the context of the grievance, the workplace, and, of course, the collective agreement. Furthermore, as Justice Dickson wrote more than 25 years ago:

There is a very good policy reason for judicial restraint in fettering adjudicators in the exercise of remedial powers. The whole purpose in establishing a system of grievance adjudication under the Act is to secure prompt, final, and binding settlement of disputes arising out of interpretation or application of the collective agreement, or disciplinary action taken by the employer, all to the end that industrial peace may be maintained.⁸

An exacting review by courts would therefore be antithetical to the labour arbitrator exercising its function authoritatively and efficiently.

Furthermore, collective agreement interpretation has always been seen as the core of the arbitrator's function and expertise. It is indeed difficult to imagine something that is more central to the arbitrator's role—apart from the fact-finding function that most administrative tribunals have in common. Put another way, collective agreements are the "home statutes" of the labour arbitrators. They partially derive their jurisdiction from them, and they are charged with the tasks of interpreting them and deciding whether parties have breached them. The Court in *Voice Construction* acknowledges both the greater relative expertise of the labour arbitrator in interpreting the collective agreement and the fact that the "patent unreasonableness" standard has historically been applied in reviewing such decisions. This approach is consistent with the Court's position, stated in *Southam*, that expertise "... is the most important of the factors that a court must consider in settling on a standard of review."⁹ And yet, in spite of this, the Court applied the less deferential standard of "reasonableness" to the arbitrator.

The Court reinforced this less deferential stance by its decision in *Lethbridge Community College*, despite once again acknowledging the greater relative expertise of the arbitration Board to decide the issue in question in that case.

The second change is that in *Voice Construction* and *Lethbridge Community College*, the Court incorporated into its analysis a greater emphasis on the strength of the privative clause that guards the arbitrator's decision. In both cases, the relevant statutes—the Alberta *LRC* and *PSERA*—contain the same provisions forming the privative clause.¹⁰ The first provision contained in both statutes purports to disallow the judicial review of an arbitration award, decision or proceeding and it specifically names a number of remedies not permitted—injunction, declaratory judgment, prohibition and *quo warranto*. A second provision, however, specifically allows for judicial review by way of two prerogative writs—*certiorari* or *mandamus*—for the 30-day period after a decision is made. It is the specific allowance of review in this second provision that the Court viewed as undercutting the preclusive effect of the first.¹¹ All in all, the Court held that all of these clauses together only constitute partial privative protection and do not bestow the greatest degree of deference.

By emphasizing this factor, the Court was able to justify the change in its view of the appropriate standard to be applied to the labour arbitrators' decisions on these issues. This is again a noticeable change from the Court's recently stated position in *Dr. Q* that the absence of a privative clause is a neutral factor and deference can still be shown to the decision-maker.¹²

How Might this Change be Rationalized?

A number of rationales may be gleaned from the judgments reviewed to account for the shift in the Court's deferential attitude toward arbitrators' decisions.

As was demonstrated in *City of Toronto* and *Parry Sound* the issues presented before arbitrators are becoming increasingly complex. That is to say that the function of arbitrators has grown beyond fact-finding and collective agreement interpretation and now involves the application and interpretation of a greater number of statutes and common law principles. As the labour arbitrator deals with issues that increasingly take her outside her core function or expertise, courts may be inclined to show less

deference to these decisions given the primacy of relative expertise and the characterization of these issues as "general law" issues. If the issue can be characterized as one of a general law, under the pragmatic and functional analysis the temptation is to point to a lower standard of deference. This was the result in *Parry Sound*.

Yet this justification for the Court's shift to a less deferential stance toward labour arbitrators does not explain why the Court is showing less deference when it comes to decisions squarely within the expertise of the arbitrator, such as collective agreement interpretation. In other words, it does not fully explain why the Court, in *Voice Construction* and *Lethbridge Community College*, has gone in the direction of less deference while still maintaining that an arbitrator has greater expertise relative to the courts in these areas.

A number of other explanations are suggested. These explanations further suggest that the application of these cases may not be limited to the review of arbitration awards, and may suggest a more general application. First, there appears to be a renewed emphasis on the strength of privative clauses and a more searching assessment of legislative intention. Privative clauses serve as an indicator of legislative intent with respect to the level of deference to be shown to a given tribunal. As the theory goes, if the legislature had intended great deference to be shown to a labour arbitration award, then it could have insulated the decision with a strong "basket-type" privative clause. In this way, a privative clause is also a more concrete way of assessing how the legislature perceives the expertise of the tribunal relative to the courts. Thus, in focussing greater attention on the strength of the privative clause, the Court may merely be searching for concrete indicators of relative expertise in addition to the legislative intent as to deference.

It may also be noted that these decisions reflect a compromise between two differing approaches of the Court to the three standards of review generally. In *City of Toronto*, the Court's established approach to standard of review was criticized by Justices LeBel and Deschamps in a separate concurring judgment. In the course of his reasons, Justice LeBel examined how the existence of three distinct standards of review has resulted in these standards being often confused and sometimes misapplied. He argued that it is especially difficult in practice as well as conceptually to differentiate between the "reasonableness" and the "patent unreasonableness"

standards. He added that the existence of the “patent unreasonableness” standard necessarily means that—assuming it can be effectively distinguished from “reasonableness”—some administrative decisions that are unreasonable are still acceptable so long as their irrationality does not exceed a certain level so as to be patently so. He asserted that such a state of affairs is inconsistent with both the rule of law and the intent of the legislature, adding:

[T]o say that the administrative state is a legitimate player in resolving legal disputes is properly to say that administrative adjudicators are capable (and perhaps more capable) of choosing among reasonable decisions. It is not to say that unreasonable decision making is a legitimate presence in the legal system.¹³

He then proposed the use of a two-standard approach to judicial review by eliminating the “patent unreasonableness” standard. Justice LeBel, on behalf of himself and Justice Deschamps reiterated this—his *City of Toronto* perspective—in *Ontario v. OPSEU* and again in *Voice Construction*.

As stated above, Justice Major for the majority of the Court in *Voice Construction* affirmed the existence of the three standards of review, as enumerated in *Southam* and later decisions. Justice Major continued by stating:

A decision of a specialised tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard. By its nature, the application of patent unreasonableness will be rare.¹⁴

In other words, only when all four *Pushpanathan* factors point clearly and strongly toward deference in a particular case will “patent unreasonableness” be the appropriate standard. I would suggest that the majority of the Court intended by these words to limit the future application of the “patent unreasonable” standard to only the “rare” case. Thus, rather than completely abandoning a long line of its own jurisprudence since *Southam* that provides for the existence of three distinct standards of review, the majority of the Court compromised by suggest-

ing more limited access to that standard seen as problematic by some members of the Court. This compromise was also indicated by reviewing on a “reasonableness” standard a decision that would have previously been reviewed on the “patent unreasonableness” standard—that of a labour arbitrator’s interpretation of a collective agreement. The criticism of the “patent unreasonableness” standard by Justices LeBel and Deschamps ended after *Voice Construction* and was not reiterated in *Lethbridge Community College*, where in fact the Court unanimously reaffirmed the existence of the three standards of review. Perhaps this indicates that the compromise proposed by the majority of the Court in *Voice Construction* was ultimately accepted by the Court as a whole.

One important corollary of this theory is that the Court’s change in stance might not signal a concomitant change in the *actual* deference shown to labour arbitrators. That is to say, the apparent lessening of deference might not mean that the Court will become more interventionist when dealing with labour arbitrators. Much of Justice LeBel’s criticism stemmed from concerns over the judicial misapplication of the standards of review and over the idea that the existence of “patent unreasonableness” as a separate standard from “reasonableness” is not optimally consistent with the rule of law. His concerns did not arise from a belief that courts were too deferential to either labour arbitrators or other administrative decision makers. Thus, the Court might simply be moving in the direction of using the term “patent unreasonableness” in only the “rare” case, whereas the Court’s actual willingness to intervene in the decisions of labour arbitrators might not have changed. This is supported by the observation that in neither *Voice Construction* nor *Lethbridge Community College* did the Court interfere with the labour arbitrator’s award. Thus, the application of the “reasonableness” standard might simply indicate a terminological shift and not a shift towards greater judicial intervention.

***Voice Construction* and *Lethbridge Community College* in the Lower Courts**

The effects of the decisions in *Voice Construction* and *Lethbridge Community College* are being felt in a number of jurisdictions.

In Ontario, the Divisional Court has adopted the less deferential stance toward labour arbitration decisions following *Voice Construction* in at least

one judgement. In *Elementary Teachers' Federation of Ontario v. Toronto District School Board*,¹⁵ a 3-member panel of the Court grappled with the appropriate standard of review for a labour arbitration board on a question involving the application of a provision of the *Employment Standards Act (ESA)*. Justice Swinton, writing for the unanimous panel, observes that while traditionally labour arbitrators were entitled to deference on a "patent unreasonableness" standard with respect to collective agreement interpretation, the Supreme Court's judgement in *Voice Construction* has reduced the level of deference due to such decisions to "reasonableness". The Court noted that an arbitrator in the past would similarly have been entitled to considerable deference in applying an *ESA* provision, given the arbitrator's relative expertise in dealing with this statute. Yet the Court ruled that the decision in *Voice Construction* must be interpreted as requiring less deference, given that only a partial privative clause protects arbitrators' decisions under the Ontario *Labour Relations Act (LRA)*. The Court reaches the conclusion that the appropriate standard of review is "reasonableness" despite characterising the problem confronting the arbitrator as being predominantly factual in nature.

A similar effect can be seen in Saskatchewan. In *Canada Safeway Ltd. v. United Food and Commercial Workers, Loc. 1400*¹⁶ and *City of Saskatoon v. C.U.P.E., Loc. 59*,¹⁷ an arbitrator's interpretation of a collective agreement was reviewed on a standard of "reasonableness". In both decisions, the question being reviewed was acknowledged to be at the core of the arbitrator's expertise and would therefore attract greater deference. However, both judges cited *Voice Construction* as indicating the lower standard of review.

In *University of Saskatchewan v. University Employees Union, Loc. 1975 C.U.P.E.*,¹⁸ Justice G.A. Smith specifically found that *Voice Construction* requires less deference to be shown to labour arbitrators in light of the similar weak nature of the privative clause in both the Saskatchewan *Trade Union Act* and the Alberta *Labour Relations Code*. However, he distinguished the case before him on the basis of the nature of the problems with which the arbitrator was confronted. On the issue of whether the arbitrator was bound by a certain precedent, the standard of review selected was "correctness". For reviewing the arbitrator's decision on whether she had the authority to substitute her own assessment for the

employer's in a hiring decision, the judge applied the standard of "reasonableness" despite his finding that this issue was within the expertise of the arbitrator. However, when reviewing the appropriateness of the remedy imposed by the arbitrator, the judge selected the "patent unreasonableness" standard indicating that this decision involved discretion and policy considerations.

In Alberta itself, the effect of *Voice Construction* and *Lethbridge Community College* has also been clear. The Alberta Court of Appeal has ruled that this decision has altered the standard of review relevant to arbitrators' interpretation of collective agreements, despite this being at the core of their expertise.¹⁹ Going even further than this is the Queen's Bench decision in *Alberta Union of Provincial Employees v. Calgary Health Region*,²⁰ where Justice Macklin reviewed on a "reasonableness" standard a decision of an arbitration board imposing a remedy based on findings of fact from medical evidence. In making this decision, which was based directly on *Lethbridge Community College*, the judge recognised that this issue had strong factual elements to it and as such that the Board would normally be entitled to greater deference.

It should be noted that, in Alberta, the effects of these two Supreme Court decisions might in fact be trickling over into the standard of review of the Labour Relations Board. A judge of the Court of Queen's Bench ruled that, as a result of *Voice Construction* and given the similarity in privative clauses between that insulating the Labour Relations Board and that protecting labour arbitrators, a decision of the Board was only entitled to deference on a standard of "reasonableness".²¹ However, this is certainly an unsettled issue as other recent decisions at the same court level in Alberta have held onto the traditional "patent unreasonableness" standard in reviewing decisions of the Labour Relations Board.²²

At the end of this analysis, some observations can be made. First, it seems that the Supreme Court of Canada has changed its view of the level of deference due to labour arbitrators. The decisions of labour arbitrators are accorded less deference and are reviewed on a "reasonableness" standard when they fall within the relative expertise of the arbitrator. This has resulted, in part, from the Court's placing a greater emphasis than in the past on the relatively weak nature of the privative clauses that tend to protect arbitrators' decisions. Second, it is

also unmistakable that these decisions have led to a reduced level of deference that lower courts are showing to arbitrators throughout Canada.

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¹ *Voice Construction Ltd. v. Construction & General Workers' Union, Loc. 92*, [2004] 1 S.C.R. 609.

² *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727.

³ [2003] 3 S.C.R. 77.

⁴ *District of Parry Sound Social Services Administration Board v. Ontario Public Service Employees Union, Loc. 324*, [2003] 2 S.C.R. 157.

⁵ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

⁶ *Ibid.* at para. 16.

⁷ *Ibid.* at para. 16.

⁸ *Heustis v. New Brunswick Electric Power Commission*, [1979] 2 S.C.R. 768 at 781.

⁹ *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 50

¹⁰ *LRC*, s. 145 and *PSERA*, s. 63. As well, the privative clause of the *LRC* is also incorporated by reference into the *PSERA* by virtue of s. 44 of that Act.

¹¹ See *Voice Construction* at paras. 23-26 and *Lethbridge Community College* at para. 16.

¹² See *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 27.

¹³ *City of Toronto* at para. 132 [emphasis in original].

¹⁴ *Voice Construction* at para. 18.

¹⁵ [2004] O.J. No. 2886 (Div. Ct.) [*Toronto District School Board*].

¹⁶ [2004] S.J. No. 706, 2004 SKQB 457.

¹⁷ [2004] S.J. No. 692, 2004 SKQB 421.

¹⁸ [2004] S.J. No. 477, 2004 SKQB 286.

¹⁹ *Health Sciences Association of Alberta v. David Thompson Health Region*, 2004 ABCA 185 at paras. 11 and 13.

²⁰ [2004] A.J. No. 1400, 2004 ABQB 881.

²¹ *Alberta Union of Provincial Employees v. Provincial Health Authorities of Alberta*, 2004 ABQB 591.

²² See e.g. *Alberta Union of Provincial Employees v. International Union of Operating Engineers, Loc. 955*, 2004 ABQB 635; *Bennett v. United Food and Commercial Workers, Loc. 401*, 2004 ABQB 809.

Message from the Chair

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We strive to make this Section an important crossroads for the administrative law community. More well-known are our dinner programs but less known are the many initiatives that our members and Executive are involved in. We have been active on both fronts.

On November 24, 2004, Greg Levine of our Executive organized a meeting in London, Ontario on Key Issues in Administrative Law (see Greg's article in this newsletter). Two days earlier, on November 22 in Toronto, Peter Ruby of Goodmans LLP moderated a panel discussion on two important Ontario industry regulators, the Ontario Energy Board and the Ontario Municipal Board (see Peter's summary of the event in this newsletter). Upcoming dinner programs include our ever popular Annual Update on Judicial Review on February 17, 2005 in Toronto and a program on the Security Certificate Process on March 10, 2005 in Ottawa. Paul Copeland, a well-known criminal and civil rights practitioner and Prof. Craig Forcese of the University of Ottawa are confirmed speakers for the latter program.

Some of the initiatives that the Section Executive and members are involved in are the ongoing consultations with the Ontario government to improve the appointment process of members to administrative agencies, and our dialogue with important actors in the administrative community, such as the Society of Ontario Adjudicators and Regulators (SOAR). On that front, congratulations are in order to Kathy Laird and Richard Prial, the 2004 recipients of SOAR's medal. Ms. Laird is Executive Director of the Advocacy Centre for Tenants Ontario. Mr. Prial is Director, Office of the Premier and Cabinet office, and Results Office.

As we plan for events in Spring 2005, we hope that you will continue to provide us with your ideas for future programs and submissions for our newsletter. It's not the crossroads that's important but rather the traffic flowing through.

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Administrative Law Cases at the Court of Appeal for Ontario

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For the Period September 29, 2004 to January 12, 2005.

Recent Decisions

2016596 Ontario Ltd. v. Minister of Natural Resources, [2004] O.J. No. 3922.

This was an appeal by the Minister of Natural Resources of a judicial review decision declaring that the applicant, 2016596, was entitled to use a road in a provincial park to access its private lands. 2016596 was a timber company that owned land east of a provincial park. Apart from a railway line, a park road was the only access to the lands. The acting park superintendent denied 2016596's request to use the road to access its lands. The park management plan stated that the road would continue to be available as a forest access road for timber companies with allocations east of the park. The superintendent found that references in the plan to allocations and timber limits referred to timber on Crown lands. On judicial review, the court held that 2016596 was denied procedural justice and that the park management plan entitled it to use the road. The Minister's application for judicial review was dismissed.

The reviewing judge erred by applying a standard of correctness to the superintendent's interpretation of the park management plan. At its highest, the applicable standard of review was reasonableness.

The decision contained the standard of correctness terminology. Had the reviewing judge applied a different standard, he would have considered whether the park management plan was reasonably capable of bearing the superintendent's interpretation. The superintendent's interpretation was not unreasonable. Historical use of the road to access private lands was generally incidental to access of Crown lands. Procedural fairness was not denied. No public hearing or order-in-council was required as a pre-condition to the access decision.

Armstrong J.A., dissenting in part, agreed on the standard of review but did not agree that the superintendent's interpretation of the park management plan was reasonable.

Ontario Provincial Police v. A.L. Favretto, [2004] O.J. No. 4248, rev'g [2003] O.J. No. 5052 (Div. Ct.).

The appellant, a police constable, was found guilty by a hearing officer of discreditable conduct. The hearing officer imposed a penalty of dismissal, subject to the appellant resigning within seven days. The Ontario Civilian Commission on Police Services upheld the finding of guilt but overturned the penalty imposed by the hearing officer and ordered instead that the appellant be demoted to third class constable for two years before returning to the rank of first class constable. The respondent appealed to the Divisional Court, which allowed its appeal and reinstated the hearing officer's penalty of dismissal.

The Court of Appeal allowed the appeal. The Divisional Court did not undertake the proper analysis of the Commission's decision in coming to the conclusion that its decision was unreasonable. The Divisional Court focused on the hearing officer's reasons and in effect concluded that the hearing officer's decision was the "correct" decision. The proper approach would have been to undertake a probing examination of the Commission's decision to determine whether its reasons taken as a whole were tenable as support for the decision. This is the approach that is mandated by the Supreme Court of Canada in reviewing a decision on the reasonableness *simpliciter* standard. In all the circumstances, the Commission's decision can be fairly characterized as reasonable and the Divisional Court erred by interfering with it.

Apotex Inc. v. Minister of Health, [2004] O.J. No. 4360, aff'g (2002), 23 C.P.R. (4th) 258 (Div. Ct.).

The appellant Apotex challenged two aspects of the Ontario government's pricing policy for generic drugs. First, Apotex challenged a requirement that drugs, to be recognized as "interchangeable" generics, must conform with the so-called 70/90 pricing formula. The 70/90 formula is set out in regulations under the *Ontario Drug Benefit Act* ("ODBA") and the *Drug Interchangeability and Dispensing Fee Act* ("DIDFA"). Second, Apotex challenged a policy that freezes the prices of generic drugs made available through the province's drug benefit program.

The Court of Appeal dismissed the appeal. The price freeze and the 70/90 regulation are not *ultra vires*. The wording of the *ODBA* and the *DIDEA* allows the government to impose the price freeze policy and the 70/90 pricing regulations. There is nothing in the *DIDEA* that prevents the government from implementing through regulation a price formula as one of the conditions for designating a generic as interchangeable. Moreover, the *ODBA* contains specific language authorizing the government to set the drug benefit price of each drug product listed under the drug benefit program. In so doing, the government may consider matters in the public interest, including the drug benefit price of other drug products. This can apply both to other interchangeable drug products as well as to the price of other drug products that are not interchangeable. In other words, the language in the *ODBA* is broad enough to authorize both the 70/90 pricing regulations and the price freeze policy.

Nor are the price freeze policy and the 70/90 regulations arbitrary, discriminatory or outside the purpose of the legislation. The record before the Court raises concerns as to whether the government's drug pricing policy may have the effect of increasing the cost of generic drugs for the government and the public rather than lowering that cost. Nonetheless, the policy has been enacted for a purpose and cannot be said to be arbitrary or irrational. If it does not work as intended, that is for the government to consider. Nor does the policy discriminate among drug manufacturers.

Her Majesty the Queen v. McKinnon and Ontario Human Rights Commission, [2004] O.J. No. 5051, aff'g 2003 CarswellOnt 6167.

There is no basis to interfere with the Divisional Court's decision that the Human Rights Tribunal retained supervisory jurisdiction over the implementation of "Order #12" - an order mandating the implementation of a human rights program in the workplace. It was open to the Tribunal, as part of its ongoing obligation to oversee implementation, to recast its original orders to meet what it found to be a continuing problem of widespread racial discrimination. The Tribunal found that the Ministry did not act in good faith in attempting to comply with the Order. The remedies ordered by the Tribunal were responsive to the evidence of bad faith. With respect to the issue of procedural fairness, the Ministry knew the scope of matters at issue. There is nothing in the record to support the submission that the Ministry had insufficient notice.

Dr. Anil Mussani v. College Of Physicians And Surgeons Of Ontario, [2004] O.J. No. 5176, aff'g (2003), 226 D.L.R. (4th) 511 (Div. Ct.).

The appellant was found guilty in a disciplinary proceeding and his license was revoked. His appeal to the Divisional Court was dismissed. He appealed arguing that the mandatory revocation provisions of the *Health Professions Procedural Code* that mandate revocation of a licence for a practitioner found guilty of sexual abuse violate ss. 2(d), 7 and 12 of the *Charter*.

The Court of Appeal dismissed his appeal. Whether there is a general s. 7 liberty right to choose a consensual sexual partner was not at issue. All parties agreed that government could limit the rights of health professionals in the public interest. Essentially, the appellant sought to protect his right to engage in the economic activity of his choice. The *Charter* does not protect such a right. This conclusion was sufficient to dispose of this case; however, given the importance of the issues, the court went on to consider the *Charter* arguments.

The s. 7 guarantee of security of the person is not engaged in this case. A certain amount of stress and stigma inevitably arises from disciplinary proceedings related to allegations of sexual abuse. This does not attract the protection of s. 7 in this case.

The appellant argued that since the provisions compel health professionals to choose between terminating a professional relationship with a patient or entering into a consensual, non-exploitative sexual relationship, the provisions interfere with the health professional's liberty interest. The court rejected this argument. The appellant also argued that a range of non-exploitative conduct was captured by the provisions, which rendered the provisions unconstitutional. The court also rejected this argument, holding both that the provisions did not deprive the appellant of s. 7 rights and that the provisions were in accordance with the principles of fundamental justice. The provisions were neither impermissibly vague nor overly broad and were motivated by legitimate state concerns.

There is conflicting caselaw as to whether professional disciplinary hearings are criminal or quasi-criminal in nature so as to attract the protection of s. 12. However, the provisions do not constitute punishment because they do not give rise to true penal consequences. Nor do they constitute treatment. Furthermore, the effect of the provisions was not cruel and unusual. The revocation of a health professional's licence is not grossly

disproportionate to the misconduct in question. In this case, there was ample evidence to support the view that revocation was appropriate.

The appellant's s. 2(d) freedom of association argument was without merit. Section 2(d) is designed to promote social interaction and collective action of a mostly public nature. It has not been applied to protect intimate personal relationships. The provisions do not prohibit health professionals from associating with their patients but merely from sexually abusing them.

If there were a need to conduct a s. 1 analysis, the provisions would be upheld as justified.

Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner), [2004] O.J. No. 4813, rev'g 65 O.R. (3d) 417 (S.C.J.).

After an individual who had been involved in a dispute with the Ministry of Health and Long-Term Care withdrew his appeal to the Minister, two journalists applied under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for any records that would explain the withdrawal of the appeal. The Ministry refused to confirm or deny the existence of any records as to do so would constitute an unjustified invasion of personal privacy within the meaning of s. 21(5) of FIPPA.

The central issue on appeal was whether the Commissioner's interpretation of s. 21(5) was reasonable or not. The Commissioner decided that in deciding not to confirm or deny the existence of a record, the decision-maker must find that: (1) disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy; and (2) disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy. The majority of the Divisional Court found this to be an unreasonable decision and Lang J. (as she then was) dissented, holding that the Commissioner's interpretation of the discretionary power established by s. 21(5) was not unreasonable.

The Court of Appeal agreed with Lang J. and reversed the decision of the Divisional Court, holding the Minister to a standard of reasonableness. The Court disagreed with the Divisional Court's finding that the second part of the test devised by the Commissioner was not an interpretation of the subsection that the

statute could reasonably bear. The Court agreed with Lang J. that that two-part test was reasonable as the second part merely circumscribed the discretion given to the Minister by s. 21(5) in a manner that is consistent with the purposes of the Act. Justice Abella dissented, holding that the second stage of the test unduly fettered the wide discretion imparted by the statute.

Enbridge Gas Distribution Inc. and Union Gas Limited v. Ontario Energy Board, Doc. No. C41293 and C41294, on appeal from 2003 CarswellOnt 5573 (Div. Ct.).

The Ontario Energy Board enacted the Gas Distribution Access Rule, which mandates three billing options for the distribution and supply of natural gas to consumers. Union Gas and Enbridge oppose the billing provisions and applied for an order declaring the billing options void. The Divisional Court unanimously dismissed their application.

The Court of Appeal dismissed a further appeal. On the issue of standard of review, whether one uses the *ultra vires* analysis or the pragmatic and functional analysis, the result is the same. The court must ask whether s. 44(1) of the *Ontario Energy Board Act*, correctly interpreted, gives the Board the jurisdiction to make the Rule. This is the same question the court would pose in assessing whether the Rule made by the Board is *ultra vires* its empowering legislation. Properly interpreted, s. 44(1)(b) gives the Board jurisdiction to make the billing provisions of the Rule. Finally, the Board satisfied the applicable statutory notice requirements.

Decisions on Reserve

Stetler v. The Agriculture, Food and Rural Affairs Appeal Tribunal, Doc. No. C41821, on appeal from [2003] O.J. No. 5203.

Wyatt Stetler, a tobacco farmer, was charged with engaging in the unlawful sale of tobacco. The Ontario Flue-Cured Tobacco Growers' Marketing Board conducted a hearing and concluded that Stetler and a corporation set up by Stetler, 934671 Ontario Limited, had sold tobacco to an unlicensed buyer in Quebec on three separate occasions. The Board cancelled Stetler's and 934671's entire quotas for these infractions. The Agriculture, Food and Rural Affairs Appeal Tribunal held that Stetler had unlawfully sold tobacco on two occasions. It declined to vary the Board's penalty.

The Divisional Court allowed the application for judicial review and quashed the Tribunal's decision and the Board's decision. It held that the Tribunal erred in: (1) failing to answer the question of whether Stetler participated in the unlawful sales; (2) in relying on the wrong standard of proof in a case involving quasi-criminal allegations; and (3) by accepting the opinion evidence of a witness who had acted as an adjudicator at the Board below.

Appeals Scheduled for Hearing

The following new appeals are scheduled for hearing:

Liquor Control Board of Ontario v. Lifford Wine Agencies Ltd., Doc. No. C42546, on appeal from (2004), 188 O.A.C. 196 (Div. Ct.), scheduled for hearing March 16, 2005.

The Alcohol and Gaming Commission of Ontario sought to revoke Lifford's wine manufacturer's licence. Lifford brought several pre-hearing motions, including a motion for a stay of proceedings based on alleged interference with witnesses. These witnesses are employees of the LCBO (which is not a party to the proceedings). Lifford says that their testimony is relevant to its defence of officially induced error. The primary issue before the Divisional Court was whether it was a breach of natural justice for the AGCO to refuse to issue a summons for an investigator hired by the LCBO to investigate and report on the issue of witness tampering. The Divisional Court allowed the application for judicial review and directed the Board to issue a summons for the investigator who is to bring transcripts or recordings of his interviews with witnesses.

Losenno v. Ontario Human Rights Commission, Doc. No. C42669, on appeal from (2004), 242 D.L.R. (4th) 550 (Div. Ct.), scheduled for hearing April 20, 2005.

The Commission decided not to refer Mr. Losenno's human rights complaint to a board of inquiry given that the respondent had made a reasonable offer to settle. The Commission subsequently denied Mr. Losenno's request for reconsideration. Both decisions were upheld by the Divisional Court. This is the first case under the Ontario *Human Rights Code* to expressly consider whether the Commission may take into account a respondent's settlement offer in deciding whether it is appropriate to refer a complaint to the Tribunal.

Ministry of the Attorney General v. Tom Mitchinson, Doc. No. C42504, on appeal from (2004), 70 O.R. (3d) 779 (Div. Ct.), scheduled for hearing March 7, 2005.

The Ministry disputes an order requiring it to disclose the amount of legal fees it paid to lawyers involved in Paul Bernardo's appeal, as well as to lawyers representing interveners in Ken Murray's trial. There are three issues on appeal: (1) the extent to which the Information and Privacy Commissioner can participate in judicial review applications regarding the merits of his orders; (2) the standard of review of disclosure decisions regarding personal information under the Freedom of Information and Protection of Privacy Act; and (3) whether the information is protected by solicitor-client privilege, or discloses "personal information", as that phrase is defined by the Act.

Ontario Restaurant Hotel & Motel Association v. City of Toronto and Board of Health for the City of Toronto Health Unit, Doc. No. C42495, on appeal from (2004), 181 O.A.C. 57 (Div. Ct.), to be scheduled for hearing.

The Ontario Restaurant Hotel & Motel Association challenges the jurisdictional and constitutional validity of by-law 574-2000, which requires restaurant operators to post the results of food premises inspections. Where the restaurant is in compliance with the Food Premises Regulation (the "FPR"), enacted under the *Health Promotion and Protection Act* (the "HPPA"), a green "pass" notice is issued. In the case of significant infractions, a yellow "conditional pass" notice is issued, which lists the infractions and notes that re-inspection will reoccur within 24 to 48 hours. Where there are crucial infractions, a red "closed" notice is posted.

The Association's main concern is the posting of "yellow notices"; since the Association says that the yellow notices scare away customers even though there may be no genuine food safety risk. The Association submits that the City did not have the jurisdiction to enact the by-law either under s. 257.2(1) of the *Municipal Act* (which deals with its power to licence businesses), or s. 102 (an omnibus provision which permits the City to make regulations for the health and safety of city residents). It argues that provincial boards of health have exclusive jurisdiction over matters of public health under the HPPA and the FPR. The Association further challenges the by-law pursuant to s. 7 and s. 2(b) of the *Charter*. The Divisional Court rejected these submissions and upheld the validity of the disclosure program.

Roach v. Workplace Safety and Insurance Appeals Tribunal, Doc. No. 42448, on appeal from [2004] O.J. No. 1734, scheduled for hearing on March 15, 2005.

Roach claims that she suffers from “traumatic vertebral ischemia”, a disorder that prevents her from working, as a result of a workplace injury. The Workers’ Compensation Board rejected this diagnosis, and determined that Roach suffers from chronic pain disorder. The Tribunal upheld the Board’s decision, including after a reconsideration application by Roach. The Divisional Court quashed the Tribunal’s reconsideration decision on the basis that the Tribunal’s reasons relating to new evidence presented by Roach on the reconsideration application were insufficient.

The Tribunal sought leave to appeal, arguing that it releases many reconsideration decisions each year and that the issue of what constitutes sufficient reasons on a reconsideration application is a matter of public importance.

The following appeals, which were reported in the last bulletin, are also scheduled to be heard:

Chong v. College of Physicians and Surgeons, Doc. No. C42190, on appeal from [2004] O.J. No. 1081 (Div. Ct.), listed for hearing March 17, 2005.

This is the first decided case dealing with the College’s quality assurance process, including its Physician Review Program. The College implemented the program in 1990 as a means of self-governing the quality of medical care in Ontario.

Dr. Chong had practiced as a general practitioner in the City of Toronto for some 30 years when the Quality Assurance Committee randomly chose his practice to undergo an audit and peer review. After a protracted process (including two peer reviews and testing), the Registrar ordered that a condition be imposed upon his certificate of registration, limiting his practice of medicine solely to surgical assisting for a period of six months. Dr. Chong sought judicial review of the Registrar’s decision. The Divisional Court allowed the application for judicial review on the basis that there had been a denial of natural justice.

Ministry of Correctional Services v. Goodis, Doc. No. C42100, on appeal from [2004] O.J. No. 894, listed for hearing on January 14, 2005.

This appeal raises the issue of whether on a judicial review of a decision of the Information Privacy Commissioner (“IPC”) the Divisional Court has the authority to order that counsel for the requester be granted access to the sealed record for the purpose of preparing to argue the merits of the judicial review application. The Divisional Court dismissed a motion to set aside the order of Blair J. Justice Blair set aside a sealing order and granted disclosure to counsel for a CBC reporter, upon counsel giving an undertaking not to disclose to her client the private record that is the subject of judicial review proceedings. Justice Blair granted access to all 459 pages of the privileged file for the purpose of facilitating counsel’s argument in response to the Ministry of Correctional Service’s application to judicially review the IPC’s decision granting access to 19 of those 459 pages. The Ministry of Correctional Services argues that counsel should not have been granted access to solicitor client and other privileged documents for the purposes of arguing whether they were privileged.

Ministry of Northern Development and Mines v. Mitchinson, Assistant Commissioner, and John Doe, Requester, Doc. Nos. C42072 and C42073, on appeal from [2004] O.J. 163, listed for hearing on April 4, 2005.

The requester sought disclosure of project evaluation reports, which were prepared by employees of the Ministry and provided to the Board of Directors of the Northern Ontario Heritage Funding Corporation to assist it in relation to project funding. The Commissioner found that portions of reports were not exempt from disclosure under s. 13(1) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). At issue is whether portions of the records alerting the government to potential issues, evaluating proposals, and listing options with pros and cons, fall within the meaning of “advice” in s. 13 of FIPPA even though they do not recommend a particular course of action.

Ontario Nurses’ Association v. Mount Sinai Hospital, Doc. No. C41847, on appeal from 181 O.A.C. 35, listed for hearing on February 1, 2005.

At issue is whether s. 58(5)(c) of the *Employment Standards Act* violates s. 15(1) of the *Charter*. Under s. 58(5)(c), an employee who is absent because of illness or injury is entitled to severance if “the employee’s contract of employment has not become impossible of performance or been frustrated by that illness or injury”.

South Etobicoke Residents Association v. The Ontario Realty Corp., Doc. No. C42483, on appeal from [2004] O.J. No. 72 (Div. Ct.), listed for hearing March 14, 2005.

The South Etobicoke Residents Association applied to the Divisional Court for an order preventing the sale of certain lands by the Ontario Realty Corporation (the "ORC"), alleging non-compliance with environmental protection legislation. In a 2-1 decision, the Divisional Court dismissed SERRA's application, concluding that there had been compliance with the environmental legislative requirements.

SERRA raises three main appeal issues. It argues that the Divisional Court erred in its review of the Director's issuance of an air approval for the crematorium (which the purchaser proposes to build on the property) under the *Environmental Protection Act*. It also argues that the Divisional Court erred in concluding that the ORC's environmental assessment satisfied the requirements of the *Environmental Assessment Act*. Third, it argues that the Divisional Court improperly applied a reasonableness standard to these two issues, rather than a correctness standard of review.

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Administrative Law Cases at the Federal Court and the Federal Court of Appeal

Martin G. Masse and Bonnie R. Penfold*

This list is current to December 15, 2004.

Federal Court of Appeal

Canada (Human Rights Commission) v. Canadian Airlines International (March 18, 2004), Doc. No. A-481-01, 2004 FCA 113

This case concerned the proper interpretation of the term 'establishment' as it is used in the *Canadian Human Rights Act* provisions relating to equal pay for work of equal value. The Applicant failed to convince the Canadian Human Rights Tribunal and the Federal Court (Trial Division) that the predominantly female flight attendant employee group worked in the same "establishment" as the predominantly male pilots and technical employees for the purposes of wage comparisons. This term was elaborated in binding guidelines, which required a common personnel and wage policy amongst the employee groups as proof that they were employed in a common establishment. Applying the correctness standard, the Federal Court of Appeal reversed the decisions below by relying on an internal Air Canada labour relations policy that applied to all three employee-groups without distinction. The Trial Division and the Tribunal had erred by undertaking an overly detailed analysis of the respective collective bargaining contracts and focusing on the many examples

of differential treatment. In human rights cases, the aim should be to give effect to the purpose of the legislation. The detailed analysis conducted by the Tribunal and the Trial Division failed to do so. As long as there was some common management in the wage and personnel policy, the standards set in the binding guideline on establishments were met.

Canada (Attorney General) v. Georgian College of Applied Arts and Technology (September 8, 2004), Doc. No. A-561-03, 2004 FCA 285

In an earlier decision in the same matter, the Federal Court of Appeal had rejected the Canadian International Trade Tribunal's ("CITT") policy against awarding costs to the Crown and referred the matter back to the CITT, with instructions to conduct the costs assessment on proper principles. On re-hearing, the CITT again denied costs to the Crown despite its success defending the complaint. While the CITT's second decision was supported by more detailed reasons, the Court still refused to accept the CITT's underlying reasoning that it should encourage procurement complaints by limiting cost consequences to complainants. The Court found that the CITT's reasoning was unsupported by the *CITT Act* and discriminated against the Crown. The Court re-affirmed the principle that generally speaking, the successful party should have its costs. While the Court could

not grant an award of costs directly to the Crown, it sent the matter back to the CITT directing it to grant costs in a specified amount to the Crown.

Vidéotron Ltée c. Netstar Communications Inc. (September 17, 2004), Doc. No. A-64-03, 2004 CAF 299

Vidéotron appealed a decision of the CRTC upholding the complaint of Netstar/RDS, concluding that Vidéotron's decision to invoke a clause in its agreement with Netstar/RDS and reduce the fee it pays to Netstar/RDS was unjustified and created an undue preference to itself, and dismissing Vidéotron's complaint that the practice of Netstar/RDS to tolerate Bell Express Vu's practice of offering multiple terminals for a single subscription had the effect of giving an undue preference to Express Vu. In so doing, the CRTC had relied heavily on the Certificate of the President of Netstar/RDS to the effect that the company had not entered into an agreement with a third party that offered more favourable fees than those paid by Vidéotron. On appeal, the Court agreed to hear new evidence uncovered by Vidéotron that contradicted the Netstar/RDS Certificate. Given the importance of the new evidence, the matter was sent back to the CRTC to be reconsidered in light of it.

Symbol Technologies Canada Ulc v. Barcode Systems (October 7, 2004), Doc. No. A-39-04, 2004 FCA 339

Barcode Systems ("Barcode") was granted leave by the Competition Tribunal for a private application against Symbol for breaching the refusal to deal with provisions of the *Competition Act*. Symbol appealed the leave decision because it was granted without taking into account all of the elements of the allegation. By ignoring the question of whether the refusal to deal had an adverse effect on competition, the Tribunal did not fully consider whether the alleged practice could be the subject of an order under the Act. This amounted to a reviewable error, for which the leave decision was set aside. In the result, the Court performed its own leave hearing in the Tribunal's stead and granted Barcode leave after reviewing the *prima facie* evidence on all the relevant elements of refusal to deal.

Telus Communications Inc. v. CRTC (October 27, 2004), Doc. No. A-589-03, 2004 FCA 365

Telus complained that the CRTC exceeded its jurisdiction by applying retroactive rates with respect to

certain of its conduits. The Court found that Telus' claim of retroactive rate setting did not accurately describe the legal effect of the CRTC's action. The CRTC's decision was in fact a reconsideration of an earlier decision. As portions of the earlier decision were made without evidence and in error, the new CRTC decision set them aside and restored the *status quo ante*. While this had the effect of changing the rates set in the earlier decision, this was allowable given the CRTC's implied and express power of reconsideration – which the Court emphasized, is a good and useful tool for administrators in cases where earlier decisions were clearly wrong. As a result, there was no excess of jurisdiction.

Telus Communications Inc. v. Canada (Attorney General) (November 12, 2004), Doc. No. A-364-04, 2004 FCA 380

The CRTC's Telecommunication Directorate ("Directorate") requested and received a legal opinion from an in-house CRTC lawyer. The Directorate then forwarded the opinion to the Commission, as is their standard practice. The Court had to consider whether this "triangle" of parties inserted a third party into the solicitor-client relationship in such a way as to destroy the privilege attaching to the legal advice. Based on the facts here, the Court found that the Directorate was an agent for the Commission and that such agency did not affect the privilege on communications between the lawyer and his client, the Commission.

Englander v. Telus Communications (November 17, 2004), Doc. No. A-388-03, 2004 FCA 387

In the context of a challenge to a report by the Privacy Commissioner, the Court found that section 14 of the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") allowed it to be engaged in a *de novo* re-hearing of the Applicant's complaint to the effect that Telus had breached PIPEDA, rather than allowing a simple judicial review of the Privacy Commissioner's report. As such, the Court was empowered to address Telus' privacy practices directly. This amounts to a quasi-"judicial review plus," which here was allowed in part. The Applicant had public interest standing only, and was not personally interested, and so the remedies were restricted in the sense that no damages were allowed and the Court refrained from issuing an order with any retroactive effect.

Federal Court

Canada (Attorney General) v. Patterson (sub. nom. "The Flying Squirrel") (September 21, 2004), Doc. No. T-1455-04, 2004 FC 1292

After applying for ownership and import/export licenses on both sides of the border, Patterson was able to bring a flying squirrel to Canada from Indiana, only to find he was subject to an Order to Remove issued pursuant to the *Health of Animals Act*. The Attorney General sought an interim injunction to get the squirrel out of the country pending trial. The Court, however, was not convinced either that there was a serious issue at hand or that there would be irreparable harm in allowing a healthy squirrel to stay put (as much as a flying squirrel will) until the matter is heard on its merits.

Saskatchewan Wheat Pool v. Canadian Grain Commission (September 23, 2004), Doc. No. T-2483-03, 2004 FC 1307

The Saskatchewan Wheat Pool ("SWP") objected to the Commission's decision to cancel a final certificate grading a wheat shipment one month after it had initially issued the same certificate. SWP relied on the doctrine of *functus officio* to argue that once the final decision is issued, the Commission is no longer seized of the matter and cannot alter it. The Court disagreed, holding that the doctrine applies only to matters that have been adjudicated, not purely administrative decisions outside proceedings before a tribunal. The Court nevertheless overturned the decision on the basis that the *Canada Grain Act* did not grant the Commission the power to cancel a certificate in these circumstances. The Commission could not rely on its own administrative guidelines to confer the power to cancel a certificate on itself. Rather such power could only come from a regulation, which the Commission had failed to have enacted.

Northwestel Mobility Inc. v. Robertson (September 27, 2004), Doc. No. T-2273-03, 2004 FC 1311

The Court unreservedly upheld a costs award made by an adjudicator appointed pursuant to the *Canada Labour Code*. The costs award, granted as part of the wrongful dismissal award, was sufficient to cover the whole legal bill incurred by the wrongfully dismissed Respondant. Northwestel disputed the cost award on the basis that it was made without express statutory authority. The Court rejected Northwestel's argument that a correctness standard should be

adopted because this was a "jurisdictional error." Such argument ignored the pragmatic and functional approach contained in "a torrent of standard of review jurisprudence emanating from the Supreme Court of Canada." Instead, applying the pragmatic and functional approach, the Court found that the decision was subject to the patently unreasonable standard and should not be set aside because the costs award was consistent with the basket remedial clause found at subsection 242(2) of the *Code*.

Canadian Union of Public Employees v. Canada (Minister of Health) (September 29, 2004), Doc. No. T-709-03, 2004 FC 1334

CUPE complained that the federal Minister of Health was maladministering the *Canada Health Act*. They sought declarations and *mandamus* orders to improve the state of monitoring and compliance reporting to Parliament. The Respondent in turn challenged both CUPE's public interest standing and more broadly whether the courts were competent to adjudicate the issue. The matter was resolved on the latter point as the Court found that the claim did not disclose a justiciable question. An inquiry as to justiciability is a normative, constitutional one which bars political questions from being decided in the wrong forum. These questions were found to be political as they challenged the Minister's discretion in monitoring and reporting under the *Act*. As such, the claim was struck out.

Agustawestland International Ltd. v. Canada (November 3, 2004), Doc. No. T-1605-04, 2004 FC 1545

Following the alleged mishandling of the helicopter procurement, the Applicant sought a remedy in the Federal Court through judicial review rather than bringing a procurement challenge before the Canadian International Trade Tribunal ("CITT"), even though the CITT provides an administrative remedy for government procurement complaints. Arguing the principle of exhausting adequate alternative remedies, Canada (PWGSC) moved to strike the application. The Court ordered Agustawestland to complain to the CITT - holding that the time would start to run there from the date of its reasons. Given the uncertainty as to whether the CITT process was available to Agustawestland (as it might not qualify as a 'Canadian supplier'), the motion to strike was adjourned *sine die* so that Agustawestland would be free to return to the Federal Court, if necessary.

Association des Pilotes de Lignes International v. Urbino (November 4, 2004), Doc. No. T-1701-02, 2004 FC 1387

The Association challenged the validity of new *Aeronautics Act* regulations on the ground of legitimate expectations raised by conflicting guidelines already put in place by Transport Canada. The Court noted that it is awkward to apply the administrative doctrine of legitimate expectations to the legislative process. Regulations that emanate from the legislative process must be challenged on their own terms. In this case, the regulations were validly made. The

presence of industry consultation during the regulation-making process ensured that there were no legitimate expectations to the contrary. This was a sensible position, as the opposite view would lead to the untenable proposition that guidelines trump any future regulations.

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Administrative Law Cases at the Divisional Court

*Patricia MacLean**

Recent Decisions

Li v. College of Physicians and Surgeons of Ontario (October 1, 2004) (Gravelly, Carnwath and Pitt JJ.) Toronto.

Dr. Li was accused of improper touching of women's breasts during the course of medical examinations and of improper comments of a sexual nature. On December 19, 2002, the College of Physicians and Surgeons of Ontario (the "College") found him guilty on three counts of sexual abuse, one count of sexual impropriety, as well as other related allegations. A Panel of the Discipline Committee revoked his certificate of registration on the same day, although reasons for the decision with respect to liability and penalty were not released until May 23, 2003.

During the first week of evidence in May 2002, a family doctor was called as an expert and factual witness for the College. She continued to assist the College prosecutor until the evidence was concluded on November 22. On November 29, 2002, she was appointed to the Discipline Committee. Although there was no evidence she discussed the case with Panel members. She sat on Panels with them on other cases while the reasons were being drafted. Defence counsel was not notified of her appointment until several months after the May 2003 reasons were released.

Dr. Li brought this appeal, requesting that the decision of the Panel be quashed on the basis of a reasonable apprehension of bias.

HELD: Decision of Panel quashed as being void *ab initio*.

Little or no deference should be given to the Discipline Committee as the matter goes to the duty to act fairly. An informed person viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly.

The College did not put in place a formal mechanism to ensure that the appointee would not communicate with members of the Panel. It remained for the members of the Panel to weigh the appointee's evidence for the purpose of making a decision with the knowledge that she was a colleague of theirs on the Discipline Committee with whom they would likely be sitting on future panels. The further failure to disclose the appointment foreclosed any inquiry by the defence about what, if any, discussions may have taken place. On a preponderance of the evidence, a reasonable apprehension of bias exists.

Upper Valley Dodge Chrysler Limited v. Ministry of Finance (October 18, 2004) (Matlow J. (dissenting), Brokenshire, and Whitten JJ.) Ottawa.

The issue in this appeal is the proper interpretation of s. 3 of Regulation 697 (the "Regulation") under the *Land Transfer Tax Act*, R.S.O. 1990, c. L.6, as amended (the "Act"), which grants an exception to tax payable on the conveyance of land from an individual to a

“family business corporation.” The sole shareholder of the appellant car dealership, William Morglan, was also the owner of the land on which the car dealership operated. Mr. Morglan conveyed the land from himself to his corporation and claimed the family business corporation exemption. The respondent Minister assessed land transfer tax, finding that Mr. Morglan could not start up the business on his land, incorporate the business as a family corporation and then later transfer the land to the family corporation free of tax. The Minister interpreted the Act to mean that the land would have to be transferred to the family corporation before the business. The assessment was successfully appealed before Power J., whose decision is under appeal.

HELD: Appeal dismissed.

The Regulation was intended to facilitate the continuance of family businesses in Ontario. The Regulation exempts from the usual taxation transfers of the land used for family businesses from the individual who had operated the business to a “family corporation”, thus permitting succession planning within a family without taxation being imposed each time the effective ownership of the family assets changed within the family. This is remedial legislation, which is entitled to a fair, large and liberal construction and interpretation that will best attain the object of the Act. The Minister’s interpretation was not specifically stated in the Regulation and, had this been the Legislature’s intention, it would have been stated. The purposive interpretation of the Regulation produces a result which is workable and in harmony with the evident purposes of the Regulation.

Dissent: Upper Valley Dodge Chrysler Limited operated the car dealership, not Mr. Morglan. Upper Valley could not qualify as an “individual” as defined by the Regulation, and, as such, the land transfer did not meet the requirements for the exemption under the Regulation. The provision in the Regulation adequately conveyed the Legislature’s intention to create a tax exemption in certain circumstances for conveyances from human beings to corporations.

Kapuskasing (Town) v. Kapuskasing Association of Professional Fire Fighters, Local 1237 (October 22, 2004) (O’Driscoll, Lane and Jennings JJ.) Toronto

The Town of Kapuskasing operates the Kapuskasing Fire Department (“Fire Department”), whose members are represented by the Kapuskasing Association of Professional Fire Fighters (“Association”). The Town

and the Association have been parties to a collective bargaining agreement since the mid-1950s.

The town council passed a by-law disbanding its entire Fire Department and replacing it with a voluntary fire department. It gave 30 days notice to the Association that the collective agreement was terminated and terminating the employment of the full-time fire fighters. The Association filed a grievance alleging that the Town had violated the collective agreement as well as s. 56 of the *Fire Protection and Prevention Act, 1997*, S.O. 1997, Ch. 4 (“*FPPA*”).

The Arbitrator decided that the collective agreement remained in effect and that the *FPPA* provided for a “freeze” until the new collective agreement could be signed. The Town did not have the right to unilaterally break its contractual collective agreement or disband the Fire Department. The Town brought two applications for judicial review, to quash the Arbitrator’s decision and to order the by-law declared passed and in full force and effect and to stay the deliberations of the Board of Interest Arbitration.

HELD: Applications for judicial review dismissed.

As there was a collective agreement in place, the Arbitrator had the jurisdiction to proceed with the arbitration. The Arbitrator was correct in finding that the collective agreement had expired and that the Association’s service of notice had triggered the “freeze” provision in s. 56(2) of the *FPPA*. There is no basis for the court to interfere in these conclusions.

The Arbitrator was correct in finding that the Town’s discretionary authority to establish a fire department does not give it authority to ignore or override its obligations under the collective agreement and under the *FPPA*. As a result, there is no reason to stay the proceedings of the Board of Arbitration.

College of Chiropractors of Ontario v. Kovacs (October 26, 2004) (Then, Meehan (dissenting), Swinton JJ.) Toronto

The College of Chiropractors (“College”) brought discipline proceedings against the Respondent as a result of complaints of sexual assault made against him by a young woman. The Complainant reported the incident to her boyfriend, a police officer, and gave a written statement and a videotaped interview to the police.

The Discipline Committee (“Committee”) commenced disciplinary proceedings against the Respondent, who

denied the allegation of professional misconduct. The majority of the Committee concluded that the College had not proven its case and that none of the allegations of professional misconduct were proven in accordance with the requisite standard of proof. The Complainant's credibility was inconsistent and changeable.

The sole dissenter concluded that the Complainant's testimony was credible and her account of what took place was "clear, detailed and convincing." The Respondent's denial was not believable and did not make common sense.

The College appealed on the ground that the majority erred in their assessment of the Complainant's credibility and erred in law by making findings of fact and drawing inferences that were unsupported by the evidence in order to make their findings of credibility.

HELD: Appeal allowed.

The decision of the Committee is unreasonable. The majority made errors in assessing the evidence that cumulatively are so serious that the decision must be set aside and a new hearing must be held.

The majority misconstrued certain parts of the evidence and failed to consider the Complainant's explanations. As a result, their assessment of her credibility based on inconsistencies is flawed. Rather than focus on the testimony of the parties, the majority appears to have used myths and stereotypes about sexual assault victims and perpetrators, which have influenced their decision in a manner that did not appear fair to all the interested parties.

Dissent: There was ample evidence to indicate that there were inconsistencies in the Complainant's evidence. There is nothing unreasonable in the majority accepting the Respondent's versions of events. There was sufficient evidence upon which the panel could reasonably find him not guilty.

Amerato v. Ontario (Motor Vehicles Dealers Act, Registrar) (October 29, 2004) (Gravelly, Carnwath and Pitt JJ.) Toronto

The issue raised in this application is whether a licensee under the *Motor Vehicle Dealers Act*, R.S.O. 1990, c. M.42, can waive his right to a statutorily-mandated hearing in a consent order issued by the Licence Appeal Tribunal ("Tribunal").

The Registrar proposed to revoke the Applicants' licence by issuing a Notice of Proposal under s. 7 of the Act. Upon receipt of the Notice of Proposal, counsel for the Applicants negotiated a consent order with the Registrar. The Tribunal issued the consent order, in which the proceedings in the matter were concluded and disposed of without a hearing on the basis of twenty-four terms set out in the order. One of the terms included an acknowledgement that any breach of the terms of the order would result in the Registrar carrying out the Proposal.

Two years later, the Applicants received a Final Notice signed by the Registrar informing the Applicants that their licences had been revoked. The Applicants argued that the Registrar had no jurisdiction to revoke their licences without issuing new Notices of Proposal and that the order of the Tribunal was *ultra vires* and of no force and effect.

Held: Application granted.

The right to a hearing, as mandated by s. 7(1) of the Act, is created in the interest of the public and cannot be waived by the Registrar or by the Applicants. To suspend a licence requires the Registrar to follow the provisions of s. 7(1) of the Act with meticulous care. The waiver of any prospective hearing was invalid, as was the order issued by the Tribunal and the Final Notice issued by the Registrar.

Should the Registrar wish to suspend or revoke the Applicants' licence, the Registrar must serve Notice of the Proposal and the Applicants will be entitled to a hearing by the Tribunal, provided they serve Notice in Writing Requiring a Hearing to the Registrar and Tribunal.

Eliopoulos v. Ontario (Minister of Health and Long Term Care) (November 03, 2004) (Pitt J.) Toronto.

The issue in this action is the alleged failure by the provincial government to prevent the spread of West Nile Virus, with which the plaintiff became afflicted in September 2002. The motion judge dismissed the defendant's motion to strike the action, finding that, since a duty of care *may* be owed to the plaintiffs, the action should proceed to trial. This marks the first time that a court in Canada has found that a public authority can be held liable in tort for failing to prevent the spread of a disease. The defendant brought this application for leave to appeal under Rule 62.02 of the *Rules of Civil Procedure*, in addition to a motion to stay the order.

HELD: Leave to appeal granted; motion to stay granted.

For leave to be granted, the judge must find either that there is a conflicting decision on the matter involved and that it is desirable that leave to appeal be granted, or that there is good reason to doubt the correctness of the order and the proposed appeal involves matters of such importance that leave to appeal should be granted. In this case, both tests are met.

In *Cheltenham Estates Ltd. v. Ontario*, [2003] 64 O.R. (3d) 620 (Sup. Ct. Jus.), Sachs J. found that the threshold question was whether the defendant government *did* owe a duty of care to the plaintiff. Similarly, in *Mitchell Estate v. Ontario*, [2004] O.J. No. 3084 (Div. Ct.), the court held that the degree of proximity must be sufficient to *establish* a duty of care. These decisions conflict with the motion judge's finding that it is sufficient that a duty of care *may* exist. It is desirable that leave to appeal be granted for an orderly development of this emerging area of law.

There is good reason to doubt the correctness of the order with respect to a matter of great public importance because of the motion judge's failure to analyze the other two applicable statutes, and her policy analysis as it relates to the need for a record in the determination of whether what appears to be a new duty of care should be recognized.

Elias Helou o/a Your Choice Pizza & Wings v. The Minister of Finance (December 17, 2004) (Cunningham A.C.J., Lane and Ferrier JJ.) Toronto

The Minister of Finance appeals from the order of Brennan J. dated September 16, 2002 wherein he granted the Respondent an extension of time for filing his notice of appeal and dismissed the Minister's cross-motion to have the notice of appeal struck out.

The Respondent was audited for the period ending October 31, 1999 and the Minister assessed him for tax collected and not remitted. The Respondent objected to the assessment by notice of objection, but failed to give reasons. The Minister informed the Respondent he had 60 days to provide reasons for the objection, failing which the Minister would confirm the assessment. The Respondent submitted no additional information.

By letter dated September 20, 2000, the Minister confirmed the assessment and advised the Respondent he had 90 days in which to dispute the matter further. On January 26, 2001, the Respondent served the Minister

with his notice of appeal, 37 days after the end of the 90-day limitation period. The Minister advised that the appeal was invalid, as it had been filed outside the limitation period prescribed in the statute. The Respondent filed a notice of motion for an extension of the time for filing his notice of appeal.

In granting the extension, Brennan J. held that s. 25 of the *Retail Sales Tax Act*, R.S.O. 1990, c. R. 31, is a deeming provision by virtue of s. 29 and has the effect of bringing a dispute between a taxpayer and the Minister into the court so that it can be dealt with impartially and pursuant to the inherent powers of the court. Alternatively, Brennan J. held that, based on the facts of the case, the Minister was estopped from relying on the 90-day limitation period set out in s. 25 of the Act.

HELD: Appeal dismissed.

The principal issue to be decided was whether Brennan J. erred in holding that the court had jurisdiction to extend the time for filing the notice of appeal. This being an order from a judge, the standard of review is correctness.

The provisions of the *Retail Sales Tax Act* are clear and unambiguous. An appeal is not deemed to be an action until the requirements set out in ss. 26 and 27 are met. They were not met in the present case. The only deeming provision is s. 27 of the Act.

Moreover, the motions judge erred in concluding that the Minister had to "meaningfully" reconsider the Respondent's appeal. The only obligation upon the Minister is to reconsider the matter.

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Administrative Law Cases at the Supreme Court of Canada will be provided in the next newsletter.

Key Issues in Administrative Law: A Discussion of Basic Principles (Administrative Law Section, London)

*G.J. Levine**

Michael Coyle, Assistant Professor, Faculty of Law, University of Western Ontario gave a clear and cogent presentation on basic principles in administrative law at the Middlesex Law Library on Nov. 24, 2004. The discussion was wide ranging and effective. Prof. Coyle covered not only the foundational rules of the right to know the case and the rule against bias but dealt with the importance of context in determining the character of fair procedure, the reasons for fairness and the importance of independence of tribunals. As well he reviewed grounds for challenging decisions of tribunals.

Prof. Coyle described both the common law sources of administrative rights as well as statutory interventions and the paramountcy of statute where common law has been altered.

Finally Prof. Coyle considered remedies. Typically while these are at the discretion of the court, a new hearing based on correct principles is the usual order.

The discussion provided an opportunity to review principles and to renew acquaintance with key concepts. It attracted questions about local cases and provided the bases for a lively discussion.

** G.J. Levine, Associate Professor, Department of Political Science, University of Western Ontario, London, (519) 438-8259, greg_levine@telus.net.*

Administrative/Municipal Law Sections Meeting on November 22, 2004

*Peter Ruby**

On November 22, 2004, the Administrative and Municipal Law Sections of the Ontario Bar Association held a joint dinner meeting where they were treated to a behind-the-scenes look at two of Ontario's industry regulators. Peter Ruby of Goodmans LLP moderated a panel discussion between Gordon Kaiser, Vice-Chair of the Ontario Energy Board ("OEB"), and Robert Owen, Vice-Chair of the Ontario Municipal Board ("OMB"). These tribunal members engaged in a candid and wide ranging discussion of how their respective tribunals make decisions.

The panellists addressed how individual members of each board were chosen to sit on specific matters. Both panellists noted that while the Chairs of their respective tribunal assigned board members, board members were free to, and did, express their interest in specific files or types of files and, from time to time, specific hearing locations. The panellists also remarked that it was up to the individual panel members, once they became seized of the matter, to decide whether a particular question would be the subject of an oral or written hearing, and what process would be followed. They also discussed at length the involvement of board staff with respect to the processing of a file before it came on for a hearing. On that issue, the practices of each tribunal were very different, with the OMB's staff largely confining itself to a clerical role, while the OEB's staff provided much more substantive assistance to the board members. The panellists also described how the tribunals differed significantly with respect to the use of board counsel. While both Vice-Chair Kaiser and Vice-Chair Owen noted that board members drafted their own decisions, in the case of the OEB, the Board's legal counsel sometimes provides input on legal issues and comments on draft decisions.

One of the most interesting exchanges of the evening concerned the manner in which each tribunal attempts to achieve some level of consistency in decision making. Moreover, a substantial difference between the practices of the two tribunals was their use of ADR, with the OEB requiring a form of mediation in many circumstances, and the OMB having a practice that has varied over time.

Overall, one fact that became apparent during the course of the panel discussion was that the two boards' approaches to decision making were dictated in part by the funding of the two tribunals. It appeared that the OEB, particularly since it became a self-funding agency, is well funded and has a more robust administrative structure. The OMB appeared to run on a much tighter budget.

The over 40 audience members greatly enjoyed the candid exchange of views between the panellists, offering questions and comments throughout the evening.

* *Peter Ruby, Goodmans LLP, (416) 597-4184, pruby@goodmans.ca.*

Community Legal Clinic Director Receives SOAR Medal

Kathy Laird, Executive Director of the Advocacy Centre for Tenants Ontario is the 2004 recipient of the Society of Adjudicators and Regulators Medal.

Ms. Laird received the award in recognition of her outstanding contributions to the administrative justice community. Ms. Laird is a past vice-chair and counsel to the Ontario Human Rights Tribunal and currently holds the position of Executive Director of ACTO, a community legal clinic advocating for the rights of tenants. In awarding its medal, SOAR has recognized Ms. Laird's significant and exemplary work in promoting integrity, fairness and accessibility in the administrative and adjudicative process for disadvantaged communities, along with Ms. Laird's contributions to training programs for adjudicators.

In her position as Executive Director of ACTO, Ms. Laird is active in legal advocacy, law reform advocacy and community education on behalf of disadvantaged communities.

SOAR is an organization of chairs, members and executive staff of administrative justice agencies. Past recipients of the SOAR medal include George Thompson, Executive Director of the National Judicial Council, Ron Ellis, former Chair of the Workplace Safety and Insurance Appeals Tribunal, and John Swaigen, former Chair of the Environmental Appeals Tribunal.

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

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