Ontario Bar Association | Association du Barreau de l'Ontario
The Ontario branch of the Canadian Bar Association | La division ontarienne de l'Association du Barreau canadien

Administrative Law

ADMINISTRATIVE LAW SECTION / SECTION DU DROIT ADMINISTRATIF

Volume 14, No. 2
June/Juin 2006

In this Issue:

Taking the Pulse of Ontario's Administrative Justice System

Message from the Chair

Human Rights in Ontario: Can We Do Better?

Administrative Law Cases at the Supreme Court of Canada

Administrative Law Cases at the Court of Appeal for Ontario

Section Executive 2005-2006

Taking the Pulse of Ontario's Administrative Justice System

*Alec Farquhar**

A joint program of the Administrative Law and Workers` Compensation Law Sections was held on April 20, 2006, featuring leading practitioners in the administrative justice field. Co-chairing the program were Alec Farquhar, Director, Occupational Health and Safety Branch, Ministry of Labour, and Andrew Wray of Gillespie, Wray, James LLP.

The Panel discussion was chaired by Raj Anand, WeirFoulds LLP with a panel that included Kathy Laird, Director of Legal Services, Advocacy for Tenants Ontario, Ian Strachan, Chair, Workplace Safety and Insurance Appeals Tribunal, and David Brady of Hicks Morley Hamilton Stewart Storie LLP.

Presentations

Raj Anand

Raj Anand introduced the key issues for the session. There have been various policy reviews by government over the years. More recently, the Administrative Justice Working Group has recommended that there needs to be reform of the appointments process, particularly for adjudicative tribunals. The focus is an open, transparent and merit-based appointments process. A number of key elements have been identified: regular postings of opportunities, public advertising of chair positions, competitive process led by the tribunal Chair, appointments and re-appointments pursuant to the recommendation of the Chair, standard duration of appointments and statutory entrenchment of the various elements of the process. Mr. Anand introduced several themes that would be covered in the program: the progress made and not made by the current government; and, the tribunal appointments process, which would serve as a jumping off point for wider issues. Remuneration and tenure are key issues. Others are the relationship of the Chair and tribunal to Ministers, qualifications for appointment and the extent to which the recruitment and re-appointment decisions are actually tied to the true needs of the tribunal. Mr. Anand urged the participants to think more broadly about the quality of decision making and the accessibility of tribunals to those who need to use them. This includes government funding for tribunals. This is a vital issue. Administrative tribunals are where many in Ontario seek justice. Courts have high expectations of these tribunals and generally defer to them. There are some key relevant court decisions coming down soon.

Mr. Anand asked: How well are we doing? Has significant progress been made? What developments are under way? What does the future hold?

Ian Strachan

Ian Strachan provided the perspective of the tribunals and of the Society of Ontario Adjudicators and Regulators (SOAR). Basically, there is good news and bad news. The good news is the prospect of an improved appointments process. For WSIAT, the appointments process has improved significantly from that under the previous government. The bad news involves Order in Council (OIC) remuneration. This is a key issue. It has been 17 years since most OIC appointees have seen an increase in their remuneration. This has been exacerbated by the recent settlement with the government lawyers, which widens the gap. Most of the WSIAT Vice-Chairs are lawyers. They are highly qualified and experienced. This has a demoralizing effect on Vice-Chairs. This comes at a time when the OIC appointees are being asked to take on a heavier caseload involving more complex appeals. The WSIAT has been having more and more trouble attracting qualified appointees. For example, there have been two vacancies now for over two years for bilingual worker and employer side members. There is now only one part-time bilingual member for workers and one for employers. If the quality and the expertise erode, this will threaten the quality of justice.

There is now an Agency Review Group headed by Debra Roberts, the Director of the Public Appointments Secretariat. It is looking at remuneration and other issues.

On the appointment front, we are moving toward a merit based appointment process. SOAR's recommendation is to entrench this process in legislation. This would make it difficult for a future government to reinstate a patronage system.

There has been a major positive shift with Labour Ministers Bentley and Peters. They have supported the WSIAT's approach, which includes an examination and an interview resulting in a merit-based process. Mr. Strachan noted that when we have people of the quality of Bill Flanagan, current Dean of Law at Queen's, and David Mullan, being appointed to WSIAT, everyone can see the positive results of a merit-based process. We need to commit strongly as a system to such a merit-based process.

SOAR calls for a merit-based system set out in legislation, with a strong role for the Chair. The Agency Review Report will hopefully support a merit based approach, with a two year initial term, with longer terms following. There may be consideration of a cap on appointment duration, for example 10 years. SOAR argues strongly against this. SOAR would like to see an exception made to allow retention of the most competent and expert members on tribunals.

Kathy Laird

Kathy Laird noted that three years ago, legal clinics got together around appointments issues in response to a serious situation where, under the previous government, good tribunal members were not re-appointed while unqualified members were being appointed. The clinics supported a merit based approach. There was also the perception that stakeholder interests were not being given appropriate weight by some tribunal Chairs. There were no mechanisms to encourage stakeholder input. For example, there was no obligation to produce an annual report at the Social Benefits Tribunal or the Housing Tribunal. Neither tribunal published its decisions. This made it difficult to determine what these tribunals were actually doing. There was no input on rules and procedures, as there had previously been at many tribunals. The clinics began meeting with Liberal policy staff and elected members prior to the last election. Others were also meeting with the Liberals on these issues. Following the election, the clinics joined with others to form the Administrative Justice Working Group (AJWG). The AJWG has developed a position paper which has been presented to the government and has been supported in general by a number of key organizations.

Much is at stake for vulnerable people appearing before tribunals – their housing and disability benefits. The current government has taken some significant positive steps, including moving to public advertisement of competitions for Chair appointments. However, the remuneration issue has been a problem. Administrative justice issues are also in the media again, including the human rights process and the health practitioner discipline system.

The Housing Tribunal has issued a decision stating that the lack of funding for the tribunal was undermining the quality of justice at that tribunal. New legislation on the housing tribunal is expected soon. The Tribunal has established a stakeholder advisory committee and as a result, progress can be expected in terms of making the rules and procedures more appropriate for the

communities served by the Tribunal. Remuneration and budget are still major issues.

The administrative justice changes so far are somewhat piecemeal. A more systemic approach is needed.

We have seen better appointments overall. But the Social Benefits and Housing Tribunal salaries are over $20,000 less than WSIAT and in turn WSIAT is much less than the OLRB. This means that it is very difficult to find qualified appointees. This sends the message that the matters adjudicated by these tribunals aren't really very important.

The Tranchemontagne /Werbeski decision from the Supreme Court of Canada will determine whether a tribunal can apply the human rights code to proceedings before it, including to suspend the application of a section of its own legislation that is contrary to the Code. [Editor`s note: The judgment was issued on 21 April 2006. See page 16 for a summary of the decision.] If the Court determines that this is possible, it will further heighten the need for expert adjudicators. Also, this is vital in terms of access of vulnerable populations to justice. Adjudicators who are qualified and knowledgeable to hear Charter and Code issues which arise in other fora are essential. BC has barred Charter jurisdiction for most of its tribunals. Quebec is going in the opposite direction.

David Brady

David Brady stated that he comes at this issue from the perspective of representing employers who use the administrative justice system. As with other stakeholders which turn to this justice system, the fundamental issue is whether the appointees are worthy of respect. Employment law lawyers spend most of their time before boards and tribunals, or adjudicators. Sometimes they go to the Divisional Court or Court of Appeal. When these tribunal decisions arrive in these courts, there is significant protection for the decisions made. The test for review is high. These are mostly final and binding decisions. This means that we need tribunals which will get it right. Quality is fundamental. If you do not have quality, you do not have justice. You need adjudicators who can analyze, write and be timely. In labour relations, the system is well funded. The arbitrators are well qualified and must get consensual appointments to succeed. You must earn the respect of both communities. But the model is built on institutions with solid resource bases. This is not the case in many boards and tribunals. Many tribunals do not have a strong institutional culture.

Tribunals need to be well led and have resources. They need to create a body of law. It is hard to understand how a tribunal dealing with important issues would not have a body of law. A tribunal needs to have a library, computer support, resources for research, and to be able to create a body of law. This creates consistency, predictability. You need to have the supports for this kind of quality. If you don't have the money and resources, you don't have justice. You have lame duck, well intentioned people who cannot solve problems. In fact, the tribunal is part of the problem. This is intolerable.

What happens after tonight? Something should happen. Constituencies must take this issue and politicize it. We must try to press for change. The Admin Justice Working Group suggestions are common sense and should be pursued. There should be follow up.

Discussion

What is SOAR doing?

- Ian Strachan – there is a new paper which will be on the SOAR website within a couple of weeks.

Is the recent development in Supreme Court appointments going to have any impact?

- Kathy Laird – various OBA Sections passed motions endorsing changes in the appointments process; there was general support from the Law Society, Legal Aid Ontario, Advocates Society, the provincial executive of the OBA. We met with the Director of the Public Appointments process. We have made progress in terms of public posting of Chair positions and around the role of the Chair in appointment and re-appointment.

What is the role of the Standing committee process?

- Kathy Laird – the clinics have asked to meet with that committee. It could be used as a place to have this discussion. Hasn't really developed yet.

Other Issues

- Ron Ellis – we have many decades of failures by politicians and bureaucrats to bring meaningful reform. The absence of government presence in this meeting is significant. There is a recent decision

of the Ontario Superior Court in which the government was ordered to establish a remuneration commission for deputy judges ("Small Claims Court"). This is of significant interest. There is a degree of pessimism of how this would apply to administrative justice tribunals. There is also the McKenzie case in BC. If so, an application to the court along these lines might succeed. It is difficult for OICs themselves to launch such a legal action. Can the OBA get active in such litigation? There is a precedent in Quebec. The political strategy just hasn't succeeded. We need a litigation strategy.

- Raj Anand– there is an argument being developed around the rule of law. This may help where arguments around judicial independence might not succeed. For example, this has succeeded around elimination of court fees for those who cannot afford them. Perhaps this could be applied to the tribunals. There is also the issue of funding of litigants before tribunals. Many people now appear without representation. The Ontario Energy Board has a mechanism for funding.

- Kathy Laird – there are legal clinic duty counsel at the Rental Housing Tribunal. This is available across the province, but in some cases only by video conference.

- Ian Strachan – WSIAT is fortunate because the system funds the Offices of the Worker and Employer Adviser. The consensus from adjudicators is that representatives from those two organizations are highly competent.

- David Brady – some arbitration cases involve competing rights in a unionized setting. This means that there are unrepresented parties. Good arbitrators can account for this and ensure that such parties are heard.

* *Alec Farquhar, Director, Occupational Health and Safety Branch, Ministry of Labour, Ontario,* (416) 326-7866, alec.farquhar@mol.gov.on.ca.

Divisional Court Practice Directions

The Divisional Court Bench & Bar Committee is reviewing the Divisional Court's practice directions with a view to updating and improving them. Please submit suggestions to Jeff Cowan or Sara Blake.

Sara Blake, Counsel
Ministry of the Attorney General
Crown Law Office, Civil Law
720 Bay Street, 8th floor
Toronto, ON M5G 2K1
Tel. 416-326-4155
Fax 416-326-4181

Jeff G. Cowan
WeirFoulds LLP
Suite 1600, The Exchange Tower
130 King Street West, P.O. Box 480
Toronto, Ontario, Canada M5X 1J5
Direct 416-947-5007
General 416-365-1110
Fax 416-365-1876
Mobile 416-559-4460

Message from the Chair

*Carole Prest**

The 2005-2006 year has flashed past, and I now find myself preparing a rather lengthy report on the events of a very busy and productive period. In addition to organizing the usual dinner meetings in Toronto and a very successful 2006 Institute program, the Section hosted an evening in Ottawa on issues of particular interest to lawyers practising administrative law in the federal setting. We also responded to the OBA's request for input on two important pieces of draft legislation which, if enacted, will have a fundamental impact on the Ontario legal landscape.

Bill 14, *Access to Justice Act, 2005* is complex legislation. Schedule C to the Bill has received the most attention as it sets out a structure for regulating paralegals. On behalf of the Section, I attended a number of meetings with the Paralegal Task Force and other concerned Sections. The Administrative Law Section filed submissions on paralegal regulation which are available on the OBA website. The submissions recognize the value in having the Law Society of Upper Canada responsible for regulation, but note the potential for public confusion arising from some of the provisions and suggest possible modifications. These submissions, along with those of other Sections, have assisted the OBA's Paralegal Task Force in preparing its response. Bill 14 passed second reading and has been referred to the Standing Committee on Justice Policy. I understand that the Paralegal Task Force will be making a presentation to the Standing Committee in September.

The Administrative Law Section was also asked to comment on Bill 107, the proposed *Human Rights Amendment Act*. The Executive Committee is considering this and would appreciate input. Andrew Pinto, Past Chair of the Section, is representing the Section. The OBA has formed a Working Group on Bill 107. Co-chairing this endeavour will be Andrew Pinto (Administrative Law) and David Wright (Constitutional, Civil Liberties and Human Rights).

Turning to dinner meetings, I would like to begin this portion of my report by noting the initiative of two Ottawa members of the Executive, Martin Masse and Sebastian Spano. In December, they, along with Eugene Meehan, organized an Ottawa dinner meeting featuring Chief Justice John Richard of the Federal Court of Appeal, speaking on "Federal Courts Advocacy: Effective Ways to Advance Your Constitutional and Administrative Law Case – What Works, What Doesn't." This event was extremely well-attended and the Executive looks forward to providing more programming in the Ottawa area on issues of particular interest to Federal Court practitioners.

The Section began the 2005-2006 year with a flourish, by being the first organization to host an evening with the then newly-appointed Ombudsman, Andre Marin. Mr. Marin discussed his vision of the Ombudsman's Office and the significant changes being made. In December, Mark Noskiewicz, Craig Flood and Jill Dougherty, experienced litigators who appear before very different tribunals, shared their perspectives on the "Expertise of Tribunals: The Key to Deference." There were also two dinners focusing on broader systemic issues. These topics are discussed in more detail elsewhere in this newsletter. Suffice to say that on April 3, the Section co-hosted a very timely "backgrounder" on human rights reform with the Constitutional, Civil Liberties and Human Rights Section. Barbara Hall, Chief Commissioner of the Ontario Human Rights Commission, and Michael Gottheil, Chair of the Ontario Human Rights Tribunal, participated in an informal and frank discussion with lawyers and members of the affected communities. The evening was ably moderated by Ena Chadha, Director of Litigation of the ARCH Disability Law Section. On April 20, the Workers' Compensation Section and the Administrative Law Section co-hosted a dinner meeting on systemic issues affecting administrative tribunals, "Taking the Pulse of Ontario's Administrative Justice System." Raj Anand of WeirFoulds LLP chaired a panel discussion featuring, Kathy Laird of Advocacy for Tenants Ontario, David Brady of Hicks, Morley, and Ian Strachan, Chair of the Workplace Safety and Insurance Appeals Tribunal, who also presented the perspective of the Society of Ontario Adjudicators and Regulators (SOAR). On May 23, the 2005-2206 year concludes with the ever popular "Annual Update on Judicial Review". Chris Paliare and Professor Laverne Jacobs are speaking and the event will be chaired by Professor Lorne Sossin.

Last, but by no means least, I am pleased to report that the 2006 Institute program, "Hot Topics, Best Practices: Everything You Need to Know in 2006" was attended by approximately 80 lawyers and received special (in a positive sense) mention from the *Law Times*. As Co-Chairs of the program, Andrew Wray and I would like to recognize the significant contribution made by those who participated. The program aimed at bringing together the perspectives of experienced litigators with a broad range of experience, and the views of members of the Bench and Tribunals. Raj Anand and John Moore, Vice-Chair of the Workplace Safety and Insurance Appeals Tribunal, spoke on Charter and Constitutional issues arising in tribunal proceedings, with a paper by Peter Ruby. Christopher Bredt and Paul Muldoon spoke on Standing and Intervention. Sara Blake presented an Administrative Law Update. The program concluded with a lively discussion of best practices -- as seen from the other side of the Bench -- by Madam Justice Nancy Spies and Lynda Tanaka, Chair of the Ontario Racing Commission.

Looking towards 2006-2007, the Section will continue to provide top quality programming on issues of concern to members practising in all areas of the administrative justice system – whether in private practice or government, in a provincial or federal agency or self-regulatory context. We can only do this if we hear from you. Please take a minute to let the Executive know what interests you and how the Section can better serve your interests and those of the administrative justice system.

* *Carole Prest, Workplace Safety & Insurance Appeals Tribunal*, (416) 314-8848, carole.prest@wst.gov.on.ca.

Human Rights in Ontario: Can We Do Better?

*Allison Knight**

On April 3, 2006, Barbara Hall, Chief Commissioner of the Ontario Human Rights Commission, and Michael Gottheil, Chair of the Human Rights Tribunal of Ontario, shared their views on the Ontario government's recent announcement regarding proposed reforms to the human rights system in the Province. The event attracted about 100 members and was jointly organized by the Constitutional, Civil Liberties and Human Rights Section and the Administrative Law Section of the OBA. Joseph Cheng, counsel with the Department of Justice Canada chaired the event, and Ena Chadha, Director of Litigation, ARCH Disability Law Centre acted as Moderator.

Ena Chadha, Director of Litigation, ARCH Disability Law Centre (on academic leave), Adjunct Faculty, LL.M. Candidate, Osgoode Hall Law School; Michael Gottheil, Chair, Human Rights Tribunal of Ontario; Barbara Hall, Chief Commissioner, Ontario Human Rights Commission; Joseph Cheng, Department of Justice Canada - Public Law Section.

Under the current human rights system, the Ontario Human Rights Commission receives complaints, investigates them, and decides whether the matter should go forward to a hearing before the Human Rights Tribunal. Under the proposed system, individual complainants will file their complaints directly with the Tribunal. The Commission will address systemic discrimination issues through education, research, and advocacy, and will maintain the ability to bring a complaint on its own behalf before the Tribunal or to intervene in other complaints.

Like many stakeholders present, Ms. Hall expressed the view that the Ministry of the Attorney General

has not yet provided any details of its reform plan. She stressed that now is the time to focus on which aspects of the current system work and which can be improved. Ms. Hall suggested several principles that define a successful human rights system, including: accessibility; promotion of the public interest through education, research and advocacy; and acquisition of the necessary tools and resources to achieve these goals.

According to Ms. Hall, it is essential that the new system provide access to investigations for complainants as well as access to the results of these investigations. In addition, significant interaction and communication between the Tribunal and the Commission is needed in order to assist the Commission in identifying systemic issues, and so that the Commission can intervene in cases of interest. Ms. Hall expressed concern that the Tribunal's current adversarial approach may dissuade some individuals from complaining; furthermore, the Tribunal's formal process may not recognize cultural sensitivities.

In conclusion, Ms. Hall stated that while the Commission supports the idea of reform, wide-ranging consultation is needed in order to hear from "those who will be most impacted by the changes, those who have the most to lose, and those who deal in the system everyday… in order that we can build not just a system of human rights, but a culture of human rights".

Mr. Gottheil highlighted the need to incorporate "good, modern, solid administrative justice principles" into the new system. According to Mr. Gottheil, a good administrative law system should include transparency; accessibility; timely, meaningful and effective remedies; and the right to be heard.

In order to incorporate these principles into the new system, Mr. Gottheil proposed a more flexible model of adjudication. He suggested that a flexible approach to adjudication acknowledges decision making that is based on law, facts and policy, thereby enhancing transparency. A less formal model would allow for facts to be obtained in an inquisitorial, rather than an adversarial, manner. In addition, less formality would provide an opportunity to stream cases, and to decide cases in an expedited fashion.

Efficient and expeditious handling of cases is one of the biggest concerns of the new system, as the Commission will no longer serve a "gatekeeping" function for Tribunal hearings. The Commission currently receives over 2400 complaints per year. The Tribunal receives approximately 150 cases from the Commission, 65% of which are settled before going to a hearing. Mr. Gottheil stresses that the change in the Tribunal's caseload represents more than an increase in volume; the scope of the decisions will be broader, and its relationship with complainants will be different. However, Mr. Gottheil suggests that because the system will incorporate more direct enforcement, the opportunity for providing meaningful remedies is great.

Several attendees voiced concerns that the government had not adequately consulted with stakeholders in the reform process. Many groups feel betrayed by what they perceive to be "unilateral government suggestions", and stressed the need for wider consultation before legislation is tabled.

Both speakers expressed difficulty in discussing the proposals when so few details had been released. Mr. Gottheil suggested that once further details on the proposed reforms become available, a return engagement may be in order. A sequel to the April 3rd event would seem like an excellent idea, as both the number of attendees and the long queues to the microphones that evening indicate that the debate on this subject is far from over.

* *Allison Knight is an articling student at the Office of the Information and Privacy Commissioner/Ontario. She can be reached at* (416) 326-4988 *or* allison.knight@ipc.on.ca.

Administrative Law Cases at the Supreme Court of Canada

*Sebastian Spano**

This list is current as of May 1, 2006.

Recent Decisions

City of Montreal v. 2952-1366 Quebec Inc., 2005 SCC 62

The City of Montreal's *By-law concerning noise* prohibits noises produced by sound equipment, whether installed inside or outside a building, where that noise can be heard from outside. A business operating a club featuring female dancers set up loud speakers that amplified the music and the commentary accompanying the show to the outside for passers-by to hear. The club operator was convicted of breaching the by-law. The Superior Court quashed the conviction on the basis that the by-law was an unjustified infringement of the operator's freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Quebec Court of Appeal upheld that decision. The Supreme Court of Canada allowed an appeal of that decision (Binnie J., dissenting).

The by-law was not overly broad despite its general language. Its scope could be determined from its history, which indicates that the purpose of the by-law is to control noises that interfere with the peaceful enjoyment of the urban environment and does not extend to sounds resulting solely from human activity. The City has the power by virtue of the *Charter of the City of Montreal* to define and regulate nuisances. It relied on this power to adopt the by-law. Judicial review of that power will only be justified if it is exercised in bad faith or for an improper or unreasonable purpose.

The Court clarified the test for the application of s. 2(b) to public property by combining elements of the tests of Lamer, C.J. and McLachlin J. (as she then was) in *Committee for the Commonwealth of Canada*. The mere fact of government ownership of a place in question is not sufficient to attract the protection of s. 2(b). If the method or location of the expressive activity undermines the values that underlie the guarantee of s. 2(b), it should be excluded from its protective scope. The new test asks whether the government-owned property is a public place where one would expect a right to free expression that does not conflict with the purposes of s. 2(b): promoting democratic discourse; truth finding; self-fulfillment. In answering the question regard should be had to: the historical or actual function of the place; and, whether other aspects of the place suggest that permitting free expression would undermine the values and purposes that underlie s. 2(b).

Zenner v. Prince Edward Island College of Optometrists, 2005 SCC 77

Prince Edward Island amended its *Optometry Act* in 1994 to require proof of 12 credit hours of continuing education in the preceding year or 36 hours in the preceding 3 years before a licence to practise optometry could be issued. Accompanying regulations came into force in 1995. At the end of 1995, the College refused to renew the Appellant's licence for 1996 because he failed to submit evidence of the required number of hours of continuing education for 1994 and 1995. The Appellant applied for a new licence in 2001. The College imposed a number of conditions to reinstatement including completion of an ethics course (condition 3) and success on the provincial examination set by the College (condition 4). The Appellant's application for judicial review of the 1996 and the 2001 decisions were dismissed. The dismissal was upheld on appeal. The Supreme Court of Canada allowed the appeal in part, quashing condition 3 of the 2001 decision and remitting the matter to the College. The standard of review of the College's decision was reasonableness. The 1996 decision was reasonable and the discretion that was conferred on the College in refusing to renew the Appellant's licence was not exercised in an arbitrary manner. The College's discretion in imposing condition 3 was exercised unreasonably as no optometric or ethics course was offered or accredited at the time, nor was it prescribed by the regulations. Condition 4 was held to be reasonable.

Terry Lee May, et al v. Warden of Ferndale Institution, et al, 2005 SCC 82.

Several prisoners were transferred from a minimum- to a medium-security institution following an administrative review of the security classifications

of all offenders serving life sentences who had not completed a violent offender program. They applied for relief in the nature of *habeas corpus* in the provincial superior court, to direct that they be transferred back to the minimum-security institutions. The transfers were alleged to be arbitrary, made in the absence of any misconduct on their part and without considering the merits of each case. Must a prisoner exhaust all remedies before applying for a remedy in the nature of *habeas corpus*? Did the provincial superior court have jurisdiction to consider the application for *habeas corpus*? Did the Respondent breach a duty of procedural fairness or fundamental justice in failing to disclose the standardized computer score which led to the transfer?

A provincial superior court should, as a matter of principle, exercise its *habeas corpus* jurisdiction when asked to do so, except where a statute such as the *Criminal Code* confers jurisdiction on a court of appeal to correct a lower court's errors and release the applicant, or where a comprehensive and expert procedure for review of an administrative decision has been created by statute, such as the scheme created by Parliament for immigration matters. Although the transfers were not arbitrary, *habeas corpus* should be granted because the respondent institutions failed to disclose the scoring matrix on the computerized security classification. (Per McLachlin C.J., and Binnie, LeBel, Deschamps, Fish and Abella JJ.; Major, Bastarache and Charron JJ., dissenting.)

Air Canada v. Canadian Human Rights Commission, Canadian Union of Public Employees (Airline Division), 2006 SCC 1

Complaints were filed with the Canadian Human Rights Commission by a union on behalf of a group of predominantly female flight attendants alleging wage discrimination as compared to two predominantly male employee groups. At issue is whether the two groups of employees are in the "same establishment" pursuant to the *Canadian Human Rights Act*, s. 11(1), as defined in the Equal Wage Guidelines, 1986, s. 10. How should the scope of "establishment" be determined? The Supreme Court of Canada dismissed the Appellant Air Canada's appeal. Employees subject to a common personnel and wage policy will be in the same establishment, regardless of whether they are subject to different collective agreements or are in the same geographic location. Establishing a common personnel and wage policy is a factual inquiry into whether a common set of principles is applied or a general approach is taken by the employer in its employment relationships, including collective bargaining. Establishment, however, should not be equated with "bargaining unit", as this would undermine the purpose of the *Canadian Human Rights Act*.

Isidore Garon Ltèe v. Syndicat du bois ouvrè de la règion de Quèbec Inc.; ***Filion et Frères (1976) Inc. v. Syndicat national des employés de garage du Québec Inc.***, 2006 SCC 2

The central issue in these appeals is whether the effect of *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, is to incorporate Articles 2091 and 2092 *Civil Code of Québec* (CCQ) into every collective agreement and, consequently, to confer on arbitrators the jurisdiction to hear claims based on these articles. Do Articles 2091 and 2092, which provide that reasonable notice is to be provided upon termination of a contract of employment, apply where there is a collective agreement and the collective agreement is silent on that question?

Deschamps J., writing for Bastarache, Binnie and Charron JJ. (McLachlin C.J. and LeBel and Fish JJ., dissenting) held that addressing the issues raised on appeal requires reconciling two important principles in labour relations: that general law and individual negotiation have no place in collective bargaining; and, that minimum employment standards, along with substantive rights and freedoms in human rights legislation and the Charter, are incorporated in every collective agreement. Not everything set out in the CCQ is implicitly incorporated into collective agreements; only those elements which are compatible. The consensual and individual nature of the notice of termination provisions in Article 2091 is incompatible with a collective bargaining scheme. The dissent held that the rules in the CCQ supplement and fill any gaps in a collective agreement. Freedom of the parties to a collective agreement to negotiate substantive standards is limited by the obligation to respect basic employment standards imposed by a legislature and the rights and values protected by human rights legislation.

Canadian Pacific Railway Co. v. Vancouver (City), 2006 SCC 5

The City of Vancouver passed a by-law in respect of land owned by Canadian Pacific, with the aim of ensuring that the land be used only for public purposes and that it remain intact as a corridor for various kinds of public transportation. Canadian Pacific offered to sell the land to the City or any other public body, or

to agree to an expropriation with compensation. The City declined the offer. Can a municipality designate private land solely for public use without purchase or expropriation in the absence of clear and unambiguous statutory language? Was a fair process adopted by the City in enacting the by-law?

The official development plan by-law was held to be *intra vires* the City. The Vancouver Charter grants extensive powers to the City to determine how lands within its limits may be used. The City is not obligated to compensate CPR for the land. The requirements for a *de facto* expropriation are not met: the City has not acquired a beneficial interest in the land and the by-law does not remove all reasonable uses of the property. The City adopted a fair process in enacting the by-law, giving notice of the public hearing and the nature of the by-law being considered, and providing CPR sufficient disclosure of information to enable it to participate meaningfully in the hearing.

City of Calgary v. Atco Gas and Pipelines Ltd., 2006 SCC 4

The Alberta Energy and Utilities Board ordered that a portion of the net gain on the sale of a utility asset be allocated to the rate base of the utility and a portion as profit for the benefit of investors. The allocation to the rate base would be used to offset utility costs, helping to keep utility rates down, and thereby benefiting utility customers. Does the Board have jurisdiction to make such an allocation pursuant to its authority under s. 15(3)(d) of the *Alberta Energy and Utilities Board Act* to make any order it "considers necessary in the public interest"? Does the allocation of a portion of the net gain on the sale of the utility asset to the customer rate base constitute a *de facto* expropriation, or interference in a property right?

Bastarache J., writing for LeBel, Deschamps and Charron JJ. (McLachlin C.J. and Binnie and Fish JJ., dissenting) upheld the Alberta Court of Appeal's decision quashing the Board's order. Bastarache J. held that the Board lacked the jurisdiction to make such an allocation. The legislation, from which the Board derived its authority, while granting express authority to approve the sale of the asset, did not grant the authority to allocate the gain from the sale of the asset. The Board's principal function is the determination of rates. While the Board has certain discretionary or ancillary powers, these do not include the power to interfere with ownership or property rights of a regulated utility. Legislation that potentially interferes with property rights is to be narrowly construed. The standard of review of the decision to allocate the gain from the sale of the asset was correctness, since the Court must determine the scope of the Board's powers: this is a "jurisdictional" question. While the Board's expertise in the rate-setting process would attract a more deferential standard of review, on the issue of the scope of its powers, its expertise is not engaged.

Binnie J., writing for the minority, rejected the property rights argument. The broad discretion given to the Board to "impose any additional conditions …in the public interest", the subjective discretion ("the Board considers necessary"), combined with the expertise of the Board and the nature of the decision "in the public interest", call for the most deferential standard of review: patent unreasonableness. The Board is in a better position than the Court to assess what is necessary in the public interest.

Balvir Singh Multani et. al. v. Commission Scolaire Marguerite-Bourgeoys et al, 2006 SCC 6.

The Respondent refused to permit an orthodox Sikh to wear a kirpan (a dagger worn in observance of the Sikh faith) at school on safety grounds. The Quebec Court of Appeal reversed a lower court decision quashing the Respondent's decision. Does the prohibition against wearing a kirpan at school violate the *Quebec Charter of Rights and Freedoms* and the *Canadian Charter of Rights and Freedoms*? Was the accommodation reasonable? What is the appropriate standard of review of the decision of the Respondent Commission? The appeal was allowed and the decision of the Commission was held to violate s. 2(a) of the Canadian *Charter*. McLachlin C.J., Bastarache, Binnie, Fish and Charron JJ. held that compliance with the Charter is central to the inquiry by a court where a complaint is based on breach of a Charter freedom, not the decision's validity from an administrative law point of view. The Court of Appeal erred in applying an administrative law reasonableness standard to its constitutional analysis. In concurring reasons, Deschamps and Abella JJ., held that the administrative law approach to assessing an administrative decision-maker's decision is appropriate. A constitutional justification analysis is conducted only when reviewing the validity of a legal norm whether in legislation, a regulation or a rule of general application.

Vernon Roy Mazzei v. Director of Adult Forensic Psychiatric Services, Attorney General of British Columbia, 2006 SCC 7

Does the British Columbia Review Board have jurisdiction to impose conditions on the Director of the Forensic Psychiatric Services Commission, pursuant

to Part XX.1 of the *Criminal Code*, in discharging its function to make or review a disposition in respect of the accused receiving a verdict of not criminally responsible (NCR) by reason of a mental disorder? The Board ordered the Director to provide an independent evaluation of the accused's diagnosis, treatment and clinical progress, his public safety risk and to undertake to enroll him in a culturally appropriate treatment program having regard to the accused's aboriginal background. The Supreme Court of Canada held that Review Boards have the authority to bind hospital authorities, the Director, as well as treatment teams, and impose binding conditions regarding or supervising, but not prescribing or imposing, medical treatment for an NCR accused. This authority "regarding" or "related to" treatment could, arguably, include anything short of actually prescribing treatment.

Tranchemontagne v. Ontario (Director, Disability Support Program)**,** 2006 SCC 14

The Appellants were denied benefits under the *Ontario Disability Support Program Act, 1997* based on a finding that their disabilities were the result of alcoholism. Section 5(2) of the ODSPA renders persons addicted to alcohol and drugs ineligible for benefits. On appeal to the Social Benefits Tribunal, the Appellants argued that s. 5(2) of the Act violated the *Ontario Human Rights Code* and was, therefore, inapplicable because of the Code's primacy over other statutes. The SBT held that it lacked jurisdiction to consider the applicability of s. 5(2) in light of the Code. The Divisional Court agreed. The Ontario Court of Appeal held that the legislation did not remove jurisdiction to consider the Code from the SBT, but it dismissed the appeal on the basis that the SBT should decline jurisdiction to apply the Code on the basis that it was not the most appropriate forum to decide the issue of the Code's applicability.

In a 4:3 judgment, Bastarache J., writing for McLaclin C.J., Binnie and Fish JJ. (LeBel, Deschamps and Abella JJ., dissenting), held that there is nothing in the Code to rebut the presumption that statutory tribunals empowered to decide questions of law are also empowered to look beyond their enabling statutes and apply the whole law, including the Code. While the *Ontario Works Act*, one of the statutes from which the SBT derives its authority, prohibits the SBT from considering the constitutional validity of statutes and regulations, the same prohibition is not evident with respect to applying the Code. The Code has primacy over other legislation. The legislature, however, has prescribed how this primacy may be overruled. The SBT's enabling legislation failed to express an intention to overrule the primacy of the Code.

Forum des maires de la Pèninsule acadienne v. Canadian Food Inspection Agency, File 30545, appeal from 2004 FCA 263

Does Part VII of the *Official Languages Act*, R.S.C. 1985 (4th Supp.), c. 31 and s. 41 of the Act, in particular, which states that the "Government of Canada is committed to enhancing the vitality of the English and French linguistic minority communities in Canada", confer rights that are enforceable by the courts, and reviewable under s. 77(1) of the Act, or is it merely declaratory? What is the scope of the Federal Court's remedial authority under s. 77 of the Act? What is the nature of the proceeding before the Court where an application is filed under s. 77 of the Act following the issuance of a report of the Commissioner of Official Languages? With the coming into force of Bill S-3, *An Act to amend the Official Languages Act (promotion of English and French)*, S.C. 2005, C. 41, on 25 November 2005, after leave to appeal had been granted, the questions of law for which leave was granted were deemed no longer to be of public importance and did not justify maintaining leave. Leave to appeal granted earlier was, therefore, withdrawn.

Decisions on Reserve

Attorney General of British Columbia v. Lafarge Canada Inc. et al, File 30317, appeal from 2004 BCCA 104 (Appeal heard 8 November 2005)

The Vancouver Port Authority, a federal Crown corporation, wished to lease land to a private corporation for the purpose of establishing a cement-mixing facility. Are municipal zoning laws applicable to the proposed development where Parliament has legislative jurisdiction over navigation and shipping pursuant to s. 91(10) of the *Constitution Act, 1867*? Are the subject lands "public property" within the meaning of s. 91(1A) of the *Constitution Act, 1867* and, as a result, not subject to municipal zoning laws? Where a federal Crown corporation holds property other than as an agent of the Crown, can that property be deemed to be "public property" pursuant to s. 91(1A) of the *Constitution Act, 1867*?

GMAC Commercial Credit of Canada v. Industrial Wood and Allied Workers Union**,** File 30391, appeal from (2004), 238 D.L.R. (4th) 677 (Appeal heard 16 November 2005).

Does a bankruptcy court have the authority to shield an interim receiver or a trustee in bankruptcy, appointed under the *Bankruptcy and Insolvency Act* to operate

the business of the debtor in order to sell it as a going concern, from the obligations of a successor employer and to deny a union leave to bring successor employer proceedings before the Ontario Labour Relations Board? A bankruptcy judge issued an order in January 2002 granting the receiver wide powers and ordered that no actions or proceedings be commenced against the receiver in any court or tribunal without leave of the court. The court also ordered that the receiver was not a successor employer and shall not be considered a successor employer. Following the order of the court, the receiver entered into an asset purchase agreement with a buyer. Under the terms of the agreement, the receiver terminated all unionized employees and the buyer of the assets re-hired selected employees without regard to the seniority list.

The union brought an application before the OLRB to declare the buyer of the assets and/or the receiver the successor employer to the bankrupt firm and bound by the collective agreement. Damages were also sought against the bankrupt firm, the receiver, and/or the buyer of the assets. A motion by the receiver to stay the proceedings was granted by the OLRB. The union then brought a motion before the bankruptcy court for leave to proceed before the OLRB. The motion was denied on the basis that the receiver was acting "qua realizer" and not "qua employer". The Ontario Court of Appeal (McPherson J., dissenting) allowed the appeal and remitted the matter back to the bankruptcy court, holding that the BIA does not grant the court the authority to determine the successor employer issue. The bankruptcy court can only determine whether a prima facie case of successor employer status is made out. The Court also held that a collective agreement does not terminate on bankruptcy and can bind successor employers, and that the OLRB has exclusive jurisdiction to determine the successor employer issue.

Concordia University Faculty Association et al v. Richard Basillon et al, Fle 30363, on appeal from (Appeal Heard 14 December 2005).

An employee of Concordia University, while president of the union representing the University's support staff, brought a motion to authorize a class action on behalf of the beneficiaries of the University's pension plan. The action sought to contest the legality of certain amendments to the pension plan and to challenge the use of the plan's surplus funds and the premium holiday. The Concordia University Faculty Association, a signatory to one of the collective agreements in question, moved to have the court decline jurisdiction over the motion to authorize the class action on the ground that the dispute at the heart of the proposed class action fell within the exclusive jurisdiction of a grievance arbitrator. The Superior Court allowed the Faculty Association's motion. The Court of Appeal reversed that decision and referred the case to the lower court to rule on the motion for authorization of the class action.

The Health Services and Support-Facilities Subsector Bargaining Association, et al v. Her Majesty the Queen in Right of the Province of British Columbia, File 30554, appeal from 2004 BCCA 377 (Appeal heard 8 February 2006)

Does the *Health and Social Services Improvement Act*, S.B.C. 2000, c.2, violate s. 2(d) and s. 15 of the *Canadian Charter of Rights and Freedoms*? The legislation voided the essential terms of a concluded collective agreement and prohibited the renegotiation of such terms. The legislation is also said to target the collective agreements in a sector of the economy dominated by women, resulting in a breach of s. 15 of the Charter.

McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital Général de Montréal, Jean Sexton, in his capacity as grievance arbitrator, File 30941, on appeal from 2005 QCCA 277 (IIJCan) (Appeal heard 12 April 2006)

The collective agreement between the Appellant hospital and the union provides that employees lose their seniority and their employment after an absence of 36 months if the absence was due to an illness or accident other than an occupational illness or disease. The employee stopped work because of a nervous breakdown. She attempted a return to work on several occasions, but was unsuccessful. She was later injured in a car accident that left her permanently unemployable. Three years after her initial layoff from work, her employment was terminated in accordance with the collective agreement. The arbitrator dismissed a grievance of the termination on the basis that the employer had discharged its duty to accommodate by maintaining the employment relationship for the required 36 months. The Québec Court of Appeal overturned the Superior Court's decision upholding the arbitrator's decision.

Ministry of Correctional Services v. David Goodis, Senior Adjudicator and Jane Doe, File 30820, appeal from [2005] O.J. No. 66 (C.A.) (Appeal heard 18 April 2006)

Does a court, on judicial review of a decision of the Information and Privacy Commissioner (IPC), have the authority to order access to a sealed record in order to permit counsel for the requester to argue the merits of the judicial review, where a claim of solicitor-client privilege has been made over those records? The Divisional Court granted counsel for a CBC reporter disclosure upon an undertaking not to disclose the private record that was the subject of the judicial review to her client. Disclosure was ordered for all 458 pages requested, of which access to only 19 had been granted by the IPC. The disclosure order was made for the purpose of arguing the issue of privilege and to ensure procedural fairness to all the parties. The Court of Appeal, in a short endorsement, held that the court had jurisdiction to make the discretionary order and control its own process.

Appeals Scheduled to be Heard

Jocelyn Binet v. Pharmascience Inc. and Morris S. Goodman - and - Attorney General of Quebec v. Pharmascience Inc. and Morris S. Goodman, File 30995, on appeal from 2004 IIJCan 14956 (QC C.A.) (To be heard 9 May 2006)

The college of pharmacists of Québec sought to compel the production of documents in the possession of a pharmaceutical manufacturer and its president in the course of its inquiry into allegations of price-fixing among pharmacists and allegations that pharmacists accepted financial benefits from those manufacturers. The respondent pharmaceutical company was implicated in the investigation. The respondents brought a motion to declare s. 122 of the Professional Code, R.S.Q. inapplicable to them, as third parties, and in breach of s. 8 of the *Canadian Charter of Rights and Freedoms*. The motion was dismissed, but the judgment was reversed on appeal.

Council of Canadians with Disabilities v. Via Rail Canada Inc., File 30909, appeal from 2005 FCA 79 (To be heard 19 May 2006)

The Canadian Transportation Agency issued two decisions which determined that VIA Rail's Renaissance passenger rail cars imposed undue mobility obstacles to disabled people with wheelchairs. VIA was ordered to address the findings made by the Agency in a preliminary decision (show cause order). In its final decision, the Agency ordered VIA to take corrective measures, finding VIA's response to the show cause order to be inadequate. On appeal, the Federal Court of Appeal held that the Agency's failure to consider whether VIA's network as a whole was flexible enough to accommodate persons in wheelchairs was patently unreasonable, as was its failure to balance the costs of improvements to remove the obstacles. A balancing of various interests was required, including the interests of the non-disabled public. Was the Court's approach in evaluating "undueness" under the *Canada Transportation Act* incompatible with the Supreme Court of Canada's unified approach to equality established in *Meiorin*?

Adil Charkaoui c. Ministre de la Citoyenneté et de l'immigration et Solliciteur général du Canada, File 30762, appeal from 2004 FCA 421 (To be heard 13 June 2006)

The Appellant was detained on an immigration security certificate pursuant to the *Immigration and Refugee Protection Act* (IRPA) on May 21, 2003. He was released with conditions on February 17, 2005. The Federal Court of Canada, on review of the security certificate issued by the Minister, determined that the certificate was reasonable. The reasonableness of the certificate was upheld on appeal to the Federal Court of Appeal. At both the trial and appeal level, numerous constitutional and international law arguments were raised. There were 40 objections on these grounds, each of which was dismissed at the Federal Court of Appeal. Does the scheme established by Parliament in the *Immigration and Refugee Protection Act* violate the *Canadian Charter of Rights and Freedoms* and international human rights norms, particularly the *International Covenant on Civil and Political Rights*? An important aspect of the appeal is the Federal Court of Canada's *in camera ex parte* process of review of the evidence against the detainee considered to be of importance to national security. Neither the detainee nor his counsel are permitted to see the evidence or test it directly or participate in the review of the evidence by the trial judge. The question of indefinite detention is also in issue.

Hassan Almrei v. Minister of Citizenship & Immigration, Solicitor General of Canada, File 30929, appeal from 2005 FCA 54 (To be heard 13 June 2006)

The Appellant claimed protection as a convention refugee in 1999. On October 19, 2001, he was detained on a security certificate under s. 40.1(1) of the

Immigration Act (IA). The certificate was found to be reasonable and a removal order was issued on February 11, 2002. A second danger opinion was issued by the Minister, the first one having been overturned on judicial review, concluding that the Appellant would not be at risk of torture if he were removed to Syria, or that if such risk did exist it would be justified in the interests of Canadian security. The Appellant applied for judicial release under s. 84(2) of the *Immigration and Refugee Protection Act* (IRPA), which had then come into force. The trial judge held that he could receive secret evidence under s. 78 in the review under s. 84(2) of the IRPA. The judge held that the length and conditions of the detention were of limited relevance to that review, and did not contravene ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms*. Did the Federal Court of Appeal err in holding that s.78 of the *Immigration and Refugee Protection Act*, applies to an application for release under s.84(2) of the *Act*, enabling the court to hear secret evidence from the state *in camera* and *ex parte*? To what extent are time spent in detention and the conditions under which it has been spent relevant to the question of whether removal from Canada will occur within a reasonable time? Is extended detention in solitary confinement cruel and usual treatment, contrary to s.12 of the Charter, and, if so, is release from detention an appropriate and just remedy pursuant to s.24(1) of the Charter?

Mohamed Harkat v. Minister of Citizenship and Immigration, et al., File 31178, appeal from 2005 FCA 285 (To be heard 13 June 2006)

This appeal is to be heard with *Adil Charkaoui v. Minister of Citizenship and Immigration, et al* (30762) and *Hassan Almrei v. Minister of Citizenship and Immigration, et al* (30929). All three cases raise common issues.

Decisions Where Leave Recently Granted

City of Lévis* v. *Fraternité des policiers de Lévis Inc. and Danny Belleau and Gabriel-M. Côté, File 31103, appeal from 2005 QCCA 639

The Respondent Belleau, a police officer, pleaded guilty to various criminal charges including assault and death threats against his spouse. The Appellant, the City of Lévis recommended the dismissal of Belleau and the city council adopted a resolution to dismiss him. The Respondent's union grieved the dismissal. Section 116 of the *Loi sur les cités et villes*, requires the dismissal of municipal employees found guilty of an offence for which the punishment is imprisonment for one year or more. Section 119 of the *Loi sur la police* also provides that for certain criminal offences, disciplinary measures short of dismissal may be imposed if the "specific circumstances" of a case justify it. The arbitrator based his decision on the *Loi sur la police* and ordered the reinstatement of the police officer citing psychological, family and drinking problems as "specific circumstances" justifying a lesser sanction. The Québec Court of Appeal overturned the Superior Court's decision quashing the arbitrator's decision. Are the two statutes in conflict? If so, which takes precedence? What is the standard of review of an arbitrator's exercise of discretion in interpreting "specific circumstances" justifying a lesser sanction?

* *Sebastian Spano, Law and Government Division, Parliamentary Information and Reserch Service.* (613) 995-7918, spanos@parl.gc.ca.

Administrative Law Cases from the Court of Appeal for Ontario

*Denise Sayer and Farah Malik**

This list is current to March 10, 2006.

Recent Decisions

Rea v. Simcoe (County Administrator, Social Services Department), [2005] O.J. No. 5543 affirming an unreported judgment of the Divisional Court (Then, Ferrier and Meehan JJ.) dated September 17, 2004.

Rea was on social assistance from 1990 until her benefits were cancelled in 2002. Following an anonymous tip, an investigation revealed that her son no longer lived with her and that she was residing with an adult male and his daughter. The Administrator of the County of Simcoe Social Services Department terminated her social assistance because she failed to report a change in circumstances regarding her living arrangements pursuant to s. 14(1) of O.Reg. 134/98, a regulation promulgated under the *Ontario Works Act,* S.O. 1997. The Social Benefits Tribunal concluded that the decision to terminate Rea's income support was correct, and the Divisional Court affirmed this decision on appeal.

At issue before the Court of Appeal was the proper construction of ss. 14 and 35 of the Regulation. In a brief endorsement, the Court of Appeal clarified that s. 14 obliges an administrator to determine that a person is ineligible for income assistance if the person fails to provide necessary information to the administrator. It is mandatory in nature. In contrast, a dependant's exemption under s. 35(2) presupposes the provision of information under s. 14 of the Regulation to permit the calculation of assistance to be provided. A breach of the requirements under s. 7 of the *Ontario Works Act* precludes resort to a dependant exemption under s. 35(2) of the Regulation. Rea's appeal was dismissed.

RSJ Holdings Inc. v. London (City), [2005] O.J. No. 5037, reversing [2005] O.J. No. 252 (Sup. Ct.)

The appellant company purchased a small one-story dwelling in a residential area of London, Ontario. It intended to demolish the existing dwelling to construct a residential fourplex in compliance with existing zoning. The appellant applied for a demolition permit and a building permit, but received no response. Approximately two months later, City Council passed an interim control by-law that had the effect of "freezing" development in the same area as the one-story dwelling for one year. This by-law was passed following a closed meeting of the City's Planning Committee and another closed meeting of the Committee of the Whole, a committee that is comprised of every member of City Council. The appellant unsuccessfully moved to quash the interim control by-law in the Superior Court of Justice. The motion judge concluded that the closed meetings were permissible because the interim control by-law fell within the ambit of the "potential litigation" exception under s. 239(2)(e) of the Act. In allowing the appeal, the Court emphasized that the subject matter that was considered by the committees was clearly the interim control by-law, and not litigation or potential litigation. The mere possibility of litigation, including the existence of a statutory right of appeal, arising from the interim control by-law did not make the "subject matter under consideration" potential litigation for the purposes of s. 239(2)(e) of the Act.

***Richards v. Catney*, [2005] O.J. No. 5230**, affirming [2005] O.J. No. 1678 (Sup. Ct.)

Richards, a Staff Sergeant with Peel Region Police Services, claimed that her employer and fellow police officers discriminated against her on the basis of gender and disability. She claimed that her reassignment and her limited access to courses were discriminatory in nature and tantamount to a demotion. On a Rule 21.01(3)(a) motion, the motion judge dismissed Richards' claim in its entirety for lack of jurisdiction on the basis that her court claims were precluded by the application of a collective agreement. Did the motion judge err by holding that Richards' defamation claim fell outside the court's jurisdiction?

The Court of Appeal dismissed Richards' appeal and emphasized that the relevant test governing a jurisdictional analysis is "the essential character of the dispute." A court must look to the facts underlying the dispute rather than the characterization of the wrong. In this case, the defamatory comments were made in the context of workplace discussions. Consequently, the essential character of the dispute was workplace discrimination and harassment, not defamation. The

entire claim was governed by the grievance procedure in her collective agreement.

Toronto Taxi Alliance Inc. v. City of Toronto [2005] O.J. No. 5460, reversing (2005), 73 O.R. (3d) 447 (Sup.Ct.)

The Toronto Taxi Alliance challenged the legality of City of Toronto By-law 906-2003, which provided that no standard taxicab shall be transferred except to an individual person who is licensed as a taxicab driver. The By-law had the effect of limiting the sale of taxicabs by current owners, except to an individual who is licensed as a taxicab driver and who owns no other taxicab. The Toronto Taxi Alliance challenged the By-law as contrary to the *Municipal Act*. Section 150(4) requires that before exercising its licensing powers, city council hold at least one public meeting at which any person in attendance "may make representation with respect to the matter." Section 150(2) of the *Municipal Act, 2001*, S.O. 2001, c. 25 requires that licensing powers be exercised only for one of the following purposes: (i) health and safety; (ii) nuisance control; and (iii) consumer protection.

Justice Rouleau, writing for the Court, held that the By-law complied with s. 150(4). The requirement for a public meeting was met, given the subject matter was contained in specific recommendations made to the EPS Committee of city council and the public had proper notice of the EPS Committee meeting and of the changes being proposed to the licensing by-law. Citing *Nanaimo (City) v. The Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, Justice Rouleau also held that "a reviewing court should not second-guess the municipality as to whether the by-law will be more or less effective in achieving the intended purpose or purposes".

Decisions on Reserve

Peacock v. Norfolk (County), on appeal from (2004), 73 O.R. (3d) 200 (Sup. Ct.)

The Peacocks sought to expand their intensive hog operation. They received the required approval of their Nutrient Management Plan under Regulation 267/03 of Ontario's *Nutrient Management Act*. After completing a groundwater study due to public concern regarding potential contamination from intensive livestock operations, the City of Norfolk passed a By-law that prohibited certain types of activities on certain locations of land based on sensitivity to ground water contamination. The Peacocks` proposed expansion is located in a sensitivity area, which would prohibit them from having intensive livestock operations on that location, and consequently the City denied the permit needed by the Peacocks to expand. Section 61(1) of the *Nutrient Management Act* reads: "A regulation supersedes a by-law of a municipality or a provision in that by-law if the by-law or provision addresses the same subject-matter as the regulation." Fedak J. found the Regulation superceded the By-law pursuant to s. 61(1) of the Act, finding that the impossibilty of dual compliance test did not apply in this case. The main issues on appeal are the correct interpretation of s. 61(1) of the Act and whether the impossibility of dual compliance is the correct test to apply.

Hill and Hill Farms Ltd. v. Bluewater (Municipality of), on appeal from (2005), 74 O.R. (3d) 352 (Div. Ct.)

Hill Farms operates an intensive hog operation and wishes to expand its operation to construct two new barns to accommodate 650 additional sows. The Municipality enacted a Zoning By-law that contains a minimum distance separation (MDS) for livestock facilities within agricultural areas. After obtaining a building permit to construct the additions, and three minor variances from the zoning by-law, Hill Farms applied to the Normal Farm Practices Protection Board pursuant to s. 6 of the *Farming and Food Production Protection Act, 1998* (FFPPA) for a determination as to whether its existing operations or proposed expansion would be considered a "normal farm practice" within the meaning of the Act. The Board found in favour of Hill Farms, ruling the expansion would be consistent with normal farm practices and MDS requirements if certain modifications involving the location of the new barns were made. The Divisional Court held that the Board erred in law in accepting jurisdiction to entertain the application. The Court held that a "municipal by-law" in s. 6(2) of the FFPPA does not include a zoning by-law but instead refers to those by-laws which deal with matters prohibiting or regulating nuisances and disturbances of the type referred to in the preamble of the Act. Zoning matters fall exclusively within the various processes recognized by the *Planning Act*.

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) Local No. 27 v. London Machinery Inc., on appeal from [2004] O.J. No. 4185 (Div. Ct.)

The Union appeals the judicial review of a labour arbitrator's interpretation of a recently- enacted provision of the *Employment Standards Act, 2000* (ESA

2000). The Divisional Court found the arbitrator's analysis of what constitutes a prescribed employee to be reasonable. The Union argued that an agreement as contemplated by s. 56(2)(c) of the ESA 2000 must be sufficiently specific before it can operate to defeat an employee's entitlement to termination pay. The main issue on appeal is whether the agreement between the employer and the trade union in s. 56(2)(c) of the *Employment Standards Act, 2000* includes a collective agreement.

Seneca College of Applied Arts v. OPSEU, Doc. No. C43274, on appeal from (2004), 73 O.R. (3d) 185 (Div. Ct.)

The Union grieved a discharge and, in addition to reinstatement, sought aggravated and punitive damages. The Board quashed the discharge, but declined to award damages, characterizing the damages claim as relating to tortious conduct and concluding that it did not have the jurisdiction under the collective agreement to entertain a tortious claim. The Divisional Court held that the Board's decision was wrong because the essential claim before it was for unjust dismissal and the Board had jurisdiction over all aspects of the discharge grievance, including the Union's claim for aggravated and punitive damages. The Divisional Court remitted the damages issue to the Board to determine if the damages should be awarded and if so, how much. Did the Divisional Court apply the proper standard of review, having regard to *Voice Construction Ltd. v. General Worker's Union*, Local 92, 2004 SCC 23? Did the Divisional Court in applying the standard of review give adequate consideration to the intention of the parties in determining whether the damages claims were arbitrable?

Appeals Scheduled for Hearing

Duffin Capital Corp. v. Ontario (Minister of Municipal Affairs and Housing), on appeal from [2005] O.J. No. 5165 (Div. Ct.)

Duffin is a developer who owns a substantial amount of land in the City of Pickering in an area known as Cherrywood. In April 2003, the Minister established a single development planning area for lands within the City under the *Ontario Planning and Development Act, 1994* (OPDA). As required by s. 2 (3) of the OPDA, the Minister commissioned an investigation and survey to be undertaken of the environmental, physical, social and economic conditions affecting the development planning area. Duffin brought an application for judicial review of the Minister's decision, challenging the preliminary investigation and consultation steps taken by the Minister, and alleging that the end result was a foregone conclusion (*i.e.* that Cherrywood would be for agriculture uses while the neighbouring Seaton area would be urbanized). The Divisional Court rejected this argument, given the extensive consultation process and opportunity for formal submissions to the Minister and proposals for modifications. The application was quashed on the basis that it was premature, finding that the time for judicial review is at the conclusion of the proceedings, absent exceptional circumstances.

Natural Resource Gas Limited v. Ontario Energy Board, on appeal from [2005] O.J. No. 1520 (Div. Ct.)

Natural Resource Gas Limited ("NRG") appeals a decision of the Divisional Court that dismissed NRG's appeal of an Ontario Energy Board (the "Board") decision. The Board's decision was found to be reasonable. NRG delivered natural gas within the distribution system of another gas distributor. Given the constant fluctuation in gas prices, NRG used a variance account to record the difference between the actual cost of gas and the forecast price paid by its customers. The Board had decided not to allow NRG to recover certain interest costs related to $531,794 in gas costs that had been overlooked because of an accounting anomaly. The Board did, however, allow NRG to create a new account to prevent the recurrence of this error.

The core issue is whether a public utility regulator is required to allow recovery of carrying costs (*i.e.* interest costs) when it has decided to defer the recovery of certain prudently incurred costs over a period of time. In other words, is interest that arises from the deferred recovery of prudently incurred costs, itself a prudently incurred cost? If so, must the Board allow recovery of that interest? NRG argues that rates that exclude interest arising exclusively from the Board's decision to defer recovery (for rate smoothing purposes) are not "just and reasonable." The Board argues its decision was a paradigmatic exercise of discretion by an expert tribunal acting within its broad statutory mandate. It further argues that the Board was entitled to balance the interests of consumers against those of NRG.

Graywood Investment v. Ontario Energy Board, on appeal from [2005] O.J. No. 345 (Div. Ct.)

The Ontario Energy Board and Toronto Hydro-Electric System Limited appeal a majority decision of

the Divisional Court that quashed a decision of the Ontario Energy Board (the "Board") as unreasonable. The Board had decided that a development project of the Graywood Investments Limited ("Graywood") was subject to high, pre-competition rates for hydro installation on the basis that an implied agreement had arisen between the parties before November 1, 2000.

In 1999, Toronto Hydro had a monopoly on the provision of new electrical supply facilities to developers. In 1999 Graywood and Toronto Hydro agreed to a design contract, and both parties anticipated that Toronto Hydro would be doing the installation work given that Toronto Hydro enjoyed a monopoly position in the market. In 2000, legislation created an open market and a competitive regime for the provision of certain electrical services. Graywood took the position that the new regime required Toronto Hydro to make an offer to connect, which could be compared with competing bids. Toronto Hydro disagreed. Graywood agreed to proceed with Toronto Hydro under the pre-2000 regime, but under protest to the pricing structure, and a contract was signed backdated to November 2000. The central issue is whether an agreement for installation can be implied prior to the date on which the formal contract was executed, based on the fact that the parties had a prior contract (for design work) in relation to the same project.

Aly Said et al v. Maurice Duval Excavation Inc. et al, on appeal from (14 June 2005), Toronto, (Ont. Div. Ct.), aff'd [2004] O.M.B.D. No. 649.

Maurice Duval Excavation Inc. (Duval) applied, pursuant to the *Aggregate Resources Act*, R.S.O. 1990, c. A8 (the ARA), to the Ministry of Natural Resources for a licence to operate a sand pit near the Village of Alfred in the United Counties of Prescott and Russell. The appellants, who own a neighbouring property, objected because they are concerned about noise, dust, traffic, the effect on wildlife and the water table, and a decrease in the market value of their home. The Ministry made a reference to the Ontario Municipal Board (the "OMB"), which dismissed the Saïds' objections and directed that the Ministry issue a licence to Duval. An appeal to the Divisional Court was dismissed.

The appellants' main argument on appeal is that the failure to conform with the Official Plan for the United Counties (the OP) is fatal to Duval's application, since the OP supersedes the applicable by-law and the Township's Official Plan.

Appeals Where Leave Recently Granted

Crane v. Ontario (Director, Disability Support Program), on appeal from (2005), 75 O.R. (3d) 282 (Div. Ct.)

April Crane is a 32-year-old with confirmed diagnoses of fibromyalgia, asthma, anxiety/depression and headaches. The *Ontario Disability Support Program Act, 1997* (ODSPA) provides public assistance for disabled persons. The *Ontario Works Act* provides "temporary financial assistance to those most in need while they satisfy obligations to become and stay employed." Benefits under the *Ontario Works Act* are about 40% lower than those provided to persons with a disability.

The Director of the Ontario Disability Support Program found that Crane was not eligible for income support as she was not a "person with a disability" under s. 4(1) of the ODSPA as she did not have a "substantial physical or mental impairment" that "results in a substantial reduction in one or more …activities of daily living." The Social Benefits Tribunal upheld this decision. A majority of the Divisional Court allowed Crane's appeal. The Director appeals the Divisional Court decision. On appeal, the main issue will be whether s. 4(1) requires an applicant to meet two distinct thresholds to qualify: demonstrating a substantial impairment; and, demonstrating that the impairment has a substantial restriction in the activities of daily living. The Director, the Tribunal and Gravely J. of the Divisional Court found that if an applicant fails to meet the first step, the inquiry ends. Matlow and Kiteley JJ. held that the issue of substantial impairment must be considered with the effect of an impairment on the activities of daily living and that there are no distinct steps.

Rosenberg v. College of Physicians and Surgeons of Ontario, on appeal from [2005] O.J. No. 4219 (Div. Ct.)

Dr. Rosenberg, a family medicine practitioner, entered into a conjugal relationship with the complainant. He lived with the complainant for approximately three years. Their relationship eventually ended two years after they ceased living together. Throughout the time that Dr. Rosenberg and the complainant had an intimate relationship, Dr. Rosenberg treated the complainant regularly as her family doctor. He administered treatments at their home and at his office, and he billed OHIP regularly for these visits. He was charged with professional misconduct under the

former *Health Disciplines Act* and the *Regulated Health Professions Act* (RHP). The Discipline Committee of the College of Physicians and Surgeons of Ontario rejected Rosenberg's argument that the current legislation mandating licence revocation for "sexual abuse" did not apply to spousal relationships. The Committee revoked Rosenberg's licence, and this decision was upheld by the Divisional Court on judicial review. Did the Divisional Court err in concluding that a physician commits "sexual abuse", thus facing mandatory licence revocation, under the RHPA if a spousal relationship exists between the physician and a patient?

Dr. Sigesmund v. Royal College of Dental Surgeons of Ontario, on appeal from [2005] O.J. No. 3267 (Sup. Ct.)

Dr. Sigesmund is a dentist who restricts his practice to the treatment of temporomandibular disorders (TMDs). TMDs are disorders related to the jaw and its alignment. The appropriate treatment of TMD is described by the Royal College of Dental Surgeons in the Guidelines. In 1996, in response to complaints about excessive fees and the use of anterior repositioning devices (ARDs), Dr. Sigesmund entered into an undertaking to adhere to the Guidelines respecting the treatment of TMD. Previously he had been using the ARDs as a first treatment option, contrary to the Guidelines. In 1997, as a result of fresh complaints, the College brought discipline charges against Dr. Sigesmund primarily for the use of ARDs. During the course of the hearings the discipline panel refused to qualify Dr. Ray Mulrooney, an expert on the treatment of TMD, proffered by Dr. Sigesmund. Dr. Sigesmund was found guilty of breaching his undertaking and of various other offences, primarily for his continued use of ARDs. His penalty was a four-month suspension and the imposition of $411,000 in costs. The Divisional Court found the panel erred in refusing to qualify Dr. Mulrooney as an expert on TMD and quashed the most serious findings of misconduct and the penalty and costs award. The Royal College of Dental Surgeons appeals the Divisional Court decision. It submits that while the Court identified the appropriate standard of review (reasonableness), it erred by applying a correctness standard when it undertook a *de novo* examination of the witness's qualifications.

Peel (Regional Municipality) Police Service v. Watson, on appeal from [2005] O.J. No. 3525 (Div. Ct.)

Watson, a Peel police officer, was acquitted of criminal charges of theft and possession of stolen property. For the same conduct, he was charged with discreditable conduct under the *Police Services Act*, R.S.O., c. P-15 (PSA). After his criminal acquittal, Watson moved for a stay of the discipline proceedings. The hearing officer granted the motion on the basis of abuse of process. The Peel Police Service successfully applied for judicial review and the Divisional Court quashed the stay and remitted the matter for a discipline hearing. The Divisional Court found that the hearing officer's decision to stay the discipline proceeding on the basis of abuse of process is a question of law reviewable on a standard of correctness. The Court held that allowing the disciplinary hearing to proceed does not bring the criminal acquittal into question. The criminal trial and the discipline proceeding were held to be separate inquires with distinct purposes and governed by different burdens of proof and rules of evidence. The Chief of Police appeals the Divisional Court's decision in favour of Watson, and the Police Association of Ontario intervenes in support of Watson. This appeal will deal with the ability of an administrative decision-maker to seek judicial review of his/her own decisions, the role of the Police Chief in the disciplinary process, and the standard of review of the decision of a hearing officer who stays disciplinary proceedings.

* *Denise Sayer, Law Clerk for the Court of Appeal for Ontario*, (416) 327-5123, denise.sayer@jus.gov.on.ca.

Farah Malik, Law Clerk for the Court of Appeal for Ontario, (416) 327-5127, farah.malik@jus.gov.on.ca.

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.

Section Executive 2005-2006

Chair: **Carole A. Prest**
Workplace Safety & Insurance Appeals Tribunal (416) 314-8848
carole.prest@wst.gov.on.ca

Past Chair: **Andrew M. Pinto**
Eberts Symes Street Pinto & Jull
(416) 920-3030
pinto@essac.com

Vice-Chair: **Martin Gregoire Masse**
Flavell Kubrick LLP (613) 230-6030
martin@flavellkubrick.com

Secretary (Sections):
Andrew Charles Wray
Gillespie Wray LLP (416) 703-2067
awray@gwlaw.ca

Newsletter Editor: **Sebastian Spano**
(613) 995-7918
spanos@parl.gc.ca

Member-At-Large: **Sara Blake**
Ministry of Attorney General-Crown Law Office Civil (416) 326-4155
sara.blake@jus.gov.on.ca

Member-At-Large: **Christopher D. Bredt**
Borden Ladner Gervais LLP
(416) 367-6000
cbredt@blgcanada.com

Member-At-Large: **Jeff G. Cowan**
WeirFoulds LLP (416) 947-5007
jcowan@weirfoulds.com

Member-At-Large: **Laverne Jacobs**
Osgoode Hall Law School (416) 751-6915
lavernejacobs@osgoode.yorku.ca

Member-At-Large: **Gregory J. Levine**
(604) 685-4106
greg_levine@telus.net

Member-At-Large: **C. Kenning Marchant**
The Marchant Practice (905) 274-1150
conmar@attglobal.net

Member-At-Large: **Mary C. O'Donoghue**
Information & Privacy Commissioner/ Ontario (416) 326-3922
mary.o'donoghue@ipc.on.ca

Member-At-Large: **David G. Purvis**
Sir Sandford Fleming College
(705) 749-5530
DPURVIS@flemingc.on.ca

Member-At-Large: **Robert H. Ratcliffe**
Ministry of Attorney General-Crown Law Office Civil (416) 326-4128
robert.ratcliffe@jus.gov.on.ca

Member-At-Large: **Peter Ruby**
Goodmans LLP (416) 979-2211
pruby@goodmans.ca

Member-At-Large: **Lorne M. Sossin**
University of Toronto (416) 946-8229
lorne.sossin@utoronto.ca

Staff Liaison: **Blossom Pangowish**
Ontario Bar Association
(416) 869-1047 x399
blossom@oba.org

Editor:
Sebastian Spano

OBA Newsletter Editor:
Vickie Rose
Graphic Designer:
Tony Melnikov
Proofreader:
Lynn Wilson

Ontario Bar Association
Association du Barreau de l'Ontario

300-20 rue Toronto St.
Toronto, Ontario
M5C 2B8

Phone • Tél.
1-800-668-8900
416-869-1047

Fax • Téléc.
416-869-1390

www.oba.org