



Administrative Law

ADMINISTRATIVE LAW SECTION / SECTION DU DROIT ADMINISTRATIF

Reviewing NAFTA Chapter 11 Awards in Canadian Courts: A Case Commentary

*Martin G. Masse**

In two recent cases, Canadian courts have been asked to judicially review arbitration awards issued under Chapter 11 of the *North American Free Trade Agreement* (“NAFTA”). In both cases, the courts were called upon to resolve the tension between providing finality for international commercial arbitration awards and the expansive Canadian view of judicial review of administrative action.

Background

Chapter 11 of *NAFTA* provides protection to investors from Canada, the United States and Mexico when investing in another member country. Chapter 11 also includes an arbitration process by which individual investors can settle disputes before a *NAFTA* arbitration tribunal (the “*NAFTA* Tribunal”) with respect to alleged unfair or discriminatory treatment by national governments.

According to the *Commercial Arbitration Act*, the decisions of Arbitration Panels established pursuant to Chapter 11 of *NAFTA* are subject to the *Commercial Arbitration Code* (the “*Code*”) which codifies the “Model Law on International Commercial Arbitration”. Article 34 of the *Code* specifically allows for judicial review only on certain defined grounds. Generally speaking, Article 34 of the *Code* allows a decision to be set aside only where the applicant provides proof that the

award deals with a dispute not contemplated by the submission to arbitration or it contains decisions on matters beyond the scope of the submissions to arbitration. The Court may also intervene if the subject matter of the dispute is in conflict with the public policy of Canada.

The *S. D. Myers* Case

In the case of *Canada (Attorney General) v. S. D. Myers, Inc.*,¹ the Court dealt with an arbitral decision relating to an export ban placed on exports to the United States of PCB waste. The Respondent, *S. D. Myers, Inc.* (“*SDMI*”) was awarded over \$6 million in damages and \$850,000 in costs by the Arbitral Panel due to injury caused by the export ban to *Myers Canada*, its Canadian affiliate.

Mr. Justice Kellen determined that the scope of review permitted under the *Code* is very limited. Essentially, he determined that Chapter 11 arbitral awards can only be set aside if the applicant furnishes proof that the award deals with a dispute not contemplated by the terms of the submission to arbitration or the award contains decisions on matters beyond the scope of the submission to arbitration. Where a matter falls within the appropriate jurisdiction of the *NAFTA* Tribunal, no review on the merits is allowed:

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“[...] Article 34 of the Code does not allow for judicial review if the decision is based on an error of law or on an erroneous finding of fact [...]”²

It is also noteworthy that the Court specifically did not deem it necessary to conduct a full pragmatic and functional assessment in order to arrive at the standards of review. The Court relied instead on the conclusions of the British Columbia Superior Court in the *Metalclad* case³ whereby the Court found that the pragmatic and functional approach did not apply to the determination of a standard of review for a decision of a *NAFTA* Tribunal. It found instead that the standard of review was dictated by s. 34 of the *Code*. It also relied on the notion that courts must refrain from exercising judicial review where international commercial arbitrations are involved.

On the main issue as to whether SDMI had made an “investment” in Canada by creating Myers Canada, the Court initially found that Canada was barred from raising the jurisdictional issue on judicial review because it had not been raised before the Tribunal. In the alternative, Mr. Justice Kellen decided to answer the question. In so doing, he established that, insofar as the *NAFTA* Tribunal had given meaning to the word “investor” and “investment of an investor” in *NAFTA*, this conclusion would be reviewed on a correctness standard. Insofar as the *NAFTA* Arbitration Panel applied the interpretation to the actual investment made by SDMI, this would be subject to a reasonableness standard.

In the end, the decision of the *NAFTA* Tribunal was upheld on the basis that it correctly interpreted the meaning of “investor” and applied it reasonably to the facts of the case.

The Feldman Case

More recently, the Ontario Court of Appeal⁴ upheld the decision of the Ontario Superior Court of Justice to the effect that a *NAFTA* Tribunal decision relating to Mexico and Marvin Feldman Karpa should be given a high degree of deference and that Mexico had not shown any basis upon which to interfere with the arbitration award.

In late 2002, the *NAFTA* Tribunal found that Mexico had breached Article 1102 of *NAFTA* and discriminated against Mr. Feldman vis-a-vis his domestic competitors by eliminating an excise tax rebate on cigarettes for exporters only. Because the seat of arbitration had been Ottawa, Mexico brought an application to set aside the

award before the Ontario Superior Court of Justice. It is this decision which eventually found its way before the Ontario Court of Appeal.

The Ontario Court of Appeal took a slightly different approach than the Court in the *S. D. Myers* case. While the Court of Appeal acknowledged that Section 34 limited the grounds of review that could be raised to set aside an award, the Court recognized that it did not prescribe the standard of review which should be applied to those grounds. Instead, the Court relied on notions of international comity, and the reality of the global market place to suggest that courts should only rarely interfere with international commercial arbitration awards. In addition, the Court looked to the Canadian pragmatic and functional approach and determined that a high degree of deference is owed to specialized bodies such as the *NAFTA* Tribunal, especially given that it constitutes a consensual arbitration tribunal. As a result, the applicable standard of review was found to be at the high end of the spectrum of judicial deference.

It was determined that, while the Tribunal may have erred in drawing an adverse inference from Mexico’s refusal to disclose taxpayer information, this did not constitute a sufficiently egregious error to warrant setting aside the decision. Moreover, the Court dispensed with Mexico’s argument that the award of damages was contrary to Canadian public policy. It was determined that the award of damages was not unjust or unfair and simply amounted to the quantification of harm caused to Mr. Feldman by Mexico’s discriminatory conduct.

Conclusion

While the Courts involved took different approaches, the *S. D. Myers* case and the *Feldman* case nevertheless illustrate the constraints that are placed on Canadian courts when reviewing international commercial arbitration awards. Particularly striking are the limits on the grounds that can be argued by an Applicant. In both decisions, Article 34 of the *Code* was seen as limiting the scope of possible arguments that could be made on review. It would appear from the decisions that, with the exception of jurisdictional arguments, an applicant has no ability to argue the merits of a decision, no matter how unreasonably decided. It is also clear from both decisions that when the limited grounds which are actually available to an applicant are assessed, the courts will generally be deferential to the *NAFTA* Tribunal and intervene only when absolutely necessary.

In the end, these decisions confirm the tendency to prefer the finality of *NAFTA* Tribunal awards over an expansive view of when judicial review should be available. In so doing, the Federal Court and the Ontario Court of Appeal have provided reassurance to the international business community that Canadian courts will not unduly interfere with international commercial arbitration awards.

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¹ 2004 FC 38, (hereinafter “*S. D. Myers*”)

² *S. D. Myers, supra* at paragraph 42

³ *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664.

⁴ *Mexico v. Karpa*, [2004] O.J. No. 16 (C.A.) aff’d [2003] O.J. No. 5070 (S.C.J.)

Message from the Chair

*Andrew M. Pinto**

I have had the privilege of serving as this Section’s Chair for the last two years. My term as Chair concludes in June 2005. There are the usual dinner programs to organize and draft legislation to comment on. These are the routine but essential activities of the Section. Then there are issues that rise to the level of fundamental importance, around which develops a broad consensus that prompt and decisive action is necessary.

The issue of improving the public appointments process reached a “tipping point” this past year. The Administrative Justice Working Group (AJWG), a diverse group of administrative law practitioners, former tribunal adjudicators, academics and clinic lawyers, coalesced around the issue of improving the process for provincial adjudicative appointments. The AJWG issued a report, and now our Section, the Law Society, Advocates’ Society, the National Judicial Institute, Legal Aid Ontario and other organizations have written to the government indicating support in principle for reform of the tribunal appointments process, including the principles espoused by the AJWG.

Regrettably, we continue to hear of post-facto renewals of appointments and non-renewals on too short notice. We recognize that, by and large, the remuneration associated with appointments to public agencies, boards and tribunals is less attractive than the private sector, and that accordingly, qualified candidates are often motivated by other factors, including the desire to contribute to the public interest.

Yet, if remuneration, security of tenure, process for renewal and non-renewal all become negatives in the decision-making ledger, then we will not have the high

calibre of candidates that is vital to the health of the administrative justice sector of this province. This has been stated more eloquently by Ian Strachan, Chair of the Workplace Safety and Insurance Tribunal, in respect of his tribunal, but which holds true more generally:

“Persons who might otherwise have applied to join the Appeals Tribunal, saw the level of remuneration as a major obstacle which, when combined with the uncertainty of the appointment process, made career prospects in the Ontario administrative justice system less attractive.” (Chair’s Report, www.wsiat.on.ca)

We know the government cares about this issue and is doing something about it, albeit more slowly than we would like. The Public Appointments Secretariat, (www.pas.gov.on.ca), is conducting a review of the appointments process. This follows PAS Director Debra Roberts’s speech in November 2004 at the Society of Ontario Adjudicators and Regulators’ (SOAR) Medal Dinner. As well, the government has widely distributed, through e-mail and other media, advertisements for key adjudicative positions. We await the outcome of the government’s review and hope that it addresses the above-noted and long-standing concerns.

Perhaps getting less attention than it should, is the diversity aspect of public appointments. It appears that the judicial appointments process has recognized that, within the pool of qualified candidates, preference should be given to those who will better reflect the diversity of the province’s many communities. That recognition now needs to happen in the

quasi-judicial sector. Two upcoming events should assist: The Council of Canadian Administrative Tribunal's (CCAT's) Annual Conference, "Administrative Justice in the Modern Canadian Mosaic", June 19 to 21 in Ottawa: <http://www.ccat-ctac.org/en/conferences/>, will feature a plenary session entitled, "Multiculturalism: Have Adjudicators and Regulators Adapted to New Realities?". A few days later on June 23-25 in Toronto, the Canadian Centre for Political Leadership presents the GTA Public Leadership Summit: <http://www.gtasummit.ca>, providing 3 days of practical training for visible minorities and newcomers with an interest in seeking public leadership positions, including elected office, campaign staff, public appointment, and senior positions within the civil service.

Speaking of diversity, this time geographically, I am pleased to report that our Section is planning an Administrative Law program to be held in Windsor, Ontario in the Fall of 2005. Our partners will likely include the University of Windsor's Faculty of Law and the Essex Law Association. This follows on the success of the dinner program held in London, Ontario in November 2004. The Executive recognizes that we need to adjust to different realities in the regions outside Toronto and Ottawa. If you are a Section member in those regions, we need your leadership to make such events happen.

Please come out to the last two dinner programs of the year. On May 26, we feature a joint session with the Labour Relations and Constitutional, Civil Liberties and Human Rights Sections on "Family Status Accommodation: How Far Does It Go?" The program will examine the law and issues surrounding employers' duty to potentially accommodate employees' family, child care and elder care obligations. We know that many employees and organizations, large and small, face challenges in this regard. And then, on June 13, 2005, our last dinner program of the year features a session on "Practice in the Divisional Court". At the time of writing, our panelists include Justice Edward Then, the Administrative Judge responsible for the Divisional Court for the past 4 years, and Jeff Cowan of WeirFoulds LLP. This program will undoubtedly complement, in a very practical way, our earlier program on Judicial Review.

I take this opportunity in my last Chair's message to sincerely thank the members of my Executive and the staff of the OBA. I have tremendously enjoyed working with you. It must be true of many endeavours that, when you finally get the knack of it, it's time to move on. So move on I will, confident that the

Section continues to be an important crossroads for the administrative law community in Ontario.

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The Appropriateness Test and Tribunals' Constitutional Jurisdiction

Hugo Lorenson*

With *Nova Scotia (Workers' Compensation Board) v. Martin* and *Nova Scotia (Workers' Compensation Board) v. Laseur*,¹ the powers of administrative tribunals appeared to be on an upswing. The Supreme Court of Canada confirmed tribunals' continued ability to hear *Charter* submissions and grant *Charter* remedies. The Court extended this power to tribunals that had never previously considered the *Charter*. As long as a tribunal's empowering legislation explicitly or implicitly allowed it to answer questions of law, it would have the presumptive ability to adjudicate the *Charter*. Further, because a previous Supreme Court decision, *Paul v. British Columbia (Forest Appeals Commission)*, held that any tribunal with jurisdiction to hear constitutional issues should not have this jurisdiction limited to any particular area,² this faculty could extend to any variety of constitutional concerns.

These broadly phrased articulations theoretically allowed for the significant broadening of the day-to-day powers of many tribunals. No longer would a qualified tribunal have to limit the range of issues it heard or remedies it fashioned by passing the adjudicative buck to other 'more competent' bodies. At its disposal now was a complement of powers that would enable it to extensively address the many issues before it - a one-stop adjudicative body. Though prudent counsel appearing before these newly minted tribunals would have to take note of the tribunal's lack of experience when arguing constitutional issues,³ no longer would these issues have to be downplayed or ignored or asserted elsewhere.

With the recently decided *Tranchemontagne v. Ontario (Director, Disability Support Program)*,⁴ however, the Court of Appeal appears to have limited the reach of the *Martin* test and inserted uncertainty into the analysis. While the Court held that the tribunal under appeal, the Social Benefits Tribunal ('SBT'), had the jurisdiction to consider constitutional issues (in this case, human rights under the *Ontario Human Rights Code*⁵), it nevertheless ruled, upon weighing various considerations, that the SBT was not the most appropriate body to consider the *Code*.

This paper will review how *Tranchemontagne* has further developed the law concerning tribunals' ability to hear constitutional issues. After having discussed the

case's background, I will consider its significance and point to several unresolved problems stemming from its reasons.

Tranchemontagne involved two admitted alcoholics (Werbeski and Tranchemontagne) who had separately applied for disability benefits under the *Ontario Disability Support Program Act, 1997*.⁶ Both applications had been denied pursuant to s. 5(2) of the *Act*, which states that income support cannot be granted to anyone whose sole impairment is alcohol abuse. They advanced appeals to the governing adjudicative body, the SBT, arguing, among other things, that the government's refusal to treat alcoholism as a compensable condition constituted disability discrimination.⁷ This discrimination, they argued, contravened the equal treatment to services provision of s. 1 of the *Code*. The adjudicator for the Werbeski appeal did not consider the *Code* in denying the appellant's appeal. The Member for the Tranchemontagne appeal also denied the appeal, but stated he lacked the jurisdiction to apply the *Code*.

A joint appeal eventually reached the Court of Appeal. The appellants argued that since the SBT could answer questions of law, this included the ability to address *Code* issues. The Court reviewed the *Act* and found that it did not grant an explicit power to answer questions of law. However, by assessing the adjudicative functions of the SBT as identified by the *Act* (ability to interpret legal standards, refuse frivolous appeals, and determine whether the appellant discharged the burden of proof) an implied power was established. Pursuant to *Martin*, therefore, the SBT had a presumptive ability to apply the *Code*. An analysis of the enabling legislation confirmed that this was not rebutted. Nevertheless, even though the SBT had jurisdiction to apply the *Code*, the Court ultimately concluded that the SBT was "not the most appropriate forum in which to make this determination;" the administrative procedure outlined in the *Code* ought to have been followed.⁸ The Court consequently dismissed the appellants' appeal. Leave to appeal to the Supreme Court of Canada was sought and subsequently granted on March 18, 2005.

The Court of Appeal relied on a variety of cases, two of which were: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney*

General (*Morin*)⁹ and *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)* (*Charette*).¹⁰ *Morin* involved various teachers whose employment was subject to a collective agreement. They filed a complaint under the provincial human rights regime, arguing that the agreement discriminated against them. The *Quebec Labour Code*, however, stated that a labour arbitrator has exclusive jurisdiction to hear matters concerning the interpretation or application of collective agreements. The majority of the Supreme Court decided that the matter was properly within the jurisdiction of the human rights tribunal; at issue was not the interpretation of the agreement, but its very validity. Discrimination claims did not fall within the ambit of the arbitrator's exclusive jurisdiction.

In *Charette*, the appellant participated in a government-sponsored program providing her social assistance benefits, since she met the criteria of having at least one child and was receiving employment income. She advanced a claim to the Quebec human rights commission, as opposed to the administrative procedure outlined in the program's legislation (which asserted exclusive jurisdiction), after she was denied benefits. The denial was based on the fact that she had started collecting maternity leave benefits, and the program held that employment insurance benefits were not income. The majority of the Supreme Court found that, for different reasons, the dispute pertained to issues within the program's exclusive jurisdiction.

The Court of Appeal extracted six practical considerations that were used in *Morin*, *Charette*, and *Paul* to determine which of the bodies ought to hear the matter (the degree to which these considerations were actually articulated varies greatly according to the decision and the judgement(s) therein).¹¹ With these considerations, the Court found that the human rights tribunal trumped the SBT as the appropriate body to hear the matter. The Court relied on *Paul's* discussion of practical considerations: "Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law. That is not to say, however, that practical considerations cannot be taken into consideration in determining what is the most appropriate way of handling a particular dispute where more than one option is available."¹² This passage provided the entry point for the Court to compare the SBT's adjudicative features with the procedure outlined in the *Code* and determine which of the two was more suited to hear the human rights issues, after it found that the SBT had jurisdiction to apply the *Code*.

Morin and *Charette*, however, were factually very different than *Tranchemontagne*. In particular, the considerations were used in the former cases to arbitrate between an administrative body that claimed exclusive jurisdiction and the default human rights regime. The considerations were needed to characterize the dispute and determine whether it fell within the scope of the tribunal, to the exclusion of the human rights regime.

In the present case, and as the Court of Appeal specifically noted, the SBT's legislation did not assert exclusive jurisdiction. This was not an instance of zero sum game, where, as was the case with *Morin* and *Charette*, only one of the two tribunals could hear the issues in dispute, and tests were formulated to determine whether the matter fell within that tribunal's exclusive jurisdiction. A concurrent, or overlapping, jurisdiction was feasible, here. The considerations were specifically employed in *Morin* and *Charette* to determine whether the tribunal claiming exclusive jurisdiction had jurisdiction; not, as was the case in *Tranchemontagne*, to determine which of two bodies with jurisdiction was 'more appropriate.' Neither case dealt with two bodies that were 'appropriate' options, since only one tribunal could claim jurisdiction. In this way, neither case supports *Paul's* proposition that practical considerations can be used to oust a tribunal with jurisdiction to hear a matter. Such a determination could only have been explored in situations of concurrent jurisdiction.

Even assuming that the Court properly employed the aforementioned considerations, however, it nevertheless passed on the opportunity to adequately contextualize their meaning. Some residual questions remain, such as: must all six considerations be satisfied; if not, which of the considerations are more determinative; how are practical considerations weighed against a tribunal that has jurisdiction. Because the decision failed to build on *Paul's* brief discussion of practical concerns, courts may continue to grapple with the concerns' significance.

Finally, *Tranchemontagne* appears to have downplayed the importance of jurisdiction when interpreting a tribunal's powers. The decision supports *Paul's* position that there may be times when a tribunal should not exercise jurisdiction. It is a principle of administrative law, however, that tribunals cannot refuse to exercise their jurisdictional powers, particularly when a party's rights are involved,¹³ as they were here. Courts typically categorize this practice as jurisdictional error. Beetz J.,

in his oft-quoted judgement in *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*, defined jurisdictional error as: “[...] an excess of jurisdiction or a refusal to exercise jurisdiction, whether at the start of the hearing, during it, in the findings or in the order disposing of the matter. Such an error, even if committed in the best possible good faith, will result nonetheless in the decision containing it being set aside.”¹⁴ By instructing the SBT to decline from hearing human rights issues, though they are within the SBT’s statutory jurisdiction, it would seem that the Court of Appeal is in fact compelling the SBT to engage in jurisdictional error.

Tranchemontagne posits a new line of inquiry. Although it adheres to the *Martin* criteria, it essentially does the decision one better by inserting an appropriateness analysis that must be satisfied before a tribunal can be found capable of addressing constitutional issues. The test, therefore, currently appears to be as follows: 1) does the tribunal have the implicit or explicit statutory power to answer questions of law; 2) if so, is the corresponding presumptive jurisdiction to apply constitutional considerations rebutted by the empowering legislation; 3) if not, does an analysis of the various practical considerations support the finding that there is a more appropriate option in handling the dispute. Only if the answer to # 3 is ‘no’ will the tribunal be found able to adjudicate any constitutional matters related to the dispute.

The Court of Appeal effectively decentred a tribunal’s power to answer questions of law as the determining issue. Even if a tribunal has jurisdiction to answer constitutional issues, this jurisdiction will be subject to whether the practice is appropriate in the circumstances. In addition, the case speaks of which body is “best determined”¹⁵ or “the most appropriate forum”¹⁶ to hear constitutional issues, suggesting the test may be higher than mere appropriateness, and at the level of the best possible adjudicative option. Practically speaking, tribunals such as the SBT would have difficulty outscoring human rights commissions as ‘the most appropriate’ body to hear matters involving human rights claims.

It is hoped that the Supreme Court of Canada will address the decision’s ambiguities. In the interim, however, counsel should note that practical considerations are a live issue and may very well undercut a tribunal from engaging constitutional matters when it otherwise had jurisdiction to do so.

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¹ [2003] 2 S.C.R. 504, 2003 SCC 54 [hereinafter *Martin*].

² [2003] 2 S.C.R. 585 at 614 [hereinafter *Paul*].

³ For a good discussion of the practical concerns facing counsel appearing before these tribunals, see P. Ruby, “*Martin* and *Laseur*: What is an Administrative Law Litigator to do?” (2004) 12:2 Administrative Law 6.

⁴ (2004), 72 O.R. (3d) 457 (C.A.), leave to appeal to S.C.C. granted [2004] S.C.C.A. No. 505 [hereinafter *Tranchemontagne*].

⁵ R.S.O. 1990, c.H-19 [hereinafter *Code*].

⁶ S.O. 1997, c. 25, Sched. B [hereinafter *Act*].

⁷ To see what other courts have said on the issue, see *Saskatchewan (Department of Finance) v. Saskatchewan (Human Rights Commission)* (2004) 245 D.L.R. 4th 636 (Sask. C.A.). The case reviewed the *Disability Income Plan*, which oversaw a provincial insurance plan funded by public sector employees. Article III (6)(e) denied disability benefits to any person who had a disability attributable to alcoholism that was not actively seeking alcohol treatment. The Court of Appeal found the section discriminatory, since it failed to take into account that denial was a fundamental component of alcoholism, and rendered the seeking of treatment difficult. The provision was prejudicial to alcoholics, therefore, and placed them at a comparative disadvantage when claiming disability benefits.

⁸ *Supra* note 4 at 479.

⁹ [2004] 2 S.C.R. 185 [hereinafter *Morin*].

¹⁰ [2004] 2 S.C.R. 223 [hereinafter *Charette*].

¹¹ These were identified as: 1) the essential character of the dispute; 2) the importance of the factual context of the case and any policy questions it raises; 3) whether the administrative body asserts exclusive jurisdiction; 4) if the body has any constitutional adjudication expertise; 5) practical constraints; 6) the consequences of having the human rights tribunal, rather than the body, hear the matter.

¹² *Supra* note 2 at 613.

¹³ R.W. Macaulay & J.I.H. Sprague, *Hearings Before Administrative Tribunals*, 2nd ed. (Toronto: Carswell, 2002) at 5-9.

¹⁴ [1984] 2 S.C.R. 412 at 420-21.

¹⁵ *Supra* note 4 at 479.

¹⁶ *Ibid.*

The Immigration Security Certificate

Sebastian Spano*

The immigration security certificate was the subject of a March 10, 2005 program in Ottawa, co-sponsored by the Ontario Bar Association's Administrative Law and Constitutional, Civil Liberties and Human Rights Law Sections. Three speakers presented insightful discussions of the process of review of the security certificate in the Federal Court of Canada. Professor Craig Forcese, who teaches international law at the University of Ottawa, described the legislative framework under the *Immigration and Refugee Protection Act* which governs detentions of persons held under security certificates and the process for reviewing the reasonableness of the certificate. Paul Copeland, a criminal law practitioner, Law Society bencher, and counsel to Mohamed Harkat, described the experience of counsel representing a detainee under a security certificate. Robert Batt, Senior Legal Counsel with the Canadian Security Intelligence Service provided the government perspective on the security certificate.

Craig Forcese walked the participants through the Act's provisions using a fluid power point presentation, showing at what stage in the review process, with reference to the Act, six of the current security certificate detainees find themselves. He reviewed the length of time the detainees had been detained under the certificate and compared the length of the detentions with the average sentences for various violent crimes in Canada. Professor Forcese commented on the recent House of Lords judgment in *A, et al v. Secretary of State for the Home Department*, [2004] UKHL 56, and suggested that Canada, whether through legislation or through judicial intervention, may soon be required to address the issue of indefinite detention in the face of a possible of deportation to torture.

Paul Copeland discussed the challenges counsel face when representing detainees in the security certificate review process in the Federal Court of Canada. One of the major concerns is the inability to see potentially significant portions of the evidence gathered by security agencies in Canada or abroad, which form the basis for the detention, as well as the inability to cross-examine witnesses and challenge the evidence directly. The other concern is with respect to the *in camera* portion of the hearing whereby the Federal Court judge is required to test the evidence, with the detainee and his or her counsel excluded. In his view, the restricted scope for counsel to test the case against a detainee is a

fundamental flaw in the process. He supported recent calls for amendments to the legislation to permit the appointment of an *amicus*, or a special counsel, similar to the process that has been adopted in the U.K. Under the U.K. review process, a special counsel with security clearance and sworn to secrecy, is permitted to attend the *in camera* hearing, review the evidence adduced by the government, and cross-examine any witnesses. The special prosecutor is not permitted to discuss with the detainee or counsel, the evidence presented in the hearing.

Robert Batt provided his perspective as counsel for the government in security certificate proceedings. In his experience, Federal Court judges do an effective job in testing the evidence provided. He maintained that the process strikes the right balance between a detainee's right to know the case against him and the state's right to protect its intelligence sources and the public interest in protecting national security.

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Administrative Law Cases at the Divisional Court

Patricia MacLean*

This list is current to May 2, 2005

Recent Decisions

Bothwell v. Minister of Transportation and the Registrar of Motor Vehicles (January 20, 2005) (Ferrier, Ground, and Crane JJ.), Toronto

This is an application for judicial review of a decision of the Ministry of Transportation (the “Ministry”) and the Registrar of Motor Vehicles denying the applicant an exemption on religious grounds from the requirement to have a photograph on his driver’s licence. The Applicant has had a driver’s licence since 1962. In November 1997, the Applicant went to renew his licence and was informed that a new photo would have to be taken by a digital camera that would be stored in a Ministry database. The Applicant refused, for religious reasons, to have a digital photo taken, and the clerk refused to issue him a new driver’s licence. The Applicant submitted an application for exemption from the photo requirement on religious grounds, based on his fundamentalist Christian beliefs and his own study of the Bible. He does not belong to any congregation, nor does he have a religious leader. His application was denied.

HELD: application dismissed.

The Applicant failed to meet the burden of establishing a sincere religious objection to the taking of a digital picture for inclusion on his driver’s licence and the requirement therefore did not violate his rights under s. 2(a) of the *Charter of Rights and Freedoms*. There were numerous inconsistencies with respect to the Applicant’s beliefs, and letters written by the Applicant raised privacy concerns, not religious ones. His past and current lack of concern for, indeed his consent to, the taking of Polaroid and digital photos of himself tends to belie his sincerity.

Bucyrus Blades of Canada Limited v. Evelyn McKinley and Pay Equity Hearings Tribunal (January 24, 2005) (Ferrier, Crane, and Pitt (dissenting) JJ.), Toronto.

This is an application for judicial review by Bucyrus Blades of Canada Limited (the “Applicant”) of the decision of the Pay Equity Hearings Tribunal (the

“Tribunal”) which found that the Respondent, a former employee of the Applicant, can maintain a complaint to the Pay Equity Office and benefit from the Order of a Review Officer after having made a settlement with the Applicant arising out of the termination of her employment, and having signed a full and final release. The Tribunal refused to revoke the Order, finding that the Settlement and Release did not bar the Review Officer from directing the Applicant to comply with the *Pay Equity Act*, R.S.O. 1990, c. P.7 (the “Act”), nor should the Settlement and Release prevent the Respondent from receiving a pay equity adjustment, should one be required. The failure of the Release to detail that it includes a release of any claim under the Act was fatal to the Applicant’s case.

HELD: application granted.

Per Crane J., Ferrier J. concurring: The parties are bound by their agreement. On public policy analysis, there is no basis not to enforce the parties’ contract. The law does not interfere with the right to contract out of the Act. The Respondent resolved her interest in a pay equity plan by way of her contractual settlement. The decision of the Tribunal is quashed and the Tribunal is directed to revoke the Order of the Review Officer.

Per Pitt J. (dissenting): The Act is distinctive in its pro-active and affirmative design and imposes a pro-active obligation to achieve pay equity on an establishment-wide rather than individual basis. The impact and significance of the release must be evaluated in context, giving full recognition to the systemic and pro-active structure of the Act. To accept a private contract which purported to release a party from its positive obligations under a statute would be tantamount to allowing private parties to repeal the statute in the particular case, which is clearly contrary to public policy.

Chief of Police of York Regional Police v. Ontario Civilian Commission on Police Services, Eva Passailaigue, Leea Nutson and Taina Andrews (January 24, 2005) (Pitt J.), Toronto

The Respondents brought a motion for an order striking out an application for judicial review, brought by the Chief of Police (the “Chief”), of the decision of the Ontario Civilian Commission on Police Services

(the “Commission”) directing the Chief to initiate a disciplinary hearing against Police Constable Kilby (“Constable Kilby”) on the ground that Constable Kilby may have committed misconduct of a serious nature in his capacity as the primary investigator in the death of Anja Broadfoot (“Broadfoot”).

On March 1, 2000, Broadfoot, who had been reported missing and as being suicidal and on anti-depressants by her husband, was found deceased, lying face down in a river. The official cause of death was drowning. The issue under investigation was whether she had committed suicide or was the victim of homicide. Her children, the Respondents, alleged that Broadfoot was murdered by her husband. The police concluded that they were unable to determine the reason why Broadfoot drowned.

The Respondents requested that the investigation be reopened, and made allegations that the police failed to properly investigate the death. The Deputy Chief of Police refused. The Respondents requested that the Commission review the decision. The Commission referred the matter to the Hamilton Police Services, which concluded that the York Regional Police Service conducted a thorough investigation and that appropriate investigative steps, proper procedures, and best practices were used. The Respondents appealed that decision to the Commission. The Commission directed a disciplinary hearing with respect to Constable Kilby’s conduct, having found that there was sufficient evidence to allege that he may have committed misconduct of a serious nature in the course of the investigation.

HELD: application granted.

The court noted that the Chief’s main concern was the anxiety and notoriety that might befall Constable Kilby as a result of a public hearing into allegations of misconduct. However, the court pointed out that the legislative purpose of the *Police Services Act*, R.S.O. 1990, c.P.15, was to increase public confidence in the provision of police services, including the processing of public complaints. Since the order made by the Commission was not indicative of a finding of responsibility but merely required a hearing to make such determination, the application did not raise serious concerns that, if they materialized, would likely result in a fundamental failure of justice. There is nothing in this case that demands the immediate intervention of the Court.

The court was being asked to make a determination on the appropriateness of the Commission’s decision to

require the Chief to initiate a hearing without awaiting the result of that hearing. It is preferable to allow such matters to run their full course before the tribunal and then consider all legal issues arising from the procedures at their conclusion.

Despite a lack of explanation for the ten-month delay in bringing this motion to quash, it is not justifiable to dismiss the motion, given the importance of the issues and the lack of demonstrable prejudice to the Chief.

Ontario (Attorney General) v. Patient (February 21, 2005) (Then, Ground, and Pitt JJ.), Toronto

The Attorney General brought this application for judicial review of a decision of the Consent and Capacity Board (the “Board”), in which the Board held that it had the jurisdiction to hear and determine the constitutional validity of its enabling legislation. The Respondent, Jane Patient, was subject to a community treatment order (“CTO”) under the *Mental Health Act*, R.S.O. 1990, c. M.7 (the “Act”). Upon renewal of the CTO, the Respondent was deemed to have applied to the Board for a review to determine whether the criteria for renewing the CTO were met. The Respondent served a Notice of Constitutional Question, indicating that she would be asking the Board to consider challenges to the CTO provisions of the Act, based on ss. 2, 6, 7, 8, 9, 10, 12, and 15 of the *Charter of Rights and Freedoms*. The Attorney General intervened to respond to the question of whether the Board has jurisdiction to consider the constitutional validity of its enabling legislation.

After considering the recent Supreme Court of Canada decision in *Nova Scotia (Worker’s Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 (“*Martin*”), the Board decided that it has jurisdiction to decide constitutional questions. While there is no explicit statutory authority conferring jurisdiction on the Board, there is implied jurisdiction. As the Board has jurisdiction to decide questions of law under the challenged provisions, the authority to determine constitutional questions was presumed. The presumption of authority was not rebutted.

HELD: application allowed, decision of the Board quashed and set aside.

As per *Martin*, the first question to be addressed is whether the Board has jurisdiction, expressed or implied, to decide questions of law under the challenged provisions. None of the impugned provisions require the Board to determine questions of law, but rather constitute fact intensive inquiries properly characterized

as questions of mixed law and fact. The availability of an appeal on a question of law does not imply that the Board has jurisdiction to decide questions of law, but merely identifies the nature of the error that the Board may make in discharging its task. Accordingly, the Board does not have jurisdiction to consider the constitutional validity of those provisions.

If the Court is in error, and the Board does have implied jurisdiction to determine questions of law, the Attorney General has rebutted the presumption that the Board has jurisdiction to consider the constitutional validity of those provisions. First, the fact-intensive nature of its role under the impugned provisions implies that the Legislature did not intend that the Board hear and decide *Charter* challenges.

Second, the strict statutory time limits imposed by the Legislature lead to the conclusion that it intended constitutional questions to be excluded from the questions of law to be addressed by the Board. The provisions of the Act and the *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sch. A (“HCCA”) require a prompt hearing of the matter and that a decision be made within one day of a hearing. This strict time limit does not allow the Board to adequately consider and rule on the constitutionality of the provisions of the Act. Moreover, the requirement to have a hearing within seven days of receiving an application is inconsistent with the requirement that notice be given to the Attorney General at least fifteen days before the commencement of the hearing. Finally, the Legislature has ensured that patients have an expedited opportunity to have their *Charter* rights addressed by a court.

Montague v. Ontario (Ministry of the Environment) (March 1, 2005) (Matlow, Lack, and Heeney JJ.), Hamilton

As a result of the clean-up after a fire that destroyed the factory of the previous owner, Lee Paint, the land in question was contaminated. Unaware of the contamination, the land was subsequently purchased by Montague, who had it rezoned as residential and built a house on it. Several years later she put the house on the market, and prospective purchasers insisted on an environmental site assessment. The site was found to be contaminated, and the Director ordered that Lee Paint, Lee personally, and Montague carry out extensive remedial work to the site.

Lee and Montague appealed the order to the Environmental Review Tribunal (the “Tribunal”). The Tribunal revoked the Director’s order as against Lee in

its entirety, and revoked the portion of the order against Montague that required her to pay for the remediation of the property.

The Director brings this appeal of the Tribunal’s decision because it could be interpreted to mean that the Tribunal lacks jurisdiction to make an order against the current owner by reason of the fact that she had nothing to do with the contamination being placed in the ground. Such an interpretation, if followed by subsequent Tribunals, would undermine the “owner pays” side of the enforcement mechanism pursuant to the *Environmental Protection Act*, R.S.O. 1990, c. E.19 (the “Act”).

HELD: Appeal allowed in part: a new hearing was directed with respect to the liability of Lee, the appeal as regards Montague is dismissed.

When the Tribunal concluded that Lee was not “responsible for” the burial of the contaminated materials, it was not asking itself the question mandated by the Act. The question remains whether his conduct “permitted” the burial of the waste. The Tribunal defined “management or control” too narrowly. While Lee was not running the company as a whole, he was in charge of the cleanup operation which is the undertaking that created the risk of discharge in the case at bar.

The Tribunal erred in law in failing to direct its mind to the proper legal issues and in applying a test for liability that was too narrow.

The Tribunal also failed to address section 43, which grants the Tribunal jurisdiction to make an order against a person who had charge and control of the land or waste. Even if he was not the owner, Lee had control of the waste, and as such, jurisdiction lies under this section to make an order against him.

The Tribunal’s revocation of the order against Montague under s. 17 on jurisdictional grounds was legally correct, as s. 17 can be invoked only against a person who “causes or permits” the discharge of a contaminant into the environment. The Tribunal correctly assumed that it had jurisdiction to make an order against Montague under ss. 18 and 43, but, after considering the fairness issue, declined to make any order that would burden her with the financial responsibility for the cleanup. There is no basis for interfering with the Tribunal’s decision with respect to Montague.

Ontario (Ministry of Community and Social Services and Ministry of Children and Youth Services) v. Grievance Settlement Board and Ontario Public Service Employees Union (March 1, 2005) (Cunningham A.C.J., Lane, and Carnwath JJ.), Toronto

This was an application for judicial review of two awards of the Crown Employees Grievance Settlement Board (“Board”) determining the relief to be awarded following earlier findings that the Applicant had breached its obligations to the members of the Ontario Public Service Employees Union (“OPSEU”) in respect of the terms on which three young offender facilities were divested by the Applicant.

The Board agreed with OPSEU’s interpretation of the article in question, ruling that it mandated that Requests for Proposals (“RFP”) require successful proponents to make job offers which included recognition of seniority in the Ontario Public Service (“OPS”) for the purposes of job competitions and layoffs. In addition, RFPs must include a term that employees who opt in obtain a contract provision that the most junior person is laid-off first, provided that the more senior person can do the work in issue.

The Board then commenced hearings to determine the appropriate remedy. The Board found that the grievors lost the opportunity of getting a job offer with the protection of seniority for the purpose of lay-off and promotion. Though it was difficult to put a value on the loss, the Board found that each employee entitled to a remedy should be awarded an amount based on the multiplication of their years of service by what each was paid for two weeks salary, plus interest.

HELD: application dismissed.

When a collective agreement is breached by the employer, as has happened here, in a manner affecting the collectivity, or a significant portion of it, collective or blanket remedies are often more appropriate than individual ones.

The employees have suffered what the Board found to be a real loss, yet the applicant contends that mere difficulty in translating that loss into dollars enables it to avoid the consequence of its breach. The compensation is imperfect: some will never suffer any monetary impact from the Applicant’s breach and others who do will likely be undercompensated. But it is a reasonable award to make in the circumstances.

Enbridge Gas Distribution Inc. v. Ontario (Energy Board) (March 2, 2005) (Lane, Molloy, and Power JJ.), Toronto.

Enbridge Gas (“Enbridge”) appealed from a decision of the Ontario Energy Board (“Board”). Enbridge is a gas distributor and seller of gas to consumers, subject to regulation by the Board under the *Ontario Energy Board Act, 1998*, S.O.1998, c. 15. The Board fixes the rates to be charged to customers, based on what it deems to be just and reasonable. Prior to 1996, Enbridge shipped its gas through the TransCanada Pipeline System (“TransCanada”). Between 1996 and 1999, Enbridge entered into four agreements with various entities to deliver some gas through alternate pipeline routes, which proved to be more costly than the TransCanada route.

Enbridge applied to the Board to approve its rates. At issue was whether the costs incurred under the new agreements were prudent. The Board found that Enbridge did not act prudently in incurring the increased costs under two of the agreements and was not permitted to build the costs into its rates. It found that additional costs were prudently incurred with respect to one agreement, and deferred consideration of the costs under the fourth agreement.

HELD: appeal allowed.

A utility is entitled to recover its prudently incurred costs. Expenditures are deemed to be prudent in the absence of some evidence suggesting the contrary. Dishonestly incurred costs or negligent or wasteful losses were excluded from the legitimate operating costs in determining rates. Whether an expenditure is prudent must be based on the particular circumstances at the time the decision to incur the costs was made; hindsight is not to be used.

There was evidence before the Board of the extra costs incurred under the four agreements over and above what would have been the cost incurred using the TransCanada route. The Board was entitled to use that information in determining whether the presumption of prudence was rebutted, but not as part of its analysis as to whether the decisions at issue were prudent at the time they were made. The Board described the test correctly, but slipped in its application of the test by allowing hindsight to creep into its consideration of prudence. This is a fundamental error of law. The matter was remitted to a differently constituted Board for reconsideration.

Caressant Care Nursing Home of Canada Ltd. v. London and District Service Workers' Union, Local 220 and Pay Equity Hearings Tribunal (April 12, 2005) (Lane, Matlow, and Molloy JJ.), Toronto

Caressant Care (“Caressant”) is a private corporation that owns a nursing home and retirement home, which are both on the same property and are essentially separate wings of the same building. The nursing home side is licensed under the *Nursing Home Act*, R.S.O. 1990, c. N.7, receives government funding, and is subject to strict government scrutiny and controls. The retirement home side is strictly a private business, receives no government funding, and is not subject to any specific provincial controls. Both aspects of Caressant’s business have a predominantly female workforce and are subject to wage adjustment under the *Pay Equity Act*, R.S.O. 1990, c. P. 7.

It is clear that the nursing home falls within the broader public sector and, as such, is subject to the “proxy method” for purposes of wage comparison. Private businesses are not subject to the proxy method of comparison. The issue in this case is whether, in the particular circumstances of Caressant’s business, the retirement home side is also subject to the proxy method of comparison.

The Pay Equity Hearings Tribunal (“Tribunal”) decided that Caressant fell within the definition of public sector employer under the Act and that its entire operation, including both the nursing home and retirement home aspects, were subject to the proxy method of comparison. The Tribunal based its decision on an Appendix to the Schedule to the Act, which provided that the public sector included “any corporation ... that operates or provides a nursing home, under the authority of a licence issued under the *Nursing Homes Act*.”

Subsequent to the Tribunal’s decision, regulations were made amending the applicable part of the definition by adding to it “but, for greater certainty, only in respect to which funding is received from the Province of Ontario.” Following this amendment, Caressant asked the Tribunal to reconsider its earlier decision. The Tribunal refused to exercise its discretion to reconsider its decision, and Caressant brought this application for judicial review of both Tribunal decisions.

HELD: application allowed, and the matter is remitted for a new hearing before a differently constituted Tribunal.

The standard of review to apply to the initial decision of the Tribunal is reasonableness. With respect to the reconsideration decision, the Court ought not to interfere with the Tribunal’s discretion unless it is patently unreasonable.

On reconsideration, the Tribunal correctly determined that the amendment to the public sector definition did not have retrospective application. The real issue, therefore, is whether the Tribunal’s initial decision can stand.

The Tribunal reached a reasonable conclusion that Caressant was the “employer” of the employees in the retirement home and that both the nursing home and retirement home were part of the same “establishment”. However, the Tribunal’s conclusion that once an employer was found to be a public service employer in any aspect of its business, it was a public sector employer for all purposes under the Act and with respect to all of its employees in the relevant geographic boundaries, creates an absurd result. It was patently unreasonable for the Tribunal to insist on a rigid, literal reading of the provision in question when reliable sources were available to facilitate an interpretation more in keeping with the intention of the legislation.

The matter was remitted for a new hearing before a differently constituted Tribunal, which was directed to interpret the term “public service employer” consistently with the amended version in O. Reg. 37/02.

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Administrative Law Cases at the Ontario Court of Appeal

*Alison Warner and Amy Britton-Cox**

This list is current to May 10, 2005.

Recent Decisions

Jane Roach v. Workplace Safety and Insurance Appeals Tribunal, [2005] O.J. No. 1295 (C.A.), rev'g [2004] O.J. No. 1734 (Div. Ct).

Roach claimed that she suffered from “traumatic vertebrobasilar ischemia” (TVBI), a disorder that prevented her from working, as a result of a workplace injury. The Workers’ Compensation Board rejected this diagnosis and determined that Roach suffered from chronic pain disorder. The Tribunal upheld the Board’s decision, and affirmed its own decision 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 and thus patently unreasonable.

The Tribunal appealed to the Court of Appeal, which allowed the appeal. The Tribunal’s decision was restored. The Divisional Court adopted the correct standard of review (patent unreasonableness) for the Tribunal’s reconsideration decision. However, the Divisional Court erred in finding that the Tribunal’s reconsideration decision was so flawed that it was patently unreasonable. The Tribunal’s decision was not clearly irrational or so flawed that no amount of curial deference could properly justify letting it stand. The Tribunal dealt with the correct issue when it considered whether the injury from the workplace incident caused Roach to suffer from TVBI. After reviewing a co-worker’s evidence of the incident, it was open to the Tribunal to conclude that it was not persuaded that the co-worker’s evidence was sufficiently weighty to contradict the previous evidence of the incident. There was a significant amount of material in the record that contradicted the co-worker’s evidence, all of which the Tribunal carefully considered and explained in reaching its decision.

Ontario Nurses’ Association v. Mount Sinai Hospital, [2005] O.J. No. 1739 (C.A.), aff’g (2004) 69 O.R. (3d) 267 (Div. Ct).

This was an appeal by Mount Sinai Hospital from the Divisional Court’s decision that s. 58(5)(c) of the *Employment Standards Act* violates s. 15(1) of the *Charter*. Section 58(5)(c) creates an exception to an employer’s obligation to pay severance pay to employees whose contracts of employment have been frustrated due to illness or injury. The grievor had been denied severance pay pursuant to s. 58(5)(c) after she was terminated for innocent absenteeism while she was receiving long term disability benefits. An Arbitration Board found that the section did not violate the *Charter*. The Divisional Court quashed the Board’s decision because s. 58(5)(c) denies disabled employees an employment benefit to which they would have been entitled but for their disability, and in so doing, devalued their past contributions to their employer’s business.

The Court of Appeal dismissed the appeal and upheld the decision of the Divisional Court. At issue at the Court of Appeal was the third branch of the *Law* test, namely, whether the differential treatment in s. 58(5)(c) is discriminatory. Section 58(5)(c) treats individuals with disabilities differently from others whose employment has not been frustrated. There is no correspondence between the ground of denial and the actual needs, capabilities and circumstances of the grievor or others in the claimant group. The differential treatment has the effect of perpetuating the view that individuals with disabilities are not likely to be members of the workforce in the future. The denial affects an interest crucially important to one’s dignity, equal treatment and equal compensation in employment. On this basis, the denial of severance pay under s. 58(5)(c) is discriminatory and is not saved by s. 1 of the *Charter*.

Ministry of Correctional Services v. David Goodis, [2005] O.J. No. 66 (C.A.), aff’g [2004] O.J. No. 894 (Div. Ct)

The issue on appeal was whether on a judicial review of a decision of the Information and 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. 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 was the subject of the judicial review proceedings. Justice Blair granted access to all 458 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 458 pages.

In this brief endorsement the Ontario Court of Appeal upheld the Divisional Court's finding that Blair J. had the jurisdiction to control the process of the court and to ensure procedural fairness to all parties. The Court of Appeal confirmed the Divisional Court's finding that there was no reason to interfere with Blair J's order.

Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner), [2005] O.J. No. 1426 (C.A.), aff'g (2003), 66 O.R. (3d) 692 (Div. Ct)

The issue at the Court of Appeal was the scope of standing to be accorded by the court to an administrative tribunal whose decision is challenged by way of judicial review. Jane Doe had been represented by the Children's Lawyer as a minor. Upon reaching the age of majority, Jane Doe sought access to her file. As was her right under the *Freedom of Information and Protection of Privacy Act*, Jane Doe appealed the decision of the Children's Lawyer to deny her access to 933 pages of her 2,800 page file. The Information and Privacy Commissioner (IPC) allowed the appeal and ordered disclosure of the pages. After a reconsideration by the IPC, the Children's Lawyer applied for judicial review of the decision and the reconsideration. The Children's Lawyer moved for an order that the IPC be denied standing or prohibited from arguing that her decision was correct on a basis that was not given in her original decision. The Divisional Court found that the *Judicial Review Procedure Act* gives the IPC the right to be a party to a judicial review application and that the court ought not exercise its discretion to limit the IPC's participation because the court would deny itself of helpful and legitimate submissions.

The Court of Appeal found that s. 9(2) of the *Judicial Review Procedure Act* entitles the administrative tribunal whose decision is being judicially reviewed to be a party to the proceedings but leaves to the court's discretion the scope of its standing. Rather than establishing fixed rules the court must follow in exercising its discretion, the Court of Appeal found that courts must exercise their discretion to determine the scope of standing

accorded to a tribunal, having regard to the importance of having a fully informed adjudication of the issues before it and to the importance of maintaining tribunal impartiality. The nature of the problem, purpose of the legislation, extent of the tribunal's expertise and availability of another party able to knowledgeably respond to the attack on the tribunal's decision may all be relevant in assessing the seriousness of the impartiality concern. The Court of Appeal upheld the Divisional Court's exercise of its discretion in dismissing the Children's Lawyer's attempt to deny or limit the standing of the IPC in the proceeding. The Divisional Court's decision demonstrated the importance of a fully informed adjudication of the issues, since the Children's Lawyer would have been the only party to the judicial review if the IPC was denied standing. The ability of the IPC to act impartially in future cases would not be adversely affected since the issues raised in the judicial review application were fundamentally ones of statutory interpretation.

Ministry of the Attorney General v. Tom Mitchinson, [2005] O.J. No. 941 (C.A.), aff'g [2004] O.J. No. 1494 (Div. Ct)

Two journalists made a disclosure request to the Ministry of the Attorney General for the legal costs paid by the Attorney General for the appeal of Paul Bernardo. The Information and Privacy Commissioner (IPC) made two orders requiring the Attorney General to disclose the payments made to various lawyers and interveners. The Attorney General unsuccessfully challenged the orders by way of judicial review. The issue on appeal was the interpretation of provisions of the *Information and Protection of Privacy Act* (the Act) concerning whether the information was protected by solicitor client privilege and whether the information was considered "personal information".

With respect to solicitor client privilege, the Court of Appeal found that the Divisional Court did not err in holding that the IPC correctly concluded that the information ordered disclosed was not subject to solicitor client privilege. With respect to the provisions in the Act, in keeping with the Attorney General's submissions, the Court of Appeal assumed that the decisions before the IPC were subject to review on a correctness standard. The Court of Appeal concluded that the IPC was correct in holding that there were no statutory bars to the disclosure of the information.

* ***Chong v. College of Physicians and Surgeons***, Doc. No. C42190, on appeal from [2004] O.J. No. 1081 (Div. Ct.) – **abandoned by notice.**

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.

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.

Teamsters Local Union 938 v. Lakeport Beverages, Doc. No. C41931, on appeal from [2004] O.J. No. 895 (Div. Ct.)

An arbitrator held that the collective agreement between the Teamsters Local Union 938 (the "Union")

and Lakeport permitted Lakeport to recall laid off seniority employees as seasonal employees. The Divisional Court quashed the award on the basis that it was irrational. What is the appropriate standard of review of the award? Did the Divisional Court err in holding that the arbitrator's award was irrational? Did the Divisional Court err by substituting its opinion for that of the arbitrator and by ignoring the plain language of the collective agreement?

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

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.).

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 Northern Development and Mines v. Mitchinson, Assistant Commissioner, and John Doe, Requester, Doc. Nos. C42072 and C42073, on appeal from [2004] O.J. 163.

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.

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

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 SERA’s application, concluding that there had been compliance with the environmental legislative requirements. SERA 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.

Appeals Scheduled for Hearing

Amerato v. Registrar, Motor Vehicle Dealers Act, Doc. No. C43000, on appeal from [2004] O.J. No. 4409 (Div. Ct.), listed for hearing July 22, 2005.

The moving party, the Registrar under the *Motor Vehicle Dealers Act*, revoked the respondent’s licence to sell cars without giving him notice or holding a hearing. The Registrar purportedly did so pursuant to a “waiver” signed by the respondent two years previously. At issue is whether such a waiver is legally enforceable. The Divisional Court said it was not. Did the Divisional Court err in holding that neither the Registrar nor the respondent could waive the right to a hearing under the *Motor Vehicle Dealers Act*? Did the Divisional Court err by disregarding ss. 4 and 4.1 of the *Statutory Powers Procedure Act*?

Town of Kapuskasing v. Kapuskasing Association of Professional Fire Fighters, Doc. No. C43068, on appeal from (2004), 246 D.L.R. (4th) 525 (Div. Ct.), listed for hearing on August 29, 2005.

At issue between the parties is whether the Town (pursuant to its discretionary authority under the *Fire Protection and Prevention Act*) can disband its fire department and dismiss its firefighters, or whether the collective agreement between the parties (which provides that “a minimum of eight firefighters will be employed with the Fire Department”) remains in force and obliges the Town to continue to employ its firefighters.

Elementary Teachers’ Federation of Ontario v. Toronto, Doc. No. C43010, on appeal from [2004] O.J. No. 2886 (Div. Ct.), listed for hearing on September 19, 2005.

The proposed appeal involves the interpretation of s. 43 of the *Employment Standards Act*, which guarantees an employee’s right following a parental leave to be reinstated “to the position most recently held with the employer”. The Divisional Court upheld the majority of the Board of Arbitration’s interpretation of the provision based on the reasonableness standard of review. Did the Divisional Court err in holding that s. 43 should be interpreted in a narrow manner, giving the teacher a right only to be reinstated to any teaching position in her school for which she is technically qualified, rather than her same teaching assignment? What is the appropriate standard of review of the Board’s decision in light of the Supreme Court of Canada’s recent holding in *Voice Construction Ltd. v. General Worker’s Union, Local 92*, 2004 SCC 23?

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.), listed for hearing on September 26, 2005.

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.

Apotex v. Genpharm Inc. and Minister of Health, Doc. No. C42169, C42177, on appeal from [2004] O.J. No. 1559 (Div. Ct.), listed for hearing on September 12, 2005.

This is a dispute between generic manufacturers of the antidepressant Celexa. Each seeks to have its drug listed first on the drug formulary under the *Drug Interchangeability and Dispensing Act*. The Ministry of Health changed an important deadline at the last moment. This benefited Genpharm, but was disastrous for Apotex. Apotex applied for judicial review to the Divisional Court, which heard the matter on an urgent basis and determined that the Minister had breached its duty of procedural fairness to Apotex and quashed the Minister’s decision.

Seneca College of Applied Arts v. OPSEU, Doc. No. C43274, on appeal from (2004), 73 O.R. (3d) 185 (Div. Ct.), listed for hearing on October 4, 2005.

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 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 issues to the Board to determine if 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 appropriate standard of review give adequate consideration to the intention of the parties in determining whether the damages claims were arbitrable?

National Automobile v. London Machinery Inc., Doc. No. C 43172, on appeal from [2004] O.J. No. 4185 (Div. Ct.), listed for hearing on October 6, 2005.

Did the Divisional Court err in finding reasonable an interpretation of section 56(2)(c) of the *Employment Standards Act, 2000*, which treats a collective agreement as an agreement between the employer and the trade union for purposes of that provision? Section 56(2)(c) stipulates that an employee’s period of temporary lay-off can be extended by agreement between the employer and the trade union.

Superintendent of Financial Services v. Sussman Mortgage Funding Inc., Doc. No. C43248, on appeal from [2004] O.J. No. 4551 (Div. Ct.), listed for hearing on October 11, 2005.

Sussman Mortgage Funding was found guilty of various breaches of the *Mortgage Brokers Act* and its registration as a broker was revoked by the Financial Services Tribunal. The Divisional Court set aside the order for revocation and substituted terms and conditions. The Superintendent seeks the restoration of the order of revocation or in the alternative an order of suspension. Was the decision of the Divisional Court to impose the most lenient penalty in this case unreasonable?

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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 April 15, 2005.

Federal Court of Appeal

Canadian National Railway Co. v. York (Regional Municipality) (December 7, 2004), Doc. No. A-63-04, 2004 FCA 419

A dispute arose as to the apportionment of project expenses between CN and York. The Canadian Transportation Agency (“CTA”) issued an order apportioning expenses on the basis of section 101 of the *Canada Transportation Act* which allows it to do so where there is no agreement between the parties. On appeal, the Federal Court of Appeal recognized that whether the evidence disclosed an “agreement” within the meaning of the statute was a mixed question of law and fact, “located towards the fact end of the law-fact continuum.” The Court decided – through a pragmatic and functional approach – that the “largely factual” question was squarely within the CTA’s expertise, and despite the appeal provision, the decision should be reviewed on the reasonableness standard. CN argued instead that the question was jurisdictional, as without an agreement the CTA could not intervene in the matter of apportioning costs. The finding that there was not an agreement between the parties was open to the CTA on the evidence, and so withstood a somewhat probing analysis. The appeal was dismissed.

Tele-Mobile Co. v. Telecommunications Workers Union (December 16, 2004), Doc. No. A-327-04, 2004 FCA 438

The Canada Industrial Relations Board (“CIRB”) decided that when company A buys company B, the workers in company B’s bargaining group can be added to company A’s bargaining group, with their differences to be worked out after the amalgamation. The workers in bargaining group B brought an application for judicial review to the Federal Court of Appeal. The Court asserted that it is not necessary to conduct a full pragmatic and functional approach each time the court reviews a labour board decision. There is consensus that the expertise, purpose and strength of the privative clause common to such boards suggest a high level of deference. Questions interpreting their constitutive

legislation should *normally* be reviewed only for patent unreasonableness. Here, the Court easily found that the principal issue before it, i.e. whether the wishes of workers needed to be ascertained before amalgamating bargaining units, fit squarely within the tribunal’s expertise and so was subject to the patent unreasonableness standard. Insofar as the application related to constitutional questions decided by the CIRB, these were subjected to a correctness review. The Court did not accept the applicants’ argument that the standard should be correctness because that issue was characterized as jurisdictional.

TMR Energy Ltd. v. Ukraine (Property Fund) (January 24, 2005), Doc. No. A-497-04, 2005 FCA 28

TMR sought to enforce a foreign arbitral award in Canada against Ukraine and the Ukraine Property Fund by way of an *ex parte* application. A prothonotary granted that application on January 17, 2003. Fully two years later, the order itself was vacated at the Federal Court due to a total absence of jurisdiction. Prothonotaries, who may only act within the scope of the *Federal Court Rules*, 1998, are empowered thereunder to dispose of certain actions (under a monetary threshold) and motions (unless reserved to judges). They have no jurisdiction to finally dispose of an application. This was not mere “non-compliance” with the *Rules* to be cured retroactively under Rule 56. It was an act without authority and cannot stand, regardless of “practice”. That it was done with “*de facto* authority” was incomprehensible to the Court, and the argument was rightly set aside. The Federal Court’s decision was also affirmed because the *ex parte* application had been made without the required high level of disclosure. The court must know if there are any circumstances impeding the enforcement of an arbitral award, and here, the applicant did not disclose vital matters (including the proper identity of the debtor).

Gorgiev v. Canada (Minister of Human Resources Development) (February 17, 2005), Doc No.A-219-04, 2005 FCA

Judicial review was sought of a decision of the Pension Appeals Board disentitling the Applicant to a disability

pension. The Applicant argued that he was unfairly prejudiced before the Appeals Board because the material presented to the Board by counsel for the Respondent included information about an offer of settlement that had been proposed by the Respondent and refused by the Applicant. The Court first considered whether the Board erred in failing to interpret the offer as being an admission by the Respondent that the Applicant was sufficiently disabled to qualify for a disability pension. The Court refused to accept this argument and ruled that the mere disclosure of the offer and its rejection was not fatal to the proceedings before the Appeals Board. The Court also considered whether the revelation of the offer and the suggestion by Respondent's counsel at the hearing that the Applicant was being unreasonable in rejecting it created a reasonable apprehension of bias. The Court found that there was nothing in the record or in the Appeal Board's reasons that would give rise to a reasonable apprehension of bias and determined that the disclosure of the offer was more likely to reflect negatively on the position of the Respondent than the position of the Applicant. The application for judicial review was denied.

Via Rail Inc. v. Canadian Transportation Agency (March 2, 2005), DOC. No. A-238-04, 2005 FCA 79

The Federal Court of Appeal considered an appeal from two decisions of the Canadian Transportation Agency, who had determined that concerns raised by the Council for Canadians with Disabilities in regard to VIA's newly purchased passenger rail cars (the "Renaissance cars") constituted undue obstacles to the mobility of persons with disabilities and consequently ordered VIA to take corrective measures to eliminate those obstacles. The Agency first rendered a preliminary decision when the Agency found 14 "undue obstacles" presented by the Renaissance cars. After making the preliminary decision, the Agency directed VIA to specifically address the findings and to answer nine complex questions relating to the removal of the obstacles, within 60 days of the date of the decision. VIA provided a partial response and argued that it was impossible to answer all the complex questions within the time allotted and instead requested an oral hearing. The Agency refused the request and issued a final decision directing VIA to take corrective measures by redesigning and reconstructing certain aspects of the Renaissance cars. The majority of the Federal Court of Appeal found that, by failing to provide VIA with sufficient time to answer the non-complex questions and by failing to hold an oral hearing, the Agency had breached the rules of procedural fairness. In so doing,

the Agency failed to allow VIA to present evidence relating to the cost of remedying the obstacles caused by the Renaissance cars. The Court also noted that the Agency, who had attempted to argue the substantive issues before the Court, should not be allowed to do so. It was not a party adverse in interest to the Applicant and, as decision maker; its role on appeal should be limited.

Federal Court

Hijos v. Canada (Attorney General) (December 14, 2004), Doc. No. T-1602-95, 2004 FC 1738

After the turbot-fisher *Estai* was taken into detention in 1995, its owners began proceedings for its recovery and all measures of damages. Ten years on, the Spanish plaintiffs alleged a reasonable apprehension of bias, given Justice Gibson's near thirty-year career at the Department of Justice. Working from the test for bias from *Committee for Justice and Liberty v. Canada*, the Court set out three principles: (a) bias allegations are to be determined on their own facts, (b) the onus lies with the party alleging bias, and (c) the high presumption that judges adhere to their oaths can only be displaced by "cogent evidence." The affiant's bald allegations, particularly that this would be considered bias in Spain, fell well below that third standard. The facts of the matter weighed in favour of non-recusal: Justice Gibson had been on the bench for eleven years since he left the public service, and there was simply no evidence of fear or favour towards the Attorney General. The plaintiffs did not discharge their onus, and Justice Gibson remains seized of the matter.

Stevens v. Canada (Attorney General) (December 15, 2004), Doc. No. T-2682-87, 2004 FC 1746

The plaintiff, a former Minister, brought an action in the Federal Court seeking a declaration that a Commission of Inquiry's final report be set aside. The final report accused the plaintiff of acting in a conflict of interest. The Commission drew up its own definition of "conflict of interest", which was not made public until the publication of the final report. The Federal Court held that the Commissioner did not have the jurisdiction to measure the plaintiffs' actions against this secret definition. The Court pointed out that commissions of inquiry are entirely bounded by their constating document, and more, that mere consent to jurisdiction cannot create authority where none is derived from law. Creating the conflict of interest definition was *ultra vires* the Commission. The Court

also noted that the shifting requirements of procedural fairness tend to be fairly low at commissions of inquiry, but rise substantially when that inquiry focuses on the conduct of a single individual. This inquiry in particular was very adversarial, and so a higher level of procedural fairness was due. The plaintiff was denied the chance to make full answer and defence, as he was not informed of the standard he had to meet. Withholding the central definition was a clear breach of the rules of procedural fairness.

Chinese Business Chamber of Canada v. Canada (Minister of Citizenship and Immigration) (January 28, 2005), Doc. No. T-1319-04, 2005 FC 142

The Regulations under the *Immigration and Refugee Protection Act* for the regulation of immigration consultants were passed after the Supreme Court of Canada resolved a jurisdictional debate in favour of the Federal Government in *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113. The new rules set up a self-regulating body to control the training and competence of the consultants. The applicants sought to stay the operation of these regulations pending the hearing on the merits of its various constitutional and legal challenges. The Court found that the facts did not favour a stay. While the Court accepted that there might be a serious issue to be tried, the applicants plead only *past harm*, rather than irreparable harm threatened pending trial. Further, it is a very high threshold to tip the balance of convenience towards staying public legislation for alleged unconstitutionality. The applicants pointed to the high regulatory bar and potential decrease in public choice, but the Court did not accept that those were sufficient to halt regulation “aimed at the protection of vulnerable persons and the preservation of the integrity of the immigration process.” The public interest clearly lay with not granting the stay.

CHC Casinos Canada Ltd. v. Chippewas of Mnjikaning First Nations Band Council (March 9, 2005), Doc. No. T-1127-04, 2005 FC 233

The applicant sought a *mandamus* order directing the respondent to grant it certain building permits for upgrades to Casino Rama. The applicant disputed, but had historically acquiesced, that the respondent was the “owner” of the Casino in addition to being its governing body. As that dispute was not before the Court, the issue was whether a public body could be directed by *mandamus* when it also stood as a private party with the right to withhold consent. The discretionary *mandamus* remedy is available in respect

of public authorities under a legal duty to act. The Court determined that it has no power to compel a private party to act when it is within its rights not to do so. The decision lays out the eight principles governing this remedy, but focuses only on the fact that the applicant must satisfy all the technical requirements that are preconditions to the fulfillment of the public duty. That was not accomplished here as the applicant failed to secure the owner/respondent’s consent.

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Administrative Law Cases at the Supreme Court of Canada

Sebastian Spano*

This list is current to May 19, 2005

Recent Decisions

Vaughan v. Canada, 2005 SCC 11

Federal government employee benefits conferred by regulation, but not achieved through a collective agreement, are grievable, but not arbitrable under ss. 91 and 92 of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (Act). One such benefit is the early retirement incentive (ERI). The Appellant grieved the denial of the ERI benefit. He pursued the ERI grievance to arbitration at the same time as he was grieving a layoff. The arbitrator ruled that he had no authority under the Act to deal with the ERI claim. The Appellant subsequently brought an action, framed in negligence, seeking to obtain the ERI benefit. The Federal Court of Appeal held that the matter was in its essential character an employment-related matter, and therefore subject to the dispute resolution process under the Act. On appeal, Binnie J., writing for the majority (McLachlin C.J.C. and Bastarache J. dissenting), held that the statutory language of the Act did not explicitly oust the jurisdiction of the courts as was the case in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. Courts retain a residual jurisdiction to deal with workplace-related issues falling outside the scope of the Act. However, courts should generally decline to exercise this discretion except on the limited basis of judicial review. In Binnie J.'s view, Parliament had created a comprehensive scheme for dealing with all labour disputes. Permitting access to the courts would undermine the dispute resolution process contained in the Act. For the minority, Bastarache J. noted that there were substantial differences between this case and *Weber*, where the labour relations legislation at issue contained a mandatory arbitration provision. Although the Act creates a comprehensive and efficient dispute resolution regime, given the unavailability of independent adjudication, combined with the absence of mandatory language in the Act and lack of expertise of the employer-appointed decision-maker at the grievance stage, the exclusive jurisdiction model could not be engaged.

Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorilla v. Quebec (Attorney General), 2005 SCC 16

The Appellant parents sought access for their children to English language instruction in Quebec pursuant to s. 73 of the *Charter of the French Language* (Charter). They did so by seeking injunctive and declaratory relief in the Superior Court, rather than avail themselves of the processes available in the Administrative Tribunal of Quebec (ATQ). The Court granted the Attorney General's motions to dismiss the applications of two of the parent applicants (Okwuobi and Casimir) on the basis of the Court's lack of jurisdiction, and dismissed the Attorney General's motions in respect of the other parent (Zorilla). The Court of Appeal affirmed the Superior Court's decision in respect of Okwuobi and Casimir and set aside the decision in respect of Zorilla. The appeals from the Court of Appeal's decision were dismissed. The Supreme Court of Canada held that the ATQ has exclusive jurisdiction to hear claims for minority language education and that the ATQ's appeal process could not be circumvented. Before turning to the courts for relief, a claimant must first apply to persons designated by the Minister of Education under s. 75 of the Charter for an exemption from the French language instruction requirements. Decisions of the person designated by the Minister are appealable to the ATQ. Pursuant to the *Act respecting administrative justice* and s. 83.4 of the Charter, the ATQ has a broad jurisdiction for adjudicating minority language education claims. The Court, in a fulsome discussion of the nature of the ATQ, noted that the ATQ is a "highly sophisticated tribunal, similar in many ways to Canadian courts of law." The ATQ is vested with broad powers to decide any question of law or fact necessary for the exercise of its jurisdiction, and to make any order it considers "necessary to safeguard the rights of the parties." In addition, the *Act respecting administrative justice* confers broad remedial powers. Furthermore, in light of the Court's judgment in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, and given the structure of the ATQ and the legislative framework from which it derives its jurisdiction, the ATQ may also apply the *Canadian Charter of Rights and Freedoms*.

Decisions on Reserve

House of Commons et al, v. Satnam Vaid and Canadian Human Rights Commission, File No. 29564, appeal from 2002 FCA 473 (Appeal heard October 13, 2004).

A former chauffeur of the Speaker of the House of Commons filed complaints with the Canadian Human Rights Commission alleging that the House of Commons had discriminated against him by reason of race, colour and ethnic or national origin when it refused to continue to employ him. The issues raised in this appeal are: whether the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, is inapplicable to the House of Commons and its Members with respect to parliamentary employment matters as a consequence of parliamentary privilege; whether the power to appoint and manage staff is a category of parliamentary privilege; if the power to appoint and manage staff is a category of parliamentary privilege, whether claims of discrimination reduce the scope of that category permitting review of the Appellants' actions; and, whether Parliament, by enacting the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.), waived its privilege over employment matters with respect to some categories of employees covered by that Act.

Biolyse Pharma Corporation v. Bristol-Myers Squibb Company et al, File No 29823, appeal from [2003] 4 F.C. 505, 2003 FCA 180 (Appeal heard November 5, 2004).

The Appellant, a small pharmaceutical company based in St. Catharines, developed a new method of producing the drug, paclitaxel, for the treatment of breast, ovarian and non-small-cell lung cancer, using a novel source. The Respondents are large pharmaceutical companies that hold two patents for the formulation and administration of injectible paclitaxel, but no patent for paclitaxel itself. The Respondents derived their formulation from the bark of the yew tree. The Appellant derived its drug from the twigs and needles of the Canadian yew bush. Because of the new botanical source, the Appellant was required to file a New Drug Submission instead of an Abbreviated New Drug Submission. A Notice of Compliance (NOC) was issued to the Appellant. As the Appellant did not compare its drug or make reference to another drug to demonstrate bioequivalence, it was not required to send a Notice of Allegation to the Respondents. The Appellants therefore began to sell and advertise their drug. The Respondents successfully applied for judicial review of the decision to issue the NOC and

for an order quashing the NOC. They argued that they should have received a Notice of Allegation before the NOC was issued. A number of issues are raised in this appeal: the proper method of interpreting a regulation, in particular, whether the expression "entire context" means the entire context of the regulation only, or whether interpretation of the regulation must be viewed in the broader context of the Act and other relevant legal principles; and the proper balance to be struck between the public interest in keeping drug prices low, and the interests of patent holders.

Minister of Citizenship and Immigration v. Léon Mugesera et al, File No. 30025, appeal from [2004] 1 F.C. 3, 2003 FCA 325 (Appeal heard December 8, 2004).

Mugesera and his family were granted permanent resident status in 1993 after fleeing Rwanda in December 1992. In January 1995, a report was submitted to the Minister containing allegations that Mugesera had made a speech constituting an incitement to commit murder, genocide, hatred, and a crime against humanity. The Minister applied for a deportation order on the basis that Mugesera became an inadmissible person by virtue of the speech. An Immigration and Refugee Board (IRB) adjudicator granted the application, and the decision was upheld by the Appeal Division of the IRB. The Federal Court Trial Division allowed the appeal by Mugesera in respect of the grounds of crimes against humanity and misrepresentation, but denied the appeal in respect of the grounds of incitement to murder, genocide and hatred. The Federal Court of Appeal allowed Mugesera's appeal and denied the Minister's appeal. The Federal Court of Appeal held the text of the speech differed in its essential points from the report received by the Minister from the International Commission of Inquiry on Human Rights Violations in Rwanda (ICI). The record revealed that there were doubts as the accuracy of the allegations in the ICI report. The Minister was unable to establish, on a balance of probabilities, that the speech itself constituted any of the grounds cited for the deportation. The issues in this appeal include: whether the Federal Court of Appeal erred in failing to show deference to the IRB Appeal Division on its findings of fact; whether the Court exceeded its jurisdiction in carrying out its own appraisal of the evidence; whether the Court erred in finding that Mugesera did not incite to hatred, murder and genocide; and, whether the Court erred in holding that the Appeal Division of the IRB had no reasonable grounds to believe that Mugesera committed a crime against humanity in delivering his speech.

Attorney General of Canada v. Attorney General of Quebec et al, File No. 30187, appeal from 2004 CanLII 28398 (QC C.A.) (Appeal heard January 11, 2005).

This appeal began as a reference by the Government of Quebec for an opinion of the Quebec Court of Appeal on whether sections 22 and 23 of the *Employment Insurance Act* are in breach of the *Constitution Act, 1867*. These sections provide for special pregnancy and parental benefits to eligible persons. The Court ruled that these provisions are contrary to section 91(2A) of the *Constitution Act, 1867* because they intrude into areas of exclusive provincial jurisdiction over property and civil rights and matters of a purely private or local nature in subsections 92(13) and 92(16), respectively, of the *Constitution Act, 1867*. The reference was brought following Quebec's enactment of the *Act Respecting Parental Insurance*, S.Q. 2001, c. 9, and the failure to negotiate an accommodation with the federal government to implement a maternity and parental benefits program provincially. The purpose of the Act is to provide eligible persons with maternity, paternity and parental benefits on the birth or adoption of a child. The Act, however, has not been brought into force. Parliament's jurisdiction over employment insurance is found in subsection 91(2A) of the *Constitution Act, 1867*. The Court of Appeal reviewed the history of the unemployment insurance legislation. Parliament acquired jurisdiction over this matter following an amendment in 1940 to the *Constitution Act, 1867*. An amendment was necessary following a judgment of the Judicial Committee of the Privy Council affirming a Supreme Court of Canada judgment which invalidated the *Employment and Social Insurance Act* enacted by Parliament in 1935. The courts had held that Parliament lacked the jurisdiction to legislate in the areas of unemployment and social insurance, as these areas fell under the provincial power to legislate in respect of property and civil rights and in respect of matters of a purely local or private nature as provided in subsections 92(13) and 92(16). With the consent of the provinces, subsection 91(2A) was added to the *Constitution Act, 1867* to enable the Parliament of Canada to establish the unemployment insurance legislation. The Court concluded that the legislative authority given to Parliament was a very narrow one that did not permit the extension of the unemployment insurance program to areas which the Court characterized as social welfare programs. The Court, in the result, held that sections 22 and 23 of the *Employment Insurance Act* amount to an intrusion into the exclusive legislative jurisdiction of the provinces.

David Hilewitz v. Minister of Citizenship and Immigration, File No. 30125, appeal from [2004] 1 F.C. 696, 2003 FCA 420; *Dirk de Jong v. Minister of Citizenship and Immigration*, File No. 30127, appeal from 2003 FCA 422 (Appeals heard February 10, 2005).

Both Appellants applied for permanent residence for themselves and their families. The applications were denied on the ground that each has dependents with developmental disabilities that might reasonably be expected to cause excessive demands on social services. The Appellants established that they had the capacity to pay for these services. The issue is whether s. 19(1)(a)(ii) of the *Immigration Act* requires consideration of the actual probability of excessive demands being placed on social services, including the ability and intention of an applicant to obtain those services privately.

Isidore Garon Ltée v. Syndicat du bois ouvré de la région de Québec Inc., File No. 30171, appeal from 2003 IJCan 14201 (QC C.A.); *Filion et Frères (1976) Inc. v. Syndicat national des employés de garage du Québec Inc.*, File No. 30172, appeal from 2003 IJCan 25968 (QC C.A.) (Appeals Heard February 16, 2005).

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 arts. 2091 and 2092 of the Code civil du Québec 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?

Balvir Singh Multani et. al. v. Commission Scolaire Marguerite-Bourgeoys et al, File No. 30322, appeal from 1004 IJCan 31405 (QC. C.A.) (Appeal heard April 12, 2005).

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 Respondent instead suggested replacing the metal dagger with a symbolic one made of non-offensive material. 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?

City of Calgary v. Atco Gas and Pipelines Ltd., File No. 30247, appeal from 2004 ABCA 3 (Appeal heard May 11, 2005).

The Alberta Energy and Utilities Board ordered that a portion of the net gain on the sale of a utility asset be allocated to ratepaying customers of the utility where no harm to the customer was found at the time of the Board's approval of the sale. Does the Board have jurisdiction to make such an allocation? Does the allocation of a portion of the net gain on the sale of the utility asset constitute a *de facto* expropriation?

Terry Lee May, et al v. Warden of Ferndale Institution, et al, File No. 30083, appeal from 2003 BCCA 536 (Appeal heard May 17, 2005).

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* with *certiorari* in aid, 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 have jurisdiction to deprive a prisoner of liberty because of a change in policy? 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?

Appeals Scheduled to be Heard

None Scheduled.

Appeals Where Leave Was Recently Granted

Air Canada v. Canadian Human Rights Commission, Canadian Union of Public Employees (Airline Division), File 30323, appeal from 2004 FCA 113.

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. Must employees be subject to a common personnel and wage policy to be in the same establishment? Can the terms of any collective agreement applying to the employee groups be considered in determining whether they are subject to a common personnel and wage policy, and consequently whether they are within the same establishment? How should the scope of "establishment" be determined?

Canadian Pacific Railway Company v. City of Vancouver, File No. 30374, appeal from 2004 BCCA 192.

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. As a result, Canadian Pacific has been unable to develop its property for its own purposes. One such proposal, which was rejected by the City, was for residential and commercial uses. Canadian Pacific has offered to sell the land to the City or any other public body, or to agree to an expropriation with compensation. The City, however, has indicated that it has no plans to acquire the property. The effect of the by-law is to freeze redevelopment on private lands for an indefinite period. The issue raised on this appeal are: whether a municipality can designate private land solely for public use without purchase or expropriation in the absence of clear and unambiguous statutory language; and, is a public hearing required as a prerequisite to the exercise of such power, or is a lesser procedural standard appropriate?

Association des juriste d'expression française du Nouveau-Brunswick c. Ville de Saint-Jean and between ***Mario Charlebois c. Ville de Saint-Jean***, File No. 30467, appeal from 2004 NBCA 49.

Does the City of Saint John have a duty under the *Official Languages Act*, S.N.B. 2002, c. O-0.5, to use the official language chosen by a plaintiff in civil proceedings brought against the City in its oral or written pleadings? Is a municipality an "institution" within the meaning of the Act? A related question is whether the expressions "oral or written pleadings" and "processes" include legal authorities cited by a party in a book of authorities and written documents that a party wishes to adduce as evidence, without providing a translation.

Vernon Roy Mazzei v. Director of Adult Forensic Psychiatric Services, Attorney General of British Columbia, File No. 30415, appeal from 2004 BCCA 237.

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 accused receiving a verdict of not criminally responsible by reason of a mental disorder?

Forum des maires de la Péninsule acadienne v. Canadian Food Inspection Agency, File No. 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?

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.

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.

Robert Tranchemontagne v. Director of the Ontario Disability Support Program of the Ministry of Community, Family and Children’s Services and between ***Norman Werbeski v. Director of the Ontario Disability Support Program of the Ministry of Community, Family and Children’s Services***, File No. 30615, [2004] S.C.C.A. No. 505, appeal from (2004), 72 O.R. (3d) 457 (C.A.).

A number of issues are raised in this appeal: whether an administrative appeal tribunal with jurisdiction over an appeal has an inherent or implied discretion to decline to exercise that jurisdiction if in its view one or more issues before it are better addressed in another forum; the appropriate test to determine when such discretion exists and how it should be exercised; whether an appellate court has jurisdiction to stay an appeal before that tribunal on the ground that another procedure or forum is more appropriate or on another ground; the appropriate test to determine whether such discretion exists and how it is to be exercised; whether an appellate court has jurisdiction to make an order that the tribunal could not have made and if so, what test should be applied to determine when and how such discretion should be exercised; where there is concurrent jurisdiction, what is the test for determining when the applicant’s choice of forum will prevail; and, to what extent do the essential nature of the dispute, practical considerations, or the existence of a comprehensive statutory scheme of review play a role in determining whether the applicant’s choice of forum will prevail.

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Administrative Law Section Newsletter: Electronic versus Paper

The Administrative Law Section Executive would like your comments regarding changing our newsletter from its current paper format to an electronic format. The OBA has asked the various Sections to respond to the question: paper or electronic, but not both!

Some concerns about electronic newsletters are: 1) that they will get lost in the sea of emails we all receive and lose their importance; and 2) they lack the portability and permanence of the paper version.

Electronic newsletters offer some advantages over paper newsletters: 1) they reduce paper waste for those who do not read the newsletters and the related cost savings to the OBA for those who print their own copy; and 2) they provide electronic links to judgments, legislation, websites and other user-friendly features available only in electronic format. Electronic newsletters can be printed.

There are several Sections that have already made the switch to electronic newsletters.

Please email your comments with the subject heading ADMIN LAW NEWSLETTER to: pd@oba.org

Written Contributions Sought

The Newsletter of the Ontario Bar Association's Administrative Law Section provides administrative law practitioners with insightful articles, case comments, and case summaries to assist them in their practice and to enlarge the scope of their understanding of the rich and constantly evolving field of administrative law. The OBA has been fortunate to have been able to draw upon the depth of experience and expertise resident in the administrative law bar in putting together its newsletter. We continue to look forward to the contributions of the administrative law bar for quality articles and case commentaries. We welcome contributions on any subject touching on administrative law, including economic regulation, labour, social policy, judicial review, procedural fairness, constitutional dimensions of administrative law, or practice before specialized tribunals. If you enjoy the process of writing and/or have the urge to educate and inform your colleagues on subjects of interest to you (and them), the newsletter will provide you with an ideal forum. The newsletter reaches over 500 lawyers practicing administrative law, all of whom would be enriched by your contributions.

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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