



Administrative Law

ADMINISTRATIVE LAW SECTION / SECTION DU DROIT ADMINISTRATIF

Message from the Chair

Carole A. Prest*



As I come to the end of my second term as Chair of the Administrative Law Section, I look back with a real sense of accomplishment at what has been achieved over the last two years.

The Section has made a positive contribution to several pieces of important legislation and has been active in identifying developing issues and updating its membership through dinner meetings, CLE events and the Section newsletter. All this has only been possible due to the efforts of the Section's Executive. I would like to take this opportunity to recognize the work they have done and to thank them for their collegiality and support.

There appears to be a growing interest on the part of government and agencies in the Section's views on such things as draft legislation and procedural rules. In addition to its involvement with paralegal regulation and amendments to the Ontario Human Rights Code, the Section Executive has been asked to comment on draft rules of practice for several agencies. Members of the Executive have also been contacted about the Agency Cluster Pilot Project. While the Executive is pleased to provide expert input, there have also been a few requests which the Section Executive has

decided to decline because it did not feel the issues were closely enough related to administrative law concerns. I anticipate that the number of requests to the Section will grow as governments and agencies adopt a more consultative approach. If you have an interest in broader administrative law issues, this is a great time to become involved in the Executive.

The Section is committed to improving services to regional members. I am pleased to report that on April 24, 2007, the Section hosted a very timely and topical session in Ottawa on the new *Federal Accountability Act*. Any suggestions from regional members for future meeting locations and topics would be gratefully received.

The year will conclude with a flourish with two dinner meetings – a joint dinner meeting with the Labour Relations Section on May 3 on Punitive Damages, Arbitrators and Standard of Review, and on May 31, 2007 the ever-popular Judicial Review Update. Please mark your calendars for these events. Then, on June 11, 2007, the Administrative Law and the Constitutional, Civil Liberties and Human Rights Sections will be co-hosting a CLE program with the Law Society of Upper Canada on "The New Ontario Human Rights System: What It Means for your Practice." This program will address all aspects of bringing and defending

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allegations of human rights violations under the recent amendments to the Code, including the new role of the Human Rights Commission, the legal support centre, practice before the Tribunal, and the role of the courts. It promises to provide an excellent introduction to human rights litigation and adjudication post-Bill 107.

Finally, thank you for the privilege of serving as the Chair of this Section for the last two years. It has been a tremendously rewarding experience to work with other members of the profession engaged in the practice of administrative law and with the staff of the Ontario Bar Association. I would like to urge others to come out and get involved. Much work remains to be done and you could not ask for a better group of people to do it with!

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Expanding the Rule of Law - A Commentary on *McKenzie v. Minister of Public Safety and Solicitor General* and *Attorney General of British Columbia v. Dugald E. Christie*

Sebastian Spano*

In a previous issue of the Ontario Bar Association's Administrative Law Newsletter, Laverne Jacobs reported on the judicial review proceedings brought by Mary McKenzie following her termination as an arbitrator appointed under the British Columbia *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act*.¹ At the time of the writing of her article, the case had yet to be heard. The case has since been heard and the Supreme Court of British Columbia issued its decision on September 8, 2006.² The judgment represents an important victory, both for Ms. McKenzie and for the principle of adjudicative independence.

The *McKenzie* decision follows another significant British Columbia judgment. In *Attorney General of British Columbia v. Dugald E. Christie*, the British Columbia Court of Appeal relied on the rule of law as a basis for invalidating legislation taxing legal services on the ground that the legislation impedes access to justice as a component of the rule of law.³ Both these judgments represent a significant enlargement of the principle as developed in the Supreme Court of Canada.

***McKenzie v. Minister of Public Safety and Solicitor General* - the Rule of Law and Adjudicative Independence**

The *McKenzie* case is unique in a number of respects. First, the legislative scheme for the appointment of arbitrators, while appearing to provide some measure of security of tenure for residential tenancy arbitrators, also contains some ambiguities on the extent of that security. Of perhaps greater significance is the fact that it squarely raises the issue of whether some adjudicators, because of the quasi-judicial nature of their functions, should attract a heightened degree of protection from interference by the executive: security of tenure rooted in the rule of law as a component of the unwritten constitutional principle of judicial independence.

The facts in *McKenzie* are amply set out in the article by Laverne Jacobs. Briefly, Ms. Mackenzie was appointed in 1994 as a residential tenancy arbitrator through a merit-based process. By all accounts, she had an unblemished record. At the time of her termination in April 2005, she was part-way through a five year term that would have ended on December 31, 2008. The dismissal followed the appointment of a new director of the Residential Tenancy Office who felt she had a statutory duty to follow certain Treasury Board directives. The Director's proposals for implementing the directives would have had a significant adverse impact on Ms. McKenzie's practice, including a potential one-third reduction in her remuneration resulting from a proposed rescheduling of her arbitration dates. Concerned about the implications of the Director's proposals for her practice, Ms. McKenzie wrote to the Director to seek a confirmation that there would be no change to her work schedule and work allocation. The Director's response was to schedule a meeting with Ms. McKenzie and present her with a letter informing her that her one-year "service agreement" would not be renewed.⁴ A second decision, described as a "reconsideration" was made by another government official. Justice McEwan dismissed this as an attempt to "cover what the Respondents were determined to do, with the appearance of due process."⁵ Indeed, Justice McEwan does little to disguise his displeasure with the treatment meted out to Ms. McKenzie. He commented at one point that "it was manifest that the Petitioner was terminated simply for having the temerity to stand up for herself."⁶

The Director relied on section 14.9 of the *Public Sector Employers Act*, R.S.B.C. 1996, which provides that the appointment of an arbitrator under the *Residential Tenancy Act* may be terminated without notice before the end of the appointment on the payment of the lesser of 12 months' compensation or the amount of remuneration owing until the end of the term. This provision is in sharp contrast to section 86.3 of the *Residential Tenancy Act* which provides that the appointment of an arbitrator may only be terminated for cause.

In the judicial review proceedings, Ms. McKenzie challenged the termination of her position on several grounds: lack of procedural fairness; an incorrect interpretation of s. 14.9(3) of the PSEA; and, if the government's interpretation of that section is correct, it is unconstitutional as it violates an unwritten constitutional principle of judicial independence. The respondents conceded that the summary manner of Ms. McKenzie's termination was procedurally unfair. They submitted that this concession should render the proceedings unnecessary.

Notwithstanding the respondents' concession, Justice McEwan considered it necessary to proceed with a review and a judgment on all the issues. In his judgment, Justice McEwan addresses two principal issues: the statutory interpretation issue or, how to reconcile the seemingly conflicting provisions in the RTA and the PSEA; and, the constitutional question of whether the principle of judicial independence as an integral component of the rule of law can be extended to RTA arbitrators given the nature of the adjudicative function performed by them, a function that may be termed quasi-judicial.

As a backdrop to both issues, Justice McEwan reviewed the history of residential tenancy dispute resolution in British Columbia and noted that this function had originally been performed by superior courts. Over the past 30 years, significant legislative reforms led to the creation of specialized tribunals to assume some of the residential tenancy dispute resolution functions of the courts. The result was that tribunals, for a time, shared concurrent jurisdiction with the courts. That jurisdiction, it was noted, is now exercised exclusively by tribunals, within the limits defined by the RTA. Justice McEwan also reviewed the British Columbia government's "Administrative Justice Project" which reviewed administrative agencies, emphasizing the importance of independence for tribunal members through security of tenure, and identifying a need to move from at-pleasure to fixed term appointments. Justice McEwan's review of the evolution of residential tenancy dispute resolution in British Columbia coupled with the province's administrative justice initiatives greatly informs the conclusions on both of the principal issues raised in the proceeding.

The statutory interpretation issue was decided, in the end, largely on the basis of the rule of statutory interpretation that where statutory provisions conflict the specific provision is to be preferred over the general. The fact that residential tenancy arbitrators perform work that courts used to perform and work that they

would otherwise perform, but for the existence of the arbitration system, however, was critical to the finding on what the legislature had intended in enacting section 86.3 of the RTA and s. 14.9(3) of the PSEA. The history of the residential tenancy dispute system and the government's stated intention to strengthen the independence of arbitrators and other administrative adjudicators clearly weighed heavily in favour of section 86.3 of the RTA and that the appointment was not at-pleasure, but a fixed term appointment which could only be terminated for cause.⁷

Mr. Justice McEwan's functional approach to the constitutional issues in McKenzie, based in large part on the analysis proposed by the petitioner, distinguishes between tribunals. Not all tribunals, he held, are so closely associated with the executive that they are government decision-makers, or instruments of the executive, and therefore not required to be constitutionally independent. Those tribunals "constituted to try issues of law as between private citizens", performing judicial functions, many of which were once performed by courts, require constitutional independence.

Significantly, Mr. Justice McEwan characterized the functions of arbitrators as falling toward the "high end," or judicial end, of the spectrum of tribunals identified by the Supreme Court of Canada in *Bell Canada v. Canadian Telephone Employees Assn.*⁸ Tribunals at the high, or judicial, end of the spectrum require a greater degree of independence than other kinds of tribunals, such as those that may exist to further government policies, given the judicial or quasi-judicial nature of their functions. On this basis, and in light of the government's stated intentions in the context of the Administrative Justice Project, Justice McEwan concluded that section 14.9(3) could not have been intended to weaken the independence of residential tenancy arbitrators. It could not, therefore, be operable in respect of residential tenancy arbitrators.

Back to Ocean Port?

The argument that certain kinds of tribunals, because of the judicial or quasi-judicial nature of their adjudicative functions, should be entitled to a degree of independence from the executive akin to judicial independence, has had a difficult reception in the courts. The *McKenzie* judgment represents an important refinement of, if not an actual challenge to, the principles enunciated by the Supreme Court of Canada in *Ocean Port Hotel v. British Columbia (General Manager, Liquor Control and Licensing Branch)*.⁹ In

Ocean Port, the Court refused to extend the unwritten constitutional principle of judicial independence, rooted in the preamble to the *Constitution Act, 1867*, as articulated by Lamer, C.J. in the *Provincial Court Judges Reference*, to at-pleasure appointees of the B.C. Liquor Appeal Board. It rejected the argument that where an administrative tribunal performs adjudicative functions, particularly where the tribunal has the power to impose sanctions comparable to the powers possessed by courts for violations of statutes, the principle of judicial independence should apply. The Court held instead that the degree of independence that a tribunal requires is to be determined by the legislation that created the tribunal. In other words, Parliament or a legislature may determine the degree of independence that a tribunal may enjoy.

In *McKenzie* the Court considered the argument that *Ocean Port* must be read in light of subsequent Supreme Court of Canada judgments on judicial independence, particularly *Bell Canada* and *Ell v. Alberta*.¹⁰ It was argued that the Court in *Bell Canada* acknowledged the existence of a type of tribunal to which the principles in *Ocean Port* may not apply, that there may be said to be a “spectrum” of tribunals, and that tribunals at the “high end” of the spectrum performing judicial or quasi-judicial functions did not fit the broad characterization of tribunals in *Ocean Port*, whose function may be said to be to advance government policy as an arm of the executive, and not to adjudicate on the rights and obligations of individuals. In *Ell*, the Court extended the unwritten principle of judicial independence to justices of the peace in Alberta because they exercised judicial functions “related to the basis upon which the principle is founded.” Justice McEwan evidently found the argument compelling and ruled that s. 14.9(3) of the PSEA, to the extent that it interferes with the independence of residential tenancy arbitrators, is inoperable in respect of those arbitrators.

Attorney General of British Columbia v. Dugald E. Christie - The Rule of Law and Access to Justice

Another perspective on the rule of law was provided by the British Columbia Court of Appeal in *Attorney General of British Columbia v. Dugald E. Christie*, 2005 BCCA 631. In that case a majority of the Court struck down the *Social Services Tax Amendment Act (No. 2), 1993*, S.B.C. c. 24, which imposed a 7% tax on fees billed for legal services. The Supreme Court of Canada granted leave to appeal the decision, and the appeal was heard on March 21, 2007. The basis for the decision was that the legislation offended the

principle of access to justice as an element of the rule of law. The court considered two sources for the rule: the rule as an unwritten constitutional principle; or, one of two principles mentioned in the preamble to the *Canadian Charter of Rights and Freedoms* (“Whereas Canada is founded upon the principles that recognize the supremacy of God and the rule of law...”). The Court held that the tax impeded persons in trying to access legal assistance, particularly low income individuals. This includes legal services “related to the determination of rights and obligations by courts of law or independent administrative tribunals.” To the extent that the legislation purported to tax these services, it was held to be unconstitutional.

The *Christie* case is to be contrasted with the Supreme Court of Canada’s most recent pronouncement on the rule of law in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49. In that case, Major J., writing for the Court, held that the rule of law, as developed in cases such as *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 and *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, embraces three principles: that the law is supreme over government officials and private individuals, thereby precluding the exercise of arbitrary power; that it requires an order of positive laws which preserve and embody a more general normative order; and that the relationship between the state and the individual be regulated by law. Major J. considered it difficult to conceive, on the basis of these three principles, that the rule of law could ever be used to invalidate legislation. Any constraints on the actions of a legislature can only be in respect of the legislative requirements as to the manner and form by which legislation is enacted, not in respect of its content.

Looking Ahead

The *McKenzie* and *Christie* cases have raised a number of important questions about the rule of law and what it implies as a constitutional imperative. These cases will likely generate considerable discussion about how to articulate the principle, its content, its application to administrative tribunals, its limits, its sources, and the extent to which it may invalidate or render inoperable otherwise valid legislation. The Courts in both cases have made important pronouncements in fashioning the rule(s) to meet current realities both in the administrative law and constitutional law fields. The *McKenzie* judgment has been appealed to the British Columbia Court of Appeal. If the Court’s embracing of an expanded conception of the principle of the rule of law in the *Christie* case is any indication, there may

well be a second significant appellate judgment giving new life to the issue. If so, an appeal to the Supreme Court of Canada may be likely where the Court may have another opportunity to elucidate on the scope of the rule of law.

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¹ Laverne Jacobs, *The McKenzie Case – Litigating Security of Tenure*, Ontario Bar Association Administrative Law Newsletter, Vol. 14, No. 1 (December 2005).

² *McKenzie v. Minister of Public Safety and Solicitor General*, 2006 BCSC 1372 (hereinafter, *McKenzie*).

³ *Attorney General of British Columbia v. Dugald E. Christie*, 2005 BCCA 631 (hereinafter, *Christie*).

⁴ Notwithstanding her appointment up to 2008, Ms. McKenzie, was subject to service agreements negotiated annually. Apparently, these were commonly used. Neither party in their submissions addressed the effect of, and the reasons for, these one-year agreements within the framework of fixed terms for five years. The Court indicated that the issue was unnecessary to address, given the outcome of the petition (see paragraphs 44-45).

⁵ *McKenzie*, para. 61.

⁶ He further notes that when the Respondent's decision was challenged, "they embarked on a relentless and disgracefully specious personal attack on the Petitioner." (Para. 61.) He laments that it is "more than regrettable that servants of the public could behave so badly in their treatment of anyone." And finally, "[t]he only error they concede, apart from bad manners, is that they did not give the Petitioner a chance to talk them out of it." (See paras. 63 and 64.)

⁷ *McKenzie*, para. 72.

⁸ *Bell Canada v. Canadian Telephone Employees Assn.*, [2003] 1 S.C.R. (hereinafter, *Bell Canada*).

⁹ *Ocean Port Hotel v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781 (hereinafter, *Ocean Port*).

¹⁰ *Ell v. Alberta*, [2003] 1 S.C.R. 857.

LOSE A FRIEND OR LOVED ONE?

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2007 CCAT Medal Awarded to S. Ron Ellis

The Canadian Council of Administrative Tribunals (CCAT) each year selects an individual to receive its medal for outstanding contributions to the administrative justice system. This year's recipient is S. R. Ellis, Q.C. Ron has earned enormous respect from the legal profession within the administrative justice community and more widely for his principled approach and strong personal commitment to administrative justice in Canada over the course of a long and remarkable legal career. It is difficult to catalogue all of Ron's many accomplishments in promoting social justice in the administrative process in a single review for a newsletter, his accomplishments being so numerous and so far-reaching. However, some of the highlights of his career bear comment. After 11 years as a management-side labour lawyer at Osler, Hoskin and Harcourt LLP, Ron made a significant career shift when he joined the faculty of Osgoode Hall Law School in 1975, becoming Director of Parkdale Community Legal Services in Toronto. His exposure to the difficulties faced by low income individuals in accessing the justice system stimulated his interest in social justice issues and legal aid.

One of Ron's most important legacies was his leadership as the first Chair of the Workers' Compensation Appeals Tribunal (now the Workplace Safety and Insurance Appeals Tribunal). He set it on its course as a model tribunal, renowned for its very high standards of adjudication, administrative fairness, and coherence in decision-making. Ron aimed for excellence in written decisions, the level of procedural fairness accorded to parties, particularly unrepresented parties, and the clarity and consistency of hearing procedures.

Ron's work in promoting high standards in adjudicative practices extended broadly. He served on the Board of Directors of CCAT and as the first president of the Society of Ontario Adjudicators and Regulators. Through these positions, he worked to ensure that the principles of fairness in adjudication and high standards of professionalism among adjudicators were spread throughout the administrative justice system.

More recently, Ron worked as *pro bono* counsel with the legal team on the *McKenzie* case, researching and co-authoring the nearly 200 pages of written legal submissions filed as part of the petition to the Supreme Court of British Columbia. In large part due to Ron's work in defining the legal issues and his enormous contribution of time and advice, the petition proceeded

to a successful hearing. The decision in the case, released on September 8, 2006, marks a significant recognition of the need to safeguard the independence of qualified tribunal members if the administrative justice system is to operate efficiently and fairly. *McKenzie* is currently on appeal to the B.C. Court of Appeal.

Ron is to be congratulated for this much-deserved achievement.

Administrative Law Cases from the Court of Appeal for Ontario

*Brennagh Smith and Adriel Weaver**

This list is current to April 26, 2007.

Recent Decisions

***Farber v. Kingston (City)*, [2007] O.J. No. 919**, affirming [2006] O.J. No. 236.

At a regular public meeting, Kingston City Council adopted a by-law changing the name of its principal public gathering place from “Market Square” to “Springer Market Square” in recognition of a \$1 million donation from the Springer family. Prior to that, Council held two meetings that were closed to the public at which they first approved in principle accepting the gift and renaming the square, and then resolved to recommend approval of the by-law at the public meeting. In both instances, the resolution to meet in closed session indicated that Council would be considering “legal matters”.

The public meeting was well attended. Council debated the issue in open session for approximately one hour before voting 7 to 5 to adopt the by-law. The appellant, a resident of Kingston, brought an application to declare the two closed meetings in contravention of the *Municipal Act, 2001* and to quash the by-law for illegality. The application judge dismissed the application, finding that the real decision to pass the by-law was made at the open meeting and that no final determination on the issue was made at the closed meetings.

The Court of Appeal dismissed the appeal. The *Municipal Act, 2001* permits Council to hold meetings *in-camera* for a variety of reasons, including to receive advice that is subject to solicitor-client privilege. However, the resolutions stating that Council would go into closed session to consider “legal matters” were insufficient to comply with the Act, which requires that Council state the general nature of the matter to be considered at a closed meeting. Similarly, although the Act provides that votes of a certain nature may be taken in closed session, the vote to approve in principle the renaming of the Square did not fall into either of the enumerated categories. That Council did not pass the requisite resolutions and conducted a vote that was of no legal effect do not, however, render the by-law

illegal. The failure to pass the necessary resolutions prior to going into closed session and the unauthorized vote were at most procedural irregularities unconnected to the real decision to adopt the by-law.

***Episcopal Corp. of the Diocese of Alexandria-Cornwall v. Cornwall (Public Inquiry)*, [2007] O.J. No. 100**, affirming [2006] O.J. No. 5169.

The Cornwall Public Inquiry (the “Commission”) was established to investigate the institutional response of the justice system and other public institutions into allegations of widespread historical sexual abuse of young people in Cornwall. The appellant sought an order banning the publication of the name of one of its employees in relation to evidence given at the Commission. The employee had been acquitted of historical sexual abuse charges in 2001. In refusing to order the requested ban, the Commissioner found that the allegations against the employee had already received wide publicity, that one could not presume the public would ignore reminders of the acquittal, and that, in view of the nature of the Commission’s mandate to clear the air, the public interest in openness outweighed any interest of the employee that would be protected by the requested ban. An application for judicial review of that decision was dismissed by a single judge of the Divisional Court, who applied a reasonableness standard of review and found that the Commissioner’s decision was not unreasonable.

The Court of Appeal dismissed the appeal, holding that the Divisional Court applied that appropriate standard of review and did not err in failing to find that the Commissioner gave insufficient weight to the employee’s privacy and reputational interests. Applying the pragmatic and functional test set out in *Pushpanathan v. Canada*, the court found that the majority of factors supported a deferential standard of review. The Commissioner was familiar with the mandate and operation and history of the Commission and with its effect on the community. He was also faced with a broad issue of policy affecting the public at large. In formulating his recommendations, he was required to take into account a wide variety of factors and considerations of a kind not ordinarily encountered by a court of law. Finally, the question before him

was not a pure question of law but one that required a discretionary balancing exercise. The appropriate standard of review was therefore one of reasonableness *simpliciter*. The court was not persuaded that the Commissioner's conclusion in favour of openness was unreasonable on the particular facts before him.

Watson v. Peel Police Service, [2007] O.J. No. 231 (C.A.), reversing [2005] O.J. No. 3525 (Div. Ct.).

The principal issue on this appeal was the capacity of an administrative official to seek judicial review of his or her own decision. The appellant, a police officer with the Peel Police Service, was acquitted of criminal charges of theft and possession of stolen property. In relation to the same conduct, he was also charged with discipline offences under the *Police Services Act*, R.S.O. 1990, c. P-15 ("PSA"). After his criminal acquittal, the appellant moved for a stay of the discipline proceedings on the basis of abuse of process. The discipline proceedings were conducted by a hearing officer who was appointed by the respondent, the Chief of the Peel Police Service (the "Chief"). The hearing officer granted the appellant's motion and stayed the discipline proceedings. Under the PSA, the Chief has no right to appeal the hearing officer's decision. However, the Chief applied for judicial review. A panel of the Divisional Court agreed with the Chief's submissions, quashed the stay of proceedings, and remitted the matter for a discipline hearing. The appellant sought and was granted leave to appeal the Divisional Court's decision to this court.

The Court of Appeal allowed the appeal. The Order of the Divisional Court was set aside and the decision of the hearing officer was reinstated. The Divisional Court held that the question of standing as it relates to the Chief should not be analyzed on the basis that the Chief is synonymous with the decision-maker; however, this analysis is grounded in a misreading of key provisions of the PSA. The structure and wording of the PSA establish that once a discipline hearing is ordered, the hearing officer will be either the Chief or the Chief's delegate and thus when the Chief chooses to appoint a hearing officer, the Chief and the hearing officer are synonymous. Subsection 70(1) of the PSA grants a right of appeal to a police officer or complainant, but not to the Chief. It is logical and consistent with the PSA that the Chief not enjoy a right of appeal because the Chief is, in effect, the decision-maker. In logic and in policy, if the Chief cannot challenge the decision of his delegate by way of appeal, he should not be able to mount a similar attack through the vehicle of judicial review. The absence of a right of appeal for the Chief,

and rejection of standing for the Chief to challenge a decision of a hearing officer by way of judicial review, make sense in light of the Chief's pervasive role in the discipline process. The PSA reflects principles of fairness and natural justice in that it does not allow the Chief, who has control of virtually all aspects of the discipline process, to seek to overturn a decision he does not like by a hearing officer he appointed.

Fraser v. Shuniah (Township), [2007] O.J. No. 1175 (C.A.), affirming [2006] O.J. No. 2608 (S.C.J.).

This was an appeal from the judgment of Pierce J., which quashed a resolution that had been passed on March 9, 2006 by the Council of the Corporation of the Township of Shuniah. The resolution authorized payment of the legal fees to fund an application under *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 (the "MCIA"), seeking to find the respondent in breach of the MCIA. The Reeve of the township had volunteered to bring the application on behalf of the township council. At trial the respondent brought an application against the township, seeking to have the resolution quashed. The appeal is in respect of whether the resolution was *ultra vires the jurisdiction and authority of the council*.

The issue on appeal to be determined was whether a municipality can fund an application brought by the Reeve of the township as an "elector" under the MCIA to determine whether a municipal councillor is in a conflict of interest. In an endorsement, the Court of Appeal dismissed the appeal and held that the determination of this issue involved the statutory interpretation and interaction between various provisions of the MCIA and of the *Municipal Act*, 2001, S.O. 2001, c. 25. The Court of Appeal held that the application judge correctly found that the Township of Shuniah is not an elector but that the Reeve of the township is an elector. On the question of whether the township can fund the Reeve's application, a municipality can only reimburse a member of council if it was for activity carried out in the course of the member's office. As the application under the MCIA is clearly outside the ambit of the Reeve's duties, the township does not have the authority to provide the funding.

Appeals Schedules for Hearing

Austin v. Ontario Racing Commission, on appeal from [2006] O.J. No. 540.

Kevin Austin, a standardbred driver, was found guilty by a panel of racetrack judges of having provided an improper (cold) urine sample. His appeal by way of hearing *de novo* was heard by the Ontario Racing Commission (ORC). At the hearing, the senior judge who led the panel that decided the matter in the first instance was called as a witness and testified. Austin's appeal was denied. On judicial review, the Divisional Court found that the calling of a judge below at the *de novo* hearing created a reasonable apprehension of bias. The ORC appeals the Divisional Court decision. It argues that racetrack judges regularly testify at ORC appeal hearings, and the Divisional Court decision will therefore have a serious impact on the functioning of the ORC. The ORC further submits that the Divisional Court failed to identify and apply the appropriate standard of review to the ORC's determination as to the admissibility of the racetrack judge's testimony, and failed to provide adequate reasons for its conclusion that the admission of that testimony gave rise to a reasonable apprehension of bias.

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Administrative Law Cases at the Supreme Court of Canada

Sebastian Spano*

This list is current as of April 19, 2007.

Recent Decisions

McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital Général de Montréal, 2007 SCC 4

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

Deschamps, J., writing for Binnie, LeBel, Charron, Fish and Rothstein JJ. (concurring reasons by Abella J. writing for McLachlin C.J. and Bastarache J.), held that the three-year period provided for in the collective agreement was a reasonable accommodation. Such clauses in collective agreements, while not determinative, can play an important role in determining the scope of the employer's duty to accommodate. A clause purporting to require the termination of employment for innocent absenteeism due to disability will only be applicable if it meets the requirements of reasonable accommodation to the extent that the measure is adapted to the circumstances of the specific case.

Adil Charkaoui v. Minister of Citizenship & Immigration and Minister of Public Safety and Emergency Preparedness, File 30762; ***Hassan Almrei v. Minister of Citizenship & Immigration and Minister of Public Safety and Emergency Preparedness***, File 30929; ***Mohamed Harkat v. Minister of Citizenship and Immigration, Minister of Public Safety and Emergency Preparedness and Attorney General of Canada***, File 31178

Indexed as ***Charkaoui v. Canada (Citizenship and Immigration)***, 2007 SCC 9

The three appellants were detained on immigration security certificates, on different dates, pursuant to the *Immigration and Refugee Protection Act* (IRPA). The certificates issued by the Minister of Citizenship and Immigration and the Minister of Emergency Preparedness declare a foreign national or a permanent resident to be inadmissible to Canada on security or other grounds. In each case, the Federal Court of Canada judged the certificates to be reasonable, with the Federal Court of Appeal upholding the judgments. Do the procedures for determining the reasonableness of the certificate and the detention review procedure established by Parliament in the IRPA violate ss. 7, 9, 10, 12 or 15 of the *Canadian Charter of Rights and Freedoms*? Do they offend the principles of judicial independence in the preamble or s. 96 of the *Constitution Act, 1867* or the principle of the rule of law?

In a unanimous judgment, the Court held that the impugned provisions of the IRPA violate ss. 7, 9 and 10 of the *Charter*. The principles of judicial independence and the rule of law, and ss. 12 and 15 of the *Charter* were held not to be infringed. The special *in camera, ex parte*, review process in the Federal Court of Canada, with the judge assuming an inquisitorial role, in the absence of the detainee or his counsel, does not provide for a fair hearing in accordance with s. 7 of the *Charter*. The secrecy of the process under the IRPA scheme denies the detainee the opportunity to know the case against him and the right to challenge the evidence and make legal arguments based on the evidence. The infringement is not saved under s. 1. The scheme does not minimally impair the rights of the detainee, given that a less intrusive alternative in the form of a special

counsel with security clearance to act on behalf of the detainee is available. The Court noted with approval that such a special counsel is currently in use in the United Kingdom. The lack of a review of the detention of a foreign national until 120 days after judicial confirmation of the reasonableness of the certificate infringes the guarantee against arbitrary detention (s. 9) and the right to a prompt review (s. 10(c)). Extended periods of detention pending deportation do not infringe ss. 7 or 12 of the *Charter*. The declaration of invalidity of the offending IRPA provisions was suspended for one year.

Lévis (City) v. Fraternité des policiers de Lévis Inc., 2007 SCC 14

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

The appeal was allowed with reasons by Bastarache J., McLachlin C.J. and Binnie and Charron JJ. concurring, with joint concurring reasons by Deschamps and Fish JJ., and concurring reasons by Abella J. Bastarache J. held that it would be appropriate to adopt different standards of review when there are “clearly defined questions that engage different concerns under the pragmatic and functional approach.” On the question of the compatibility between s. 119 of the PA and s. 116 of the CTA a correctness standard is required. The question of the proper interpretation and application of s. 119 of the PA to the respondent Belleau’s conduct requires a reasonableness standard. Bastarache J. found the two provisions to be in conflict. The conflict should be resolved in favour of the PA. It was held to

be unreasonable for the arbitrator to conclude that the “specific circumstances” justified a lesser sanction. Deschamps and Fish JJ. found no conflict between the two provisions.

Council of Canadians with Disabilities v. Via Rail Canada Inc., 2007 SCC 15

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

Abella J., writing for the majority (McLachlin C.J. and Bastarache, LeBel and Charron JJ., concurring; Binnie, Deschamps, Fish and Rothstein, dissenting), held that the factors that the Agency considered in establishing undue hardship as set out in s. 5 of the CTA are compatible with and flow from the factors developed under human rights principles, particularly the reasonable accommodation analysis as established in *Meiorin*. The voluntary 1998 Rail Code was a proper factor to consider. The human rights aspect of the proceedings before the Agency did not raise jurisdictional questions beyond the Agency’s expertise. Parliament granted the Agency the mandate under the CTA for determining whether undue barriers exist for the disabled and to remedy them, not the Canadian Human Rights Commission. The Agency has the specialized expertise and it is uniquely positioned to balance to the requirements of accommodating the disabled against the financial, structural and logistical requirements of the federal transportation system. The Agency’s decision was not unreasonable. Both the unreasonableness and patent unreasonableness standards speak to a decision that is a marked departure from what is rational such that it is unsustainable.

Decisions on Reserve

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

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

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

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

Corporation of the City of London v. RSJ Holdings Inc., File 31300, appeal from 2005 CanLII 43895 (ON C.A.) (Appeal heard 15 November 2006)

The respondent purchased a small dwelling with the intention of demolishing it and building a residential fourplex. Two months after the respondent’s application for a building permit the appellant City of London passed an interim control by-law effectively freezing development in the area for one year. The by-law was passed following a closed meeting of the City’s Planning Committee and a closed meeting of the Committee of the Whole comprising all members of City Council. Section 239(1) of the *Municipal Act, 2001* (Act) requires that all meetings be open to the public subject to an exception in s. 239(2). The lower court denied a motion by the respondent to quash the by-law on the grounds that s. 239(2)(e) of the Act permits closed meetings

where there is a real potential for litigation. On appeal, the judgment was overturned, the Court of Appeal holding that the subject matter of the closed-door deliberations was the interim control by-law and not any potential litigation.

Attorney General of British Columbia v. Dugald E. Christie, File 31324, appeal from 2005 BCCA 631 (Appeal heard 21 March 2007)

The *Social Service Tax Amendment Act (No. 2)*, 1993, S.B.C. c. 24 imposes a 7% tax on fees billed for legal services. In a majority judgment, the B.C. Court of Appeal upheld the trial judge’s decision that the legislation is unconstitutional as it offends the principle of access to justice as an element of the rule of law. The central question addressed by the Court was whether the rule of law, either as an unwritten constitutional principle or as one of two principles mentioned in the preamble to the *Canadian Charter of Rights and Freedoms* (“Whereas Canada is founded upon the principles that recognize the supremacy of God and the rule of law...”) may be the basis for invalidating legislation.

Appeals Scheduled to be Heard

David Dunsmuir v. Her Majesty the Queen in right of the Province of New Brunswick, File 31459, appeal from 2006 NBCA 27 (Scheduled to be heard 15 May 2007)

Under the *Public Service Labour Relations Act*, R.S.N.B., 1973, c. P-25, non-unionized civil servants in New Brunswick may initiate a grievance to an adjudicator in respect of a discharge, suspension or other employment matter. The Appellant, a non-unionized Legal Officer employed with the Department of Justice, was terminated from his employment with 4.5 months pay in lieu of notice. The adjudicator assigned to hear the grievance ruled in a preliminary decision that he had jurisdiction to inquire into the reasons for the discharge and whether there was cause. The Province argued that as the Appellant was not discharged for cause, it was irrelevant whether there were sufficient grounds for discharge and, therefore, the adjudicator’s jurisdiction was limited to assessing the reasonableness of the notice period. In a second decision, the adjudicator ruled that, as an “at pleasure” appointee, the employee was owed a duty of procedural fairness, which was not provided. The dismissal was ruled void *ab initio* and the employee was ordered reinstated. On judicial review, the reviewing judge set aside the decision, holding the adjudicator’s preliminary decision to a standard of correctness. The adjudicator was held to

have no jurisdiction to determine whether procedural fairness had been accorded. The adjudicator also erred in reinstating an “at pleasure” appointee. The Court of Appeal held that the appropriate standard of review was reasonableness, but the adjudicator’s decision failed to meet that standard.

Société de l’assurance automobile du Québec v. Yvan Cyr, et al., File 31657, appeal from 2660 QCCA 932 (Tentatively scheduled to be heard 18 October 2007)

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

Cases Where Leave Recently Granted

Ville de Montréal (aux droits de la communauté urbaine de Montréal) c. Commission des droits de la personne et des droits de la jeunesse et autre, File 31551, appeal from 2006 QCCA 612 (Leave granted 11 January 2007)

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

decision, holding that the SPCUM had breached s. 18.2 of the Quebec *Charter of Human Rights and Freedoms*, which forbids discrimination in employment on the basis of a prior criminal act not connected to the employment or for which a pardon was received.

Hydro-Québec c. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ), File 31395, appeal from 2006 QCCA 150 (Leave granted 8 February 2007)

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

Association des courtiers et agents immobiliers du Québec, et autre c. Proprio Direct Inc., File 31664, appeal from 2006 QCCA 978 (Leave granted 8 March 2007)

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

Adil Charkaoui c. Ministre de la Citoyenneté et de l'Immigration et Solliciteur général du Canada, File 31597, appeal from 2006 FCA 206 (Leave granted 15 March 2007)

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

Privacy Commissioner of Canada v. Blood Tribe Department of Health, File 31755, appeal from 2006 FCA 334 (Leave granted 29 March 2007)

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

New Brunswick Human Rights Commission v. The Potash Corporation of Saskatchewan Inc., File 31652, appeal from 2006 NBCA 74 (Leave granted 29 March 2007)

New Brunswick's *Human Rights Code* provides an exemption to the general prohibition against age discrimination in employment if a discriminatory practice or policy is a term or condition of a *bona fide* retirement or pension plan. The effect of the provision is that a retirement age of 65 may be imposed if it is part of

a term or condition of a *bona fide* pension plan. This raises the question of the interpretation of the provision, and others like it, in light of the Supreme Court of Canada's judgments in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (*Meiorin*), and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (*Grismer*). To what extent should the *Meiorin* test be incorporated in the determination of a *bona fide* pension plan? Is the approach set out in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, a judgment dealing with discrimination in the insurance context, appropriate in determining the meaning of *bona fide* pension plan? What is the standard of review of the decision of the Human Rights Board of Inquiry?

Honda Canada Inc. operating as Honda of Canada Mfg. v. Kevin Keays - and - Ontario Human Rights Commission, File 31739, appeal from 2006 CanLII 33191 (ON C.A.) (Leave granted 29 March 2007)

A long-term employee was wrongfully dismissed from his employment following an absence from work due to medical reasons including chronic fatigue syndrome. He returned to work after his long-term disability benefits were terminated, although he continued to experience difficulties performing his work and missed work intermittently. The employment was terminated following a series of failed attempts to reach a work accommodation, the culminating event being the employee's request for clarification of the purpose and methodology of an examination by a doctor proposed by the employer. In addition to damages for wrongful dismissal, including an extended notice period for bad faith in the manner of dismissal, the employee was awarded punitive damages as a result of discriminatory conduct contrary to the *Ontario Human Rights Code*. The damages were awarded on the basis that conduct contravening a right protected in the *Human Rights Code* meets the requirement for an independently actionable wrong. The trial judge's decision was upheld on appeal, except the quantum of punitive damages, which the majority ruled was excessive. Should discrimination and harassment be treated as separate causes of action? Should human rights statutes be incorporated in individual employment contracts?

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