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Administrative Law Update

Tribunal Independence – Constitutionally Protected?

McKenzie v. British Columbia (Minister of Public Safety), 2006 BCSC 1372.

Section 14.9((3), *Public Sector Employees Act*: arbitrators under *Residential Tenancy Act* could be terminated without notice on payment of legislated compensation.

(a) Respondent conceded lack of procedural fairness. (Includes concession that entitled: *Knight*).

(b) Section 14.9(3) conflicted with section 86.3 (may terminate for cause) of the *Residential Tenancies Act*, enacted contemporaneously as part of same legislative package – specific prevails over the general. (Both came through section 54 of the *Administrative Tribunals Appointment and Administration Act*. Dismissal for cause found in provisions of *Administrative Tribunals Act*, s.8)

(c) Rule of law – underlying constitutional principle demands that there be independence for this type of tribunal appointment – performing a function previously belonging to courts – adjudicating claims between individuals. Dismissal without notice inconsistent with basic notions of security of tenure, a key component of independence.

Why go the constitutional route?

PEI Provincial Court Judges Case; *Ell* (Alberta Justices of the Peace); *Ontario Deputy Judges* (Small claims court); *Bell Canada*.

Ocean Port

Tribunal Authority Over Questions of Law Pertaining to Mandate

Tranchemontagne v. Ontario (Director, Disability Support Program), [2006] 3 S.C.R. 809.

Ontario Social Benefits Tribunal – denial of a category of benefits to those addicted to alcohol and drugs.

Explicit withdrawal of jurisdiction to deal with constitutional (including *Charter*) questions.

What about argument that substantive provision in constitutive legislation is not consistent with provisions of *Ontario Human Rights Code*?

Tribunal decided that it did not have jurisdiction to deal with argument – 2001 – before *Martin*. Upheld by Divisional Court. Appeal dismissed but not on this ground – had jurisdiction but as a matter of discretion should have declined it.

(a) As a matter of interpretation not covered by this provision (*cf* Abella).

(b) Tribunals have authority to deal with all relevant questions of law pertaining to the exercise of their jurisdiction.

(c) Rejects CA position that as a matter of discretion should have deferred to Human Rights Commission and HRTO. Has no discretion. (*cf* repeal of provision making HRTO exclusive; s. 34(1)(a) – discretion of Commission to defer to other mechanisms.)

(d) Good thing in any event. Extension of philosophy in *Martin*. (*cf* Abella).

Limits on Procedural Innovation

Geza v. Canada (Minister of Citizenship and Immigration), 2006 FCA 124.

Lead case (as opposed to jurisprudential guide) strategy of CRDD of IRB. Used for dealing with influx of Hungarian Roma. Condemned by FCA for bias.

Was it because of the way in which it was done? Evans JA starts by acknowledging importance of innovation. Affidavit evidence relating to planning could create impression that exercise aimed just as much at reducing number of successful claims as producing consistency. Failure to consult stakeholders. Use (as replacement) of the particular member who had developed the strategy.

Issue of waiver. Counsel did not know all of background. In enthusiasm for project, may have lost sight of clients' interests.

Thamotharem v. Canada (Minister of Citizenship and Immigration), [2006] 3 F.C.R. 168.

Directive on who questions the refugee claimant first – "standard practice" should be for RPO (if there) or RPD member to go first. Applies to most cases before tribunal but can be varied as a matter of discretion.

Overreaching. Acts as compulsion. Fetters discretion. Interferes with independence. (Blanchard J.)

Benitez v. Canada (Minister of Citizenship and Immigration), 2006 FC 461.

Not so! (Mosley J.)

This kind of guideline is permissible. Not improper fettering of discretion. Not mandatory. Does not operate as if it is.

Waiver not to have objected.

Now before FCA.

Scope of Disclosure Obligations

May v. Ferndale Institution, [2005] 3 S.C.R. 809.

Stinchcombe does not apply to administrative tribunal proceedings.

However, given terms of relevant regulations and common law notions of procedural fairness, strong disclosure obligations on penitentiary authorities in transfer cases.

Should have provided scoring grid. (*cf* Charron – knew criteria).

Canadian Pacific Railway Co. v. Vancouver (City), [2006] 1 S.C.R. 227.

Extends duty of procedural fairness to legislative functions.

However, at bottom end of spectrum of procedural fairness obligations. Has impact on application of legitimate expectation doctrine and also disclosure obligations – perfection not required but reasonable notice and disclosure. Newspaper advertisements clear enough. Ongoing (rather than prehearing) disclosure of written submissions by members of the public adequate. Staff studies – of marginal relevance.

Elaborating the Duty to Give Reasons

Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada, 2006 FCA 337.

Intersection between substantive review and review for failure to provide adequate reasons.

Copyright Board. Tariffs for public performance of musical works and sound recordings.

Findings pertaining to the previous royalty rate and broadcasters' increased efficiency in their use of music to enhance revenues. % figures not justified in reasons.

Adequacy: enhancing quality, assuring parties submissions considered, enabling meaningful judicial review, providing guidance.

Meaningful judicial review crux here. Not explained and no evidence in record.

Sets aside, remits (to differently constituted panel), and parties may supplement the record.

Difference between this and setting aside as patently unreasonable in that not supported by any evidence?

Evans JA refers to the focus on the reasons in unreasonableness review by reference to *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 - no line of analysis within the given reasons that could reasonably lead to the conclusion reached on the basis of the evidence before the tribunal. Take your pick!

Duty to Consult First Nations

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388.

Taking up of rights conferred by existing Treaty. Proposal to build a road. Duty of consultation?

Yes, reversing FCA.

Not met by extension of invitation to public meetings. First Nations entitled to more than that. Individualized consultation even though at low end of spectrum. Different from common law procedural fairness.

Failure to attend excused by that, continued correspondence, and lack of notice to all affected bands.

What about accommodate? More than an opportunity to let off steam (Binnie). However, does this import some sort of substantive obligations to be responsive? *Haida First Nation* – correctness on law and unreasonableness on response to demands.

(I discuss the Supreme Court of Canada judgments contained in this list in the attached paper.)

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