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**Session Summary: Concurrent Plenary A – Administrative Law Blast 2013: At the Crossroads of Continuity and Change**

Moderator: **Bob Butterworth,** ELTO-Assessment Review Board

Speakers: **Jeff Cowan,** Weir Foulds LLP; **Professor Laverne Jacobs,** Faculty of Law-University of Windsor; **Justice Thomas Lederer,** Ontario Superior Court of Justice; **Jack Walker, QC,** Walker Poole Nixon LLP.

*This session reviewed the legislative changes and leading decisions from the courts and tribunals in the field of administrative law.*

**Justice Thomas Lederer**

Justice Lederer spoke on the question of administrative law appeals from the perspective of a judge.

Introduction

Post-Dunsmuir, it is difficult to succeed on judicial review or application for leave. Most cases are decided on reasonableness, i.e. does the decision fall within a reasonable range of alternatives. This is a broad concept and a big tent. It is now difficult to succeed on appeal or judicial review. It is important to be aware of this, and focus on one’s role and responsibility as an adjudicator.

In an institutional sense, adjudicators make government decisions, but in a courtroom-like setting. There is a tension between the process and the nature of the decisions of tribunals. Why is this a problem? Why should we have more review?

Case #1: *Aviva v. Pastore*

One reason is policy. Justice Lederer recently handed down a decision on motor vehicle accidents. Since the 1970s, the Government of Ontario has been trying to balance what to pay people as victims of MVA and the cost of premiums to the general public. From 1990-2003, there were three amendments to the legislation that tried to find the balance.

Today, we have a tort system but a significant no-fault award. According to the Statutory Accident Benefits Schedule (SABS), if one is found to be catastrophically impaired, more money is granted. The person applies for these SABS recognitions, and there are appeals through boards. There is a guideline for how to assess this. There are five levels. The fourth highest is marked impairment. If the person has marked impairment, they have a catastrophic injury. There was an issue in the legislation and the Director Delegate’s interpretation of the requirements for a catastrophic impairment.

Ultimately, the Ontario Court of Appeal differed with Justice Lederer’s decision and found that the standard was reasonableness. Decisions like these enable an adjudicator to interpret the government policy as the adjudicator interprets it to be. This is the problem.

Case #2: *Tanudjaja v. Canada*

This case did not involve judicial review but one can reflect on the role of s. 96. The Superior Court of Justice is a s. 96 Court. In pre-Charter days, a common legal issue was whether the government in creating boards had effectively created a Section 96 Court.

Section 7 has been the topic of much litigation recently. There are two ideas under s.7. First, there we have right to LLSOP. Second, we are not to be deprived of principles of fundamental justice. When matters come, they look at what is fundamental justice and has it been breached. They look at fundamental justice not just policy.

Justice Arbour’s dissent in *Gosselin* says there is a positive right in s. 7. If one takes the first part of s.7 as a free-standing clause, then one leaves the government in a position where it has a positive obligation to provide satisfaction of the rights.

In *Tanudjaja*, it was suggested that there were decisions made by provincial and federal governments and that people had been denied affordable housing. The proponents argued that there is a fundamental right to the housing due to LLSOP. Is there a positive obligation in respect of housing? Among the relief requested, the proponents wanted the Government of Canada and the Government of Ontario to implement effective national and provincial strategies to eliminate homelessness and inadequate housing, and those policies to be developed and implemented in consultation with affected groups. The proponents further requested that the Court should remain seized of supervisory jurisdiction to address concerns of implementation. This is recreating s.7 and stepping over the line of policy and what courts do. This invites the courts to step over the line and create policy.

Case #3: *Disciplinary Committee of the College of Physicians and Surgeons*

There was a physician accused of having sexual relations with a patient. He was charged with conduct unbecoming of a physician. There was a neighbor, and the neighbor contacted Children’s Aid Society which subsequently investigated the doctor. The neighbor ran into the doctor at a school concert and saw the physician berating a child.

We do not set up groups of peers to see whether this is acceptable behavior. What does this have to do with being a doctor? There was a case of a police officer calling his neighbour obscenities and he was found to have engaged in conduct unbecoming. A lawyer making comments on underage girls was found to have engaged in conduct unbecoming. A teacher shooting a gun was found to have impaired ability as a teacher.

Justice Lederer reported that we have integrity clauses and legislation for all sorts of professions. We are going to have doctors decide what is acceptable behaviour for doctors, lawyers decide what is acceptable behaviour for lawyers. The result is that we end up with all sorts of value systems. Is this not the role of the Divisional Court, namely, to provide an overall sense of values for the system? Instead, there is no review because the standard is reasonableness.

Concern #1 - It asks the question – what are you an expert in?

We are going too far to assume that all tribunal members will have an overarching sense of what is acceptable behaviour in our society. By what standard do adjudicators decide what has passed the line of acceptability? Are adjudicators able to make the judgment of what is acceptable behaviour?

Concern #2: Adjudicators are making decisions of a governmental nature, and this takes us to the question of evidence.

The rules of evidence are less formal at tribunals. You can accept hearsay. The tribunal member says “I’m going to determine the weight”. This means nothing. There is no standard and no rationale. Adjudicators are the contact person between people and their government. Giving evidence the weight it deserves tells them nothing.

Case #4: *Ellis Don*

In 1958, there was a working agreement for a Sarnia trade union. In 1978, the provincial government passed comprehensive labour legislation that applied across the province. Suddenly the contract is now everyone’s across the province. Then the trade union found the purported original agreement from 1958. The idea put forward was that the original document was to bind the province. The issue was what were these documents, and what did they mean?

In the document, the names were typed above the line, but not the signature. The third page was from another document. The type was smaller, but there were signatures.

The labour arbitrator admitted the document as a business record and an “ancient document”. Was this a business record? Arguably it was because the union was in the business of making the documents. Also, one of the signatures was recognizable. This has nothing to do with the history of why business records are admitted. It is an exception to the hearsay rule. In the past, business records were admitted when business owners were dead. We have a broader notion of business records now.

With regards to the finding on “ancient documents”, the arbitrator found an article written in 1978 from Sopinka’s evidence textbook that mentions that documents that are 30 years old can be admitted if their custody can be traced. However, this only applies to property, not agreements. The problem in this case was about the admissibility of the document.

The rules of evidence mean something, and must have consistency. It seems that we need review beyond the big tent of reasonableness. In the end, the decision was not based on the admissibility of the evidence, but rather on estoppel. It looked like there was agreement between Ellis Don that they would wave implications of the legislation. The Board accepted this and imposed estoppel for two years.

Conclusion

Justice Lederer recalls a case of twenty-five years ago where there was an application for a shopping centre potentially to the detriment of downtown Perth. The Town of Perth retained a municipal lawyer (Justice Lederer). In this case, the municipality opposed the shopping centre. There was a company prepared to redevelop the downtown area. The lawyer thought he was going to win but lost. The presiding OMB member constantly told him to be quiet when objecting. The lawyer was told he could not cross-examine the witnesses. The lawyer had no control over the case.

In a more nuanced way, if you think about that situation, adjudicators will not be questioned on process unless the decisions are unreasonable, for policy findings, or for evidence.

**Professor Laverne Jacobs**

Professor Jacobs spoke on the issue of perfecting shared governance, noting that it is quite relevant to the work of adminstrative law actors today. Her talk focused on the problems of concurrent jurisdiction in regards to issue estoppel and the standard of review.

Professor Jacobs argued that there are three elements at play when we talk about concurrent jurisdiction:

1. Jurisprudential impact
   1. shared governance
   2. SCC decisions in mid-2000s opened up the possibility for administrative bodies to apply different statutes to the same case
   3. Statutory human rights matters
   4. *Conway* decision, applying the Charter
2. Increasing emphasis on shared government = efficiency
   1. Significant emphasis on efficiency in government, e.g., clustering, maximizing resources, pooling and sharing expertise, ensuring that admin actors are not wasted
   2. We see this across Ontario (e.g., SJTO)
3. Access to Justice
   1. Individual user (public) can go to one administrative body and have all their matters resolved there, instead of having to apply to six different administrative bodies to get different parts of their problems resolved
   2. *Figliola* and *Penner* decisions

Professor Jacobs examined the Supreme Court's decision in *British Columbia (Workers' Compensation Board)* v*. Figliola*, which is a case of three individuals with chronic pain from workplace injuries receiving fixed awards from Worker's Compensation. These individuals challenged the awards under the BC Human Rights Code on the basis of disability discrimination, but the Worker's Compensation Board found that the chronic pain policy and fixed rewards were not contrary to the Code. While judicial review was available to the applicants, they instead took the case to the Human Rights Tribunal. Unfortunately, the BCHRT dismissed the case as having been apporpriately dealt with in another proceeding. The Supreme Court, in spite of a split decision, held that the BCHRT's decision was "patently unreasonable". However, the majority and minority decisions provided two different analyses that are quite telling about the various issues competing in the area of concurrent jurisdiction.

Justice Abella for the majority provided guiding principles for determining whether a matter has been “appropriately dealt with” by a decision-maker with concurrent jurisdiction. Briefly, other major ideas in Justice Abella's decision:

1. Whether there was concurrent jurisdiction to decide human rights issues;
2. Whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and
3. Whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself.

Justice Abella interpreted in a narrow fashion, putting limits on “forum shopping” and cautioning against a second tribunal judicially reviewing the first tribunal's decision. She also indicated that statutory interpretation of ss. 27(1) gave the BCHRT limited discretion. However, Justice Abella also emphasized that it is better to look at underlying universal concepts behind fairness and estoppel rather than rely on an overly formalistic interpretation of "appropriately dealt with".

Justice Cromwell for the minority gave concurring reasons. He emphasized discretion and consideration of specific administrative law contexts. In *Danyluk* v*. Ainsworth Technologies*, the Supreme Court made it clear that within the administrative law context, even if all the elements of the finality doctrines are present, the court has an obligation to exercise its discretion to determine whether or not to allow the claim to proceed.

The *Danyluk* factors which Justice Cromwell indicated in his decision become more relevant in the *Penner* decision. While the *Figliola* decision has significant weight, the *Penner* decision has brought some challenges and changes. In particular, Penner clarifies the last *Danyluk* factor, "potential injustice".

In *Penner*, a matter of police misconduct was brought to the Public Complaints Commission, after which a claim for damages from the same incident was put forward to the Superior Court. The issue in the *Penner* decision was whether a civil claim to damages by Penner should be barred because the matter was already heard in a different forum.

Once the police complaint proceedings were finished, the court held that Penner was therefore estopped from going forward at Superior Court. Penner appealed to the Supreme Court where significant aspects of the minority decision in *Figliola* were adopted by the majority in *Penner*.

While *Penner* was a civil case, its finding should apply to all administrative bodies. For the majority, Justice Cromwell asked whether the application of the issue of estoppel would result in unfairness or injustice. Factors to be considered are as follows:

1. Fairness in prior proceedings
2. Fairness of using the results of prior proceedings to bar subsequent proceedings

In order to assess justice or fairness, we must consider:

1. Wording of legislation
2. Reasonable expectations of parties

* Professor Jacobs noted that we have not really seen this factor elaborated on before.

1. Financial stakes in the disciplinary hearing
2. Policy considerations
   * Will the issue of estoppel undermine the purpose of administrative law proceedings?

Professor Jacobs suggested that, for adjudicators, it is important to be aware whether injustice will occur if a matter is not allowed to proceed at their tribunal. Adjudicators should assess the reasonable expectations of parties and consider the extent to which additional *Danyluk* factors might be applied post-*Penner*. Fairness issues that arise from the issue of estoppel might be addressed by applying *Danyluk* factors, so why not other factors that might be useful? For standard of review, an adjudicator may need a correctness standard if they are assessing a decision for a second time.

Implications for adminstrative state:

* Appropriate application of expertise?
* Appropriate model of shared governance?
* Do we need legislative intervention?

Professor Jacobs concluded by providing a pie chart of the application of *Figliola* by tribunal subject area:

* + Human Rights Tribunals = 85%
  + Labour Boards = 6%
  + Labour Arbitration = 5%
  + Other (Env, IPC, etc.) = 4%

**Jack Walker**

Mr. Walker discussed the historic limitations to the jurisdiction of tribunals. Notwithstanding acceptance by the judiciary of tribunals as integral components of the justice system and a deference to the expertise of tribunals, especially a tribunal operating under its home statute, there still remains a number of areas that have historic limitations upon tribunal jurisdictions. Mr. Walker noted that there are two types of limitations, the first obvious and the second latent, and the reasons for these limitations are fourfold:

Four reasons for limitations:

1. Historic reticence of courts to allow tribunals to adjudicate in certain areas without judicial supervision, overstepping and using s. 96 powers that they do not have, and exercising “judicial power”.
2. Genesis of standard of review applied to tribunal decisions, as it evolves, to the acceptance of Justice Binnie’s position that there should be a presumption that reasonableness should be the standard of review for admin decisions.
3. Lack of clarity as to the meaning of reasonableness.
4. Failure of courts to focus on factors such as expertise and legislative delegation of authority.

Assessment Review Board

Historically, the Assessment Review Board looked at matters of exemptions from taxes. in 1950, in the case of *Quance v Ivery & Sons*, the Board had jurisdiction to make a determination of exemption under s. 3 of the *Assessment Act*. The Board had been deemed to have the right to exercise judicial power and outside the jurisdiction of the tribunal.

Mr. Walker then addressed the problem of the Divisional Court coming down hard on tribunals. He argued there was no basis for the Divisional Court developing such a practice and that the court's reticence to move forward is clear. He pointed, with all due respect to Justice Lederer's talk at the beginning of the session, in which he expressed his own reluctance to accept tribunal members as decision-makers since they are not judges and lack s. 96 powers.

Mr. Walker discussed the decision in *R* v*. Conway* in which the Supreme Court held that the Ontario Review Board was not a "court of competent jurisdiction" that could grant an absolute discharge to Mr. Conway as a remedy under the Charter.

Nevertheless, in cases where a tribunal is making decisions within its home statute, deference should be given. Mr. Walker expressed dismay that the Assessment Review Board continues to be judicially reviewed at the Divisional Court in regards to applications for assessments, which are firmly within the Board's power to grant. He mentions a case involving the Bank Towers in the City of Toronto, which he described as a well-written decision by an administrative board, which was overturned at Divisional Court. The Ontario Court of Appeal upheld the Divisional Court's decision and said that the standard of review was correctness, even though *Dunsmuir* remains good law. At that point in time the SCC had determined that the reasonableness standard will apply when a tribunal is applying or interpreting its home statute or statutes closely connected with its function except in exceptional circumstances.

**Jeff Cowan**

Collateral Attacks

Following *Penner*, the approach on collateral attacks has changed due to the decision in *Molten Contractors*. In this case, a logging license was granted. The First Nations, who had territory in the area, did not object or take to lobbying of the license. Instead, the FN blocked access to the roads leading to the logging area. There was a tort claim raised by the company and the company defended the validity of the license. The First Nations argued that there was a duty to consult. The SCC applied collateral attack. In the circumstances, the duty to consult did not impinge on the validity of license.

Active Adjudication and Civility

When can you intervene as adjudicators and when should you not intervene? Active adjudication means having to bring into balance the considerations of what you do as an adjudicator and the notion of fairness. Fairness has to be looked at within the context of *Baker* and a contextual approach to the facts. Done appropriately, active adjudication can achieve worthy objectives and in ways that lend credibility to the process.

Tools of Active Adjudication

* rules and policies
* pre-hearing conferences
* procedural orders
* discovery
* documents to be relied upon provided in advance
* opening remarks and discussion at outset about how the case will be managed
* witness statements
* bifurcation – make decisions to resolve or reduce other matters
* hot-tubbing – all sides’ evidence on issue-by-issue basis
* active listening
* summary of understanding
* time limits