

**Administrative Law Update: “The Time has Come”
the Walrus said “To Talk of Many Things”.**

David Mullan, Integrity Commissioner of Toronto

In this workshop, David Mullan summarized and commented on a number of recent court decisions relating to administrative law. The first case Mr. Mullan commented on was *McKenzie v. B.C. (Minister of Public Safety)* 2006 BCSC 1372. In this decision the B.C. Supreme Court was asked to interpret and apply conflicting legislation relating to the ability of the B.C. government to dismiss *Residential Tenancies Act* adjudicators for a set amount of compensation without cause or notice. The Court found the termination of the adjudicator was an unlawful infringement on the constitutional requirement of independence attaching to the functions of the adjudicator.

After reviewing the various constitutional arguments put forth by the parties, Mr. Mullan identified some potential difficulties arising from the decision in *McKenzie*, including the task of determining which tribunals deserve tenure protection because of their ‘court like’ nature. Mr. Mullan acknowledged that for many tribunals there is a strong argument for guaranteed tenure, particularly when one considers the fact that Justices of the Peace and Small Claims Court Judges enjoy security of tenure.

The next decision reviewed by Mr. Mullan was *Tranchemontagne v. Ontario (Director, Disability Support Program)* [2006] 1 S.C.R. 513. In this decision the SCC was asked to review a decision of the Ontario Social Benefits Tribunal where the tribunal declined to apply the Ontario Human Rights Code and determine the validity of a particular section of its enabling statute. While the legislation clearly prohibited the tribunal from considering the constitutional validity of legislation, the SCC found that statutory tribunals are empowered to decide questions of law and are presumed to have the power to look beyond their enabling statutes in order to apply the whole law to a matter properly before them. In particular the SCC found the tribunal had the jurisdiction and obligation to apply fundamental statutes such as the Ontario Human Rights Code and that the Social Benefits Tribunal was an appropriate forum for making determinations under the OHRC. While reviewing the impact of this decision, Mr. Mullan recognized that the *Tranchemontagne* decision may place additional resource strains on tribunals by significantly widening their mandate; in turn this may translate into challenges for tribunal staffing and recruitment, expedient decision making, and self-represented applicants. Mr. Mullan was troubled by the SCC’s ruling insofar as it challenged the ability of tribunals to decline to hear a matter by referring it to a more appropriate forum.

The final two cases Mr. Mullan discussed were *Geza v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.A. 124 and *Thamotharem v. Canada (Minister of Citizenship and Immigration)* [2006] 3 F.C.R. 168. Mr. Mullan interpreted both of these decisions as examples in which tribunals’ attempts at creating innovative processes has been hampered by the courts. In addition, Mr. Mullan expressed concern over what he characterized as an ‘over-judicialization’ of a tribunal’s rules of procedure which he inferred as being an attempt to address the courts’ increasing procedural fairness concerns.

The Bullet-Proof Tribunal:
Making Decisions that Survive Judicial Scrutiny

David Stratas, Heenan Blaikie LLP

In this workshop, Mr. Stratas discussed a variety of practical tips aimed at assisting tribunal members to draft decisions which, upon review, are more likely to withstand judicial scrutiny.

Mr. Stratas began the workshop by detailing the grounds upon which a tribunal's decision may be reviewed: on the basis of substance or on the basis of procedure. By being aware of the various tests which courts will apply in a judicial review, Mr. Stratas argued tribunals can craft their decision language in order to attract more deference and a higher standard of review. He further suggested that tribunal members should ensure they write reasons which are adequate insofar as they demonstrate to the parties that their submissions have been understood and considered. In particular, tribunal members should pay special attention when determining issues of credibility and their decisions should go beyond simply finding that a particular witness is 'not credible'.

In addition to adequacy, Mr. Stratas suggested that all reasons should focus on clarity, directness and brevity. Writing decisions in a clear manner ensures the reviewing court will quickly and easily grasp the issue and suggests the decision maker is competent and focused. Writing decisions in a direct manner using active language further focuses and engages the reader, while brief (but adequate) reasons ensure the judge will quickly pick up on the most important aspects of the decision. Coherence within each paragraph and overall decision coherence was also emphasized by Mr. Stratas who suggested employing the 'point first' writing method wherein paragraphs begin with their conclusion and then develop their reasons in support of the conclusion. Mr. Stratas also cautioned against inserting 'putty words' such as 'generally' and 'mostly' as these may communicate uncertainty and a lack of confidence.

While Mr. Stratas emphasized tribunals cannot write in a manner which will avoid judicial review altogether, by following these tips, when the time comes tribunal members can ensure their decisions stand a greater chance of surviving review by the courts.

A Unique Viewpoint: Administrative Justice
– A Perspective From the Ombudsman

Andre Marin, Ombudsman for Ontario.

In this discussion, Mr. Marin reviewed the role his office plays in handling complaints about the administrative tribunal community. Starting with a general overview about the role of the Ombudsman, he explained how his office has recently streamlined its case management system and has focused its resources on pursuing high profile cases that resonate with the public at large. With respect to the interaction between his office and administrative tribunals, he emphasized that as the complexity of government and its associated agencies grows, so too does the potential for abuse and the creation of impersonalized processes. Some of the more common complaints registered with his office pertaining to administrative tribunals involved inadequate reasons being issued, discrimination allegations, and a lack of procedural fairness. Mr. Marin recognized that while the majority of complaints pertaining to tribunals are usually solved informally, he emphasized the importance of acknowledging errors and ensuring all individuals offer their complete co-operation when his office begins inquires in response to a complaint.

What's Next With the Appointment Process?

Debra Roberts, Public Appointments Secretariat

In this discussion, Debra Roberts discussed the government's mandate for increasing transparency, openness and excellence in the appointments process. She discussed how there had recently been major efforts aimed at increasing the amount of information available on-line with respect to the appointment procedure and availability of positions. Ms. Roberts then discussed the recent remuneration rate increases for administrative tribunal members and commented on how previously, uncompetitive remuneration led to a recruitment and retention crisis. Ms. Roberts also discussed the government's recent efforts aimed at clustering together five tribunals in the Municipal and Land Planning sector.

Adjudicative Roots – A View from the Bench

**Justices Deena Baltman, Peter Howden,
Andromache Karakatsanis and Anne Mactavish.**

This panel discussion was composed of Ontario justices who are former members of the adjudicative justice community. All of the panelists agreed that their former tribunal experience presented some unique challenges and advantages for them once they were appointed to the bench. Moving from a specialist role as a tribunal member to a generalist role as a judge, the panelists emphasized that judges are not ‘omnipotent’ or ‘all knowing’ and often do not have a great deal of experience or depth of knowledge in a particular subject area. Consequently, the panelists emphasized the importance avoiding shorthand ‘lingo’ and of fully explaining reasons when tribunal members write decisions. On the other hand, the panelists all agreed that their specialist experiences also enables them to ‘switch gears’ rapidly, create ‘tighter’ and ‘leaner’ decisions, run a flexible and efficient hearing process, and deal with the challenges associated with unrepresented litigants. Other panelists suggested that their tribunal expertise enabled them to assess expert witnesses and identify their assumptions.

With regard to how the administrative justice system is perceived by the courts, the panelists agreed that there has been a shift towards greater deference over the past 20-30 years and a gradual acceptance of the expertise of these bodies. While all of the panelists had experience in the administrative justice system, some panelists acknowledged that the degree of sensitivity and deference still varies from judge to judge, depending on their experience with the administrative justice system and philosophical outlook in regard to administrative law.

In terms of balancing the judgment writing process with the need for expedient decisions, the justices agreed that writing the decision as soon as possible after the hearing is beneficial as the issues are fresh in the decision maker’s mind. The panelists further agreed that decisions should be designed to be straightforward and clear—summaries are helpful. In terms of collegiality, the panelists all emphasized the importance of having colleagues available to discuss difficult points of law, flesh out issues, and ‘commiserate’. Collegiality was viewed as coming from the ‘top down’, where senior members of the court/tribunal were perceived to play an integral role in the creation of a friendly and collegial atmosphere.

Media: Managing the Message from Within

Barry McLoughlin, President of McLoughlin Media

In the final session of the day, Mr. McLoughlin discussed ways in which administrative tribunals can effectively deal with and communicate through the media. Mr. McLoughlin emphasized that once communicated, public comments become immediately open for interpretation. Consequently, caution and careful planning are required in order to avoid miscommunication or misinterpretation. He further emphasized the importance of having a core message when making a communication and reviewed strategies on how to avoid being 'baited' by a member of the media. Mr. McLoughlin also reviewed means in which difficult or sensitive questions can be 'sidestepped' using general comments and bridge phrases such as: 'an equally important question is X' or 'lets look at this from another perspective'.