Second Plenary Session

Administrative Law Blast

Moderator: Grace Knakowski, Law Society of Upper Canada

Speakers: Sara Blake, Ministry of the Attorney General
Professor Vanessa Gruben, Faculty of Law - University of Ottawa
Professor Michael Lynk, Faculty of Law - University of Western Ontario
Professor Gus Van Harten, Osgoode Hall Law School - York University

Sara Blake - *Judicial review of reasons for decision*

Ms. Blake looked at two Supreme Court of Canada decisions issued a week before the conference, and scrutinized the application of judicial review. Both cases concerned the Human Rights Tribunal ("HRT"), which lost in both cases.

The first decision Ms. Blake looked at was *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] S.C.J. No. 53. (otherwise known as the "Mowat" Case). The question facing the Court on review was whether the Human Rights Tribunal could award legal costs in addition to compensation. The Tribunal said it had authority to award legal costs.

The Supreme Court did not perform a review of the jurisdiction to award costs, but rather maintained that the issue of ability to award legal costs was a question of law related to interpretation of the enabling statute. Ms. Blake questioned this approach, as the Court neglected to mention the long line of cases on the matter of inherent jurisdiction in awarding costs.

The standard of reasonableness was chosen for review since the Tribunal was expert and the issue was not one that was of central importance to the legal system, and fell within the core function of expertise. Ms. Blake pointed out that although the Human Rights Tribunal has typically not been shown much deference, as the courts tend to think that they have just as much expertise in human rights matters, here the Court departed from that norm and leveraged *Dunsmuir* to say they would be deferential in this case.

The Tribunal had made the mistake of turning to a dictionary to determine the meaning of which "expenses" they were able to award. The Supreme Court and Ms. Blake reminded us that the issue was a question of statutory interpretation, and that the context and purpose of the statute must be taken into account. For this reason, Ms. Blake cautioned against dictionary usage for interpretation since the dictionary definitions concern words that are taken out of context. The Supreme Court of Canada thus upheld the decision of the Federal Court of appeal that the Human Rights Tribunal could not award legal costs.

The second case Ms. Blake looked at was the Supreme Court of Canada's recent decision *British Columbia (Workers' Compensation Board) v. Figliola*, [2011] S.C.J.

No. 52, in which Justice Abella "accused and convicted" the Human Rights Tribunal of "lateral adjudicative poaching".

The case dealt with a chronic pain victim who sought compensation from the British Columbia Workers' Compensation Board. The Board had applied a policy that limited compensation for chronic pain. On appeal, the Board's Review Division Officer found that the policy did not violate the Human Rights Code, and that the Officer did not have jurisdiction to decide whether the policy was patently unreasonable or unconstitutional, which fell within the jurisdiction of the Workers' Compensation Appeal Tribunal's ("WCAT ").

In the meantime, WCAT's enabling statute was amended to take away the appeal right and the ability to decide human rights issues. However, there was still an avenue for judicial review available.

Instead of seeking judicial review, the respondents went to the Human Rights Tribunal and argued the same points they had argued before the Review Officer. The Tribunal rejected the Board's motion to dismiss on the grounds that the Tribunal did not have jurisdiction to hear the matter and that the complaint had already been dealt with in another proceeding.

On judicial review, the Tribunal's decision was set aside since the issues had already been "conclusively decided". The Court of Appeal restored the Tribunal's decision, ruling that it was not patently unreasonable.

The appeal was allowed and the Tribunal's decision set aside by the Supreme Court of Canada, which clarified that the Human Rights Code did not allow the Tribunal to "judicially review" the decision of another administrative body or to reconsider an issue that had already been decided in order to see if a different outcome was warranted. The emphasis of the Supreme Court was that administrative law has review mechanisms in place, including appeals and judicial reviews, and that parties should use these instead of launching a collateral attack before a different adjudicative body. The Court found that the respondents had inappropriately circumvented the processes designed to allow for review, avoid re-litigation, provide finality, produce consistent results, and avoid duplicative proceedings, thereby wasting judicial resources. The Supreme Court declared that the legislative intention was to create administrative territorial respect by having vertical lines of review, thereby protecting tribunals from lateral adjudicative poaching and forum shopping.

Vanessa Gruben - ***Disclosure to administrative tribunals to determine privilege***

Professor Gruben spoke about administrative tribunals' power to look at documents that a party alleges are privileged and confidential in order to determine whether or not they are in fact privileged and therefore confidential, and gave an overview of decisions that have considered and distinguished the *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 ("*Blood Tribe*") ruling.

Blood Tribe was a case in which the employer claimed that a bundle of letters in a certain file was covered by solicitor-client privilege and was therefore confidential. The Court reviewed the federal Privacy Commissioner's statute and *Personal Information*

Protection and Electronic Documents Act ("*PIPEDA*") and found that there was no express or implied authority for the Commissioner to determine whether or not a document was actually privileged. Although *PIPEDA* section 12 allows the Commissioner to compel production of evidence, the Court said that the Commissioner was an investigator and not an adjudicator, and could not determine privilege. The Court also found that it was not necessary for the Privacy Commissioner to review documents as there were other avenues to determine whether privilege had been properly claimed, that protection afforded by privilege is key to the proper functioning of legal system, and that piercing of privilege should be restrictive.

This decision caused concern that the Court had reduced the Commissioner's ability to carry out his mandate, and increased the burden on the administrative process by creating a necessity of being represented by counsel. *Canada (Privacy Commissioner) v. Air Canada* [2010] F.C.J. No. 504, expanded the *Blood Tribe* decision, rehashing the finding that the Privacy Commissioner has no authority to require production of documents in order to determine privilege, as there is no express or implied power to pierce the veil of privilege in the enabling statute. The party claiming privilege in that case was not even required to provide a reason for claiming privilege.

Other cases have distinguished *Blood Tribe* based on the enabling statute/statutory language, the nature of the decision maker, and the type of privilege.

Enabling Statute

Some cases have attempted to distinguished *Blood Tribe* based on an argument that an enabling statute either expressed or implied authorization for the adjudicative body to decide whether or not privilege has been properly claimed. *Consumers Council of Canada*, 2011 LNONOEB 165 (Ont. En. Bd. Dec.) relied on section 5.4(2) and section 19 of the *Statutory Powers Procedure Act* to assert the power to determine whether privilege stands, and that decision has not been reviewed. *Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland (AG)*, 2011 used section 52 of the *Access to Information and Protection of Privacy Act*, SNL, to argue the same, though the trial division said the statutory language was not sufficient to pierce the veil of privilege.

Nature of the Decision Maker

Other cases have differentiated the *Blood Tribe* decision by looking at the nature of the administrative decision maker, specifically whether the decision maker may become adverse, is quasi-judicial in nature, and whether they are empowered to determine fact and law. In *Proplus Construction & Renovation Inc.*, [2008] O.L.R.D. No. 4940, the Ontario Labour Relations Board ruled that it was allowed to determine confidentiality since it could not become adverse in interest to the responding party, in contrast to the Commissioner in *Blood Tribe*. In *Quadrini v. Canada Revenue Agency* 2009 PSLRB 104, while there was no clear statutory authority to pierce confidentiality, the decision was not set aside because the documents in question were not relevant.

Type of Privilege

Some types of privilege, particularly solicitor-client, are more jealously guarded than others. The Canadian Human Rights Tribunal in *Walden v Canada*, 2008 CHRC 35 concluded it could review a document guarded only by litigation privilege since litigation privilege is very different in nature from solicitor-client privilege.

Generally speaking, *Blood Tribe* was a wake-up call for those tribunals that routinely pierce the solicitor-client privilege veil to see whether privilege should stand. Professor Gruben wrapped up by pointing out that if administrative tribunals have the jurisdiction to apply the *Charter* where it arises in the context of their expertise, as *Conway* SCC confirmed, it makes sense that they should then also have the authority to adjudicate quasi-constitutional questions like privilege.

Michael Lynk - *Labour law issues and the ongoing application of Dunsmuir*

Professor Lynk looked at the efforts and result of the Supreme Court of Canada in *Dunsmuir* to reduce the number of standards of review from three to two. While leaving the correctness standard untouched, *Dunsmuir* effectively collapsed the standards of patent unreasonableness and reasonableness into a single standard of reasonableness in an attempt to bring clarity to the issue of standards of review. It is now clear that this decision has made a difference in the way that deference to adjudicators and tribunal decisions is used and applied in the courts.

Professor Lynk performed an analysis of pre-*Dunsmuir* and post-*Dunsmuir* judicial reviews of administrative decisions, and the numbers were telling: the post-*Dunsmuir* cases revealed a significant drop (17%) in deference to tribunal decisions. It is clear that the former standard of patent unreasonableness induced higher degree of deference, and that the *Dunsmuir* decision has resulted in less deference shown by the courts.

While the intention of the Court in Dunsmuir was to bring clarity and simplicity, the result has been more invasive and interfering judicial reviews, which have caused a significant drop in deference shown to administrative decision makers.

In concluding his review, Professor Lynk posed the question of what this result will mean for future judicial reviews: Does the simplification of the standards of reasonableness necessarily have to mean a reduction in deference? Will we fall back to three standards or move to a sliding standard of reasonableness?

Gus Van Harten - *Adjudicative mechanisms in international agreements and their impact on provincial adjudicative bodies*

Professor Van Harten discussed NAFTA chapter 11, which allows parties to sue member countries when government actions, including administrative tribunal decisions, have negatively affected their investments. Chapter 11 can be invoked under a wide range of circumstances, and the primary mechanism is the award of retrospective damages.

While Professor Van Harten says this provision was initially included in the agreement to protect Canadian and American investors in Mexico, it has mostly been used by Americans to sue Canadians, who have so far paid more than $150 million CAN in

damages to them (Canadians have tried to sue the United States on various matters, but have been entirely unsuccessful).

Both federal and provincial administrative decisions in Canada have been found to violate NAFTA. Though complaints under NAFTA Chapter 11 are rare, administrative tribunals should be aware of the possibility of Chapter 11 actions - it is important for adjudicators to structure decisions in accordance with their mandate, and in a manner that hedges against this kind of claim being brought. In addition it should be noted that the international NAFTA reviews can be used in parallel to judicial review.

NAFTA cases that reviewed administrative decisions in Canada include: *Clayton/Bilcon v. Canada* and *St. Mary's Cement v. Canada*, which involved quarries; *Mobil & Murphy v. Canada*, which concerned an offshore petroleum Board's R&D expenditure; and *Mesa Power v. Canada*, which dealt with wind farms.