Second Plenary
36 Minutes of Administrative Law

Moderator: **Linda Lamoureux, Health Professions Appeal and Review Board**
Speakers: **Leslie McIntosh, Ministry of the Attorney General**
Craig Flood, Koskie Minsky LLP
Victoria Réaume, Cavalluzzo Hayes Shilton McIntyre and Cornish
Audrey Macklin, Faculty of Law, University of Toronto
Hart Schwartz, Ontario Human Rights Commission
Avvy Yao Yao Go, Metro Toronto Chinese and Southeast Asian Legal Clinic

In this plenary session, the Panel presented an overview of various administrative law principles. Leslie McIntosh talked about the fact that the issue of standard of review in itself illustrates one of the major tensions in administrative law, the balance between fairness and efficiency. The standard of review is intended to achieve a balance between these principles. Ms. McIntosh reviewed the history of standard of review which is rooted in labour law, where labour tribunal decisions were regularly reviewed by the courts. In the landmark decision, *CUPE v. New Brunswick Liquor Board*, it was found that interference by the court exceeded their role and offended the labour board policies of finality and efficiency. It was held that the court should not interfere without patent unreasonableness in the decision. As the standard of review issue grew to other tribunals and to statutory appeals, the test of reasonableness simpliciter developed. Although there has been some division within the Supreme Court as to whether we need three standards or whether the original two would suffice, the current law remains. The three standards continue to be applied and different standards may be applied to different issues within the same case.

Craig Flood spoke about the practical effect of judicial review on tribunal practice and decision-making. Primarily there have been two sets of cases dealing with this issue, one set is before the OLRB dealing with amendments to the *Labour Relations Act, 1995* and the other set is before the Ontario Court of Appeal dealing with the Ontario Health premium. In the first set the issue was centered on amendments to the LRA which allowed changes to the certification process. On judicial review (*Maystar General Contractors Inc. v. International Union of Painters and Allied Trades, Local Union 1819*, 2007 CanLII 8928 (ON S.C.D.C.), the court found that the standard of correctness should be applied to Board decisions. The decision is now being appealed. In the Ontario health premium cases (*Lapointe-Fisher Nursing Home v. United Food & Commercial Workers International Union, Local 175/633*, 2006 CanLII 40970 (ON C.A.), the court allowed for a plurality of outcomes depending on the case before the decision-maker.

Audrey Macklin talked about the tension between the concepts of independence and consistency. In administrative law, we have the principle that like cases should be decided alike, out of a concern for consistency. This collides with the principle that decision-makers need to be independent and free to make decisions according to their best understanding of the law. In a recent Federal Court of Appeal decision (*Canada (Citizenship and Immigration) v. Thamotharem* 2007 FCA 198 (CanLII)), the balance between independence and consistency was addressed. The court found that implementing a policy designed to reduce inconsistency in hearings, did not unduly fetter discretion, as the language in the guideline was not mandatory, there were exceptions defined, and there was evidence that exceptions were actually made in practice. The court found that independence is not an all-or-nothing concept, it is a matter of degree and is influenced by many factors.

Victoria Réaume spoke about the recent landmark case, *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII), in which the Supreme Court of Canada recognized the protection of collective bargaining under section 2(d) of the *Charter.* The goal of the legislation introduced in BC was to reduce costs and make management more efficient. There were no reductions in wages, but instead the legislation rearranged the workforce in the health care sector and was implemented without discussion with the unions, knowing that the unions would oppose it. The legislation addressed things like the transfer of

employees, contracting out, lay off and bumping rights. It had the effect of invalidating many core terms of collective agreements. The coalition of unions argued that the legislation violated the *Charter*. The question before the court was whether 2(d) protected collective bargaining, a question which had been answered in the negative in all previous Supreme Court decisions. The court reversed the historical position and found that collective bargaining in the right to associate, to achieve workplace goals, was protected under section 2(d). The court relied heavily on the notion that ‘a deal is a deal’ and that the parties are held in good faith to have negotiated agreements. It was also important to note that the court reached its decision relying heavily on international law, including international covenants, in interpreting *Charter* rights. The court found that international thoughts on human rights, dignity and worker autonomy were persuasive tools in interpreting the *Charter*.

Avvy Yao-Yao Go spoke about the duty to give reasons in administrative law decision-making. The duty to give reasons comes out of *Baker v. Canada (Minister of Citizenship and Immigration)* 1999 CanLII 699 (S.C.C.) and is especially true where there is a statutory right of appeal or the decision at stake is very important in the life of the claimant. The duty to give reasons makes decision-making better and provides an explanation to the claimant. In *R v Teskey* 2007 SCC 25 (CanLII), the court found that if reasons come after the decision is made, that the reputation of neutrality and impartiality is put at risk. It is important that both objectively and subjectively the reasons are not seen to be crafted after the decision. It was suggested that there are three practical principles that come out of *Baker* and the duty to give reasons: don’t rush with an answer; let the reasons drive the decision, not the other way around; and deliver timely decisions with reasons.

Hart Schwartz spoke about the jurisdiction of tribunals to deal with human rights and *Charter* issues. In *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 (CanLII), it was made clear that any tribunal that can decide questions of law can decide the supreme law. Jurisdiction is easiest to determine if the legislation specifically says that *Charter* issues can be decided. If the Act says that some questions of law can be decided, then presumptively the tribunal can also decide *Charter* questions, unless it is implied otherwise. In response, some statutes began taking back jurisdiction by actually stating in the legislation that the tribunal cannot decide constitutional questions or by setting the standard of review. In response to this stripping of *Charter* jurisdiction, in a recent Supreme Court decision, it was held that if the constituent legislation only stated that *Charter* issues could not be decided, the *Human Rights Code* could still be applied by the tribunal. As the *Code* is quasi-constitutional, it trumps other legislation.