

# Impartiality, the Charter and Administrative Proceedings

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SOAR/COBA

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# Impartiality and Charter Cases

## Institutional Bias Cases

- Overlapping functions – *Xanthoudakis*
- Public Officers Act – *Jogendra*
- Role of ILC and deliberative secrecy – *Rudinskas, Summitt*

## Charter

- *Doré*
- *Rowan*

# Impartiality - institutional

- Decision-maker has overlapping functions in a case
- Tribunal employs staff giving rise to bias concerns
- Party's institutional role may bias outcome
- Tribunal or its members may be thought to have a financial interest in outcome
- Tribunal engages in improper internal consultations (Regimbald, p. 360)
- Test: does the institutional structure given rise to a RAB in the mind of a well-informed person “in a substantial number of cases” (*Regie*, para. 44)

# *Xanthoudakis, Ont 2011*

- *Xanthoudakis v. Ontario Securities Commission*, 2011 ONSC 4685 (CanLII)
- OSC hearing re Securities Act violations by persons involved in Norshield investment scheme
- Chair of OSC interviewed on television during the course of the hearing

# *Xanthoudakis – Chair Stated:*

- “The OSC wants to allow people to do business. So we clear prospectus[es] so people can pursue earning a living by managing other people's money in the capital markets, and 99% of the time they're good people that aren't fraudulent people. Norshield was run by people who were not honest. That's what happened in Norshield. “

# *Xanthoudakis*

- Appellants sought stay – institutional bias (“corporate taint.”) – No RAB
- no suggestion of bias in the actions or statements of the 3 Commissioners who conducted the hearing
- No communication by Chair with the members of the panel concerning the investigation, the hearing, or the specific proceeding."

# OSC

- OSC an "integrated" agency, with overlapping investigative and adjudicative functions under its statute.
- The Chair's mandate included acting as the Commission's spokesperson on matters that may affect capital markets.
- Chair was acting within his statutory authority, although the comment was "inappropriate"

# *Xanthoudakis* – No RAB

- “We find that a reasonable person, informed of the facts would recognize the separation of the Chair from the adjudicative function, and would not conclude that, as a result of the comments made by the Chair, the OSC had pre-judged the conduct of the appellants and that they did not and would not receive an impartial hearing.”



# *Jogendra v. HRTO*

- *Jogendra v. Human Rights Tribunal of Ontario*, 2011 ONSC 3307; aff'd 2012 ONCA 71; SCC leave denied
- Former part-time Justice of the Peace
- April, 1999, charged with sexual assault counts re 10 women - contact with him in his capacity as a Justice of the Peace

# *Jogendra*

- Complaint to Justice of the Peace Review Council
- Does not dispute complaints, retires, charges withdrawn by Crown (2003)

# *Jogendra v. HRTO*

- 2008 – discrimination complaint (ancestry, colour, ethnic origin) against AG and others – failure to advance to full time JP status
- 2008 – discrimination complaint vs. AG – failure to reimburse legal fees (same grounds)
- 2009 – Dismissed by HRTO Vice Chair Muir– reconsideration denied

# *Jogendra v. HRTO*

- Mr. Jogendra then applied to HRTO claiming discrimination by both Vice-Chair Muir and the HRTO as a whole (in relation to the previous adjudicative decision)
- Application under *Public Officers Act* – for appointment of a “disinterested” decision-maker (“Procedure when public officer interested in question before him’)

# *Public Officers Act, s. 16*

**Where by any ...Act any person or the occupant for the time being of any office is empowered to do or perform any act...and such person ...is disqualified by interest from acting and no other person is by law empowered to do or perform such act...then he or she or any interested person may apply, upon summary motion, to a judge of the Superior Court of Justice, who may appoint some disinterested person to do or perform the act, matter or thing in question.**

# General Guidance

- Two step approach.
- *If* disqualification occurs “*then*” an application “upon summary motion” can be made to a judge
- Tribunal or court should determine impartiality issues before a s. 16 application made

# Importance of Evidence

- Evidence included Tribunal's "Mandate, Mission & Core Values", a description of its hiring process, job descriptions for its members, the list of its forty one full and part-time members, biographies for its full time members, the Tribunal's Code of Conduct, Policy on Public Complaints and Rules of Procedure.

# Was Tribunal Disqualified? No

- 41 members
- A bare allegation of misconduct against a Tribunal does not disqualify all of its members from acting. There must be an evidentiary foundation
- Caution against disqualification for strategic reasons



# *Summitt Energy - OEB*

- *Summitt Energy Management Inc. v. Ontario Energy Board* 2012 ONSC 2753
- OEB found Summitt breached OEB act
- New ground on appeal – RAB
- Sought summons to examine both a panel member and the panel's outside independent legal counsel (Stikeman Elliot)

# Summitt Energy – RAB Question

- Q: reasonable apprehension of bias by reason of Stikemans acting as counsel to the OEB where Stikemans in conflict of interest due to: (a) its representation of Summitt's competitors; and (b) its having access to confidential information relevant to Summitt's due diligence defence arising from its OEA membership?

# Summitt Energy

- Summons quashed (relevance)
- Strong defense of deliberative secrecy
- Deliberative secrecy extends to independent counsel unless there is good reason and a factual foundation to believe that counsel transgressed fairness and natural justice: *Rudinskas*.

# OEB Act, s. 10

- “10. Members of the Board and employees of the Board are not required to give testimony in any civil proceeding with regard to information obtained in the discharge of their official duties”
- “testimonial immunity” provision of s. 10 OEB Act did not apply to outside counsel (not an employee), but privilege

# *Rudinskas v. CPSO*

- 2011 ONSC 4819
- RAB challenge - role of independent legal counsel in giving advice to the Discipline Committee, and role in assisting in drafting reasons for decision
- Can give advice on “ultimate issue” if Cttee is free to accept or reject
- Not one-sided; inevitable that ILC will take a position in favour of one side on issues

# *Rudinskas* – Drafting Reasons

- both proper and desirable for the Committee to seek the advice of its counsel as to the ways in which it might improve the quality of the reasons that it has drafted so as to more effectively explain its decision provided of course, that there was no interference with the Committee's ultimate responsibility for the authorship of its reasons.

# *Rudinskas* – No production of file

- Appellant sought adverse inference on grounds of ILC's refusal to give details of drafting advice
- Deliberative secrecy
- Involvement of ILC does not put the propriety of decision in doubt – no production of file required

# Charter and Administrative Decisions

- *Doré v. Barreau du Québec*, 2012 SCC 12
- Constitutionality of AMPs – *Rowan v. Ontario Securities Commission* (2012 ONCA 208)



# *Doré v. Barreau du Québec*

- “D wrote a private letter to the judge calling him loathsome, arrogant and fundamentally unjust, accusing him of hiding behind his status like a coward, of having a chronic inability to master any social skills, of being pedantic, aggressive and petty, and of having a propensity to use his court to launch ugly, vulgar and mean personal attacks.”

# *Doré v. Barreau du Québec*

- Disciplinary Council found that the letter was likely to offend, rude and insulting, that the statements had little expressive value, and that the judge's conduct, which resulted in a reprimand from the Canadian Judicial Council, could not be relied on as justification for it.
- 21 day suspension and reprimand

# *Doré v. Barreau du Québec*

- The Council rejected D's argument that provision of *Code of Ethics of Advocates* violated Charter s. 2(b), finding that the limitation on freedom of expression was reasonable.
- CA upheld the reprimand – full *Oakes* analysis – rational connection, proportional

# *Doré v. Barreau du Québec*

- SCC: how to protect Charter guarantees and values in the context of adjudicated administrative decisions?
- Discretionary decision within jurisdiction—SOR reasonableness?
- Q: Does Charter issue call for replacement of SOR admin law framework with the *Oakes* test (“reasonable limit” under *Charter* s. 1?)

# *Doré v. Barreau du Québec*

- “an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? (para. 4)

# *Doré v. Barreau du Québec*

- reasonableness analysis contextual.
- Charter context - reasonableness analysis centres on proportionality, ensuring that the decision interferes with the relevant Charter guarantee no more than is necessary given the statutory objective

# *Doré v. Barreau du Québec*

- DM – how Charter value at issue will best be protected in view of statutory objectives
- JR – whether, in assessing the impact of the relevant Charter protection, and given nature of decision, statutory and factual contexts, the decision reflects a proportionate balancing of Charter protections at play

# *Doré v. Barreau du Québec*

- When a tribunal is determining the constitutionality of a law, the standard of review is correctness (Doré, para. 43)
- Admin body exercising a discretionary power under home statute, has, b/c expertise and specialization, particular familiarity with the competing considerations at play in weighing Charter values. (para. 47)



# Rowan – AMPs

- *Rowan v. Ontario Securities Commission*, 2012 ONCA 208
- Constitutionality of OSA s. 127(1)(9)
- administrative monetary penalties (AMPs)
- maximum penalty of \$1 million, can be imposed for each transaction in a single course of infractions

# Rowan - AMPs

- Argument - the potential size of an AMP is so large that it amounts to a penal sanction, and a party who is subject to such a penalty is a person “charged with an offence” within the meaning of the Charter, s. 11(d).
- Individual AMPs here - \$520,000 was highest

# Rowan - AMPs

- power of an administrative tribunal to impose substantial monetary penalties is to be assessed on the basis of the penalty imposed rather than on penalties that are theoretically possible. (para. 46)
- legislation conferring an imprecise discretion must be interpreted as not allowing Charter rights to be infringed

## *Rowan para. 49*

- “Penalties of up to \$1 million per infraction are, in my view, entirely in keeping with the Commission’s mandate to regulate the capital markets where enormous sums of money are involved and where substantial penalties are necessary to remove economic incentives for non-compliance with market rules.”

# Impact on Tribunals

- Rules – Constitutional Questions
- Environmental Review Tribunal, Rules 73-83
- HRTO Rule 4
- Clarity and guidance to parties before tribunal; CJA s. 109 requires notice

# Issues for Tribunals

- Role of interveners (*Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (CanLII))
- Evidence – more formal approach ?
- Written submissions
- Effect on scheduling, timelines

# Thank You

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