MIDDLE PLENARY

Administrative Law Blast

Moderator: Jerry DeMarco, Environmental Review Tribunal

Speakers: Jeff Cowan, Weir Foulds LLP

Freya Kristjanson, Cavalluzzo, Hayes, Shilton, McIntyre & Cornish LLP

Leslie McIntosh, Ministry of the Attorney General

Terrence O'Sullivan, Lax O'Sullivan Scott

Jeff Cowan: Recent Cases from the Supreme Court

R. v. Conway [2010] 1 S.C.R. 765

- Mental health detainee alleged that *Charter* rights were breached, and sought absolute discharge, or access to psychotherapy and move away from location adjacent to construction site as remedies before Ontario Review Board. Absolute discharge available where no "significant threat" to public safety (ORB had found to the contrary).
- ORB found it had no *Charter* jurisdiction to grant an absolute discharge
- Court of Appeal for Ontario agreed, but found it was unreasonable for the ORB not to address treatment issues of Conway's continued detention.
- SCC: dismissed the appeal
    - Restates and consolidates *Mills* based s.24(1) test of jurisdiction over the person, the subject matter, and remedy sought, as evolved through *Slaight* (exercise of statutory discretion is subject to *Charter* and its values) and the *Douglas College*, *Cuddy Chicks Ltd.*, *Tétrault Gadoury s.52(1)* trilogy (tribunals with expertise and authority to decide questions of law are best positioned to determine initially the constitutionality of their statutory provision).
    - Now, with rare exceptions, tribunals with authority to apply the law have *Charter* s.24(1) jurisdiction on issues that are within the proper exercise of their functions.
- Result is consistent with tribunal accessibility and avoidance of bifurcation in decision making on constitutional questions the essential factual character of which falls within the tribunal's specialized jurisdiction.
- Rather than requiring litigants to test, remedy by remedy, whether tribunal is a court of competent jurisdiction, the initial inquiry is whether it has express or implied jurisdiction to decide questions of law. If it does, and there is no clear legislative intent to withdraw *Charter* jurisdiction, then it is a s.24 (1) court of competent jurisdiction.
- The remaining issue is whether the remedy is one legislatively intended to fit within the statutory mandate, structure, and functions of the tribunal.
- Same wine in a new bottle? Or is there a genie within with new powers, just waiting to be called forth? Public safety mandate, factual findings and express statutory provisions in this case lead to conclusion that time will tell, as litigants and courts determine what

Charter remedies are consistent or compatible with statutory remedial jurisdiction of the tribunal, and specifically its legislative intent.

R. v. 97464 9[2001] 3 S.C.R. 575 (Dunedin)

- Provincial offences court's quasi-criminal Court role favoured expansive remedial jurisdiction to award costs for *Charter* breaches where legislation disclosed no contrary intention and gave the court functions that attracted *Charter* issues and remedies.

Blencoe v. B.C. [2000] 2 S.C.R. 307

- Although *Charter* applied generally to B.C. Human Rights Commission, *Askov Charter* analysis and remedy rejected where common law fairness analysis did not warrant a stay for delay as it did not offend the community's sense of decency and fairness. Only exceptional cases where the state interferes with a right to make decisions that affect a person's fundamental being engage a *Charter* s.7 analysis, since dignity, reputation or freedom from stigma are not free standing rights. Query: does *Conway* change this?
- Although *Dunsmuir* merged three standards of review into two for ease of threshold analysis, the debate continues, particularly as to the application of the reasonableness standard. Will *Conway's* progeny continue to engage a similar fact-based uncertainty on *Charter* remedies?

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43
The Role of Tribunals in Aboriginal Consultation

- The duty of a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal.
- SCC rejects the argument that a tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has taken place and, if not, to itself fulfill the requirement regardless of whether its constituent statute so provides. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law.
- The tribunal seeking to engage in consultation itself must possess remedial powers necessary to do what it is asked to do in connection with the consultation. The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent.

Ontario (Public Safety and Security) v. Criminal Lawyers Association [2010] 1 S.C.R. 815

- Omission of s.14 (law enforcement) and s.19 (solicitor-client privilege) exemptions from s.23 (public interest override) in F.I.P.P.A. did not violate *Charter* s. 2(b) (freedom of expression).
- Trial judge ordered murder trial stay based on state misconduct. OPP investigation exonerated police of misconduct without reasons. Lengthy report and legal advice relating to same not disclosed. IPC and Divisional Court agree. Court of Appeal determined exemption scheme violated *Charter*.
- SCC reverses. Criminal Lawyers Association did not demonstrate that meaningful public discussion of investigation and prosecution cannot take place within the exemption scheme, let alone address the recognized derogation from *Charter* protection of privilege

and proper government function. Sections 14 and 19 also incorporate considerations of the public interest.

Freya Kristjanson: Hot-Tubbing with Experts and Other Procedural Tools

Hot-Tubbing with Experts

- Hot-Tubbing with experts allows two or more experts for different parties to give concurrent evidence.
    - Allows for a structured discussion as opposed to the subsequent integration of expert testimony, which may often be separated by lengthy periods of time.
- Used in both courts and administrative proceedings in Australia.
- Federal Courts Rules amended in August 2010 to include rules governing the presentation of concurrent expert evidence also known as 'hot-tubbing.'
- Pros:
    - Addresses concerns with respect to independence of experts, costs and length of hearings.
    - Experts confer in advance of hearing and testify as a panel –give own views, comment on testimony of other experts; counsel cross-examine, judge/tribunal members pose questions.
    - Provides the opportunity to structure the evidence in different ways.
    - Decision-makers who had heard concurrent evidence noted that they felt it enhanced the decision-making process and found it easier to come to a decision.
- Concerns raised by the profession:
    - Costs of requiring pre-hearing conferences
    - Concessions made by experts
    - Will personality of expert dominate?
    - Effect on non-professional experts
    - Should leave be required for questions *inter se*?
    - Generally, lawyers are hesitant about using 'hot-tubbing' because it forces them to give up a degree of control in the proceedings.

Proportionality and Procedural Flexibility

- Ontario Civil Rules –Osborne Report –January, 2010 (section 1.04(1.1))

    "In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding."

- *Public Inquiries Act* (unproclaimed) (2009, c.33, Sched.6, s.5)

    5. A commission shall,

    (b) ensure that its public inquiry is conducted effectively, expeditiously, and in accordance with the principle of proportionality

- It is still unclear how exactly proportionality will play out and what it will mean for the administrative justice realm. It may be that you get more time based on the importance of the issue.
- What are the implications for administrative proceedings?
    - The procedure/process must be flexible in relation to the proportionality of the issue. Ultimately, the goal is to find ways to make the process proportionate and cost effective with respect to the importance of the issues at stake.
    - The creation of efficient and contextual rules, which determine the procedural fairness required in a certain case.
    - Examples:
        - Strict time limits.
        - Limited hearing time.
        - Limited disclosure.
        - Limited witnesses.
- Additional tools of procedural flexibility:
    - Use of investigative summaries, filing evidence with opportunity to challenge
    - Filing detailed chronologies
    - Expert panels (facts and policy) (SPPA s. 15.2)
    - Commissioning and circulating background research/consultation papers
    - Hearings –circulate detailed issues list to parties in advance, revise on a going-forward basis
    -

Leslie McIntosh: Administrative Law – The 2010 Year in Review

Ms. McIntosh provided a comprehensive, but whirlwind review of the 2010 leading precedents on the following administrative law topics: standard of review, justiciability, judicial review procedure, enforcement of tribunal orders, minister's power to control statutory agency, tribunal authority, appointment of tribunal members, tribunal procedure, bias, lawsuits concerning exercises of statutory powers, licensing. Highlights include:

Standard of Review

- Although *Dunsmuir* collapsed three standards into two, outlined the "standard of review analysis" and provided a definition of reasonableness, there are still questions to be answered.
- Reasonableness:
    - Reasons must be transparent and supportive of the outcome (fall within a range of reasonable outcomes).
    - Does this include different degrees of reasonableness?
        - *Mills* – Court of Appeal states that there is one standard of reasonableness, but that it may be contextual.
    - *Shaw v Phipps* 2010 ONSC 3884 (Div.Ct.) further develops this line of case law:

- although formerly the standard of review for the Human Rights Code was patent unreasonableness, in light of *Dunsmuir* the standard of review was stated to be reasonableness.

Justiciability

Beauchamp v. Canada (Attorney General)
2009 FC 350

- Governor-in-Council's ongoing failure to proclaim statutory amendments into law is not subject to judicial review

Babineau v. Ontario (Lieutenant Governor)
[2009] O.J. No. 4230 (Div. Ct.)

- Lieutenant Governor's granting of royal assent to a Bill is not subject to judicial review

Mavi v. Canada (Attorney General) (2009), 98 O.R. (3d) 1 (C.A.), appeal to be heard December 9, 2010

- Does the government owe an administrative law duty of procedural fairness when enforcing its contractual rights? – sponsorship undertakings given to sponsor family class immigrants
- Ontario adopted a policy enforcing sponsorship agreements when the sponsored citizen goes onto social assistance. Asks whether a discretion is involved and if so, does that discretion attract procedural rights? Ontario is arguing that the sponsorship arrangement is a purely private and contractual arrangement between Ontario and the citizen, and thus it doesn't attract any procedural rights.

Bot Construction Ltd. v. Ontario (Ministry of Transportation) (2009), 99 O.R. (3d) 104 (Div. Ct.), appeal allowed 2009 ONCA 879

- Is a government procurement decision subject to judicial review?
- Divisional Court suggested that government procurement should be subject to judicial review.
- (Ms. McIntosh disagrees on the basis that there are contractual remedies available, thus it should not be subject to judicial review)

Civil Liability for Exercise of Statutory Power

- Should private law principles be imposed on public law transactions?

  TeleZone Inc. v. Canada (Attorney General) (2008), 94 O.R. (3d) 19 (C.A.), appeal to SCC heard
    - 6 appeals to SCC under reserve
    - Issue involved a determination whether plaintiffs can sue the Federal Crown, without first applying to the Federal Court for judicial review of the legality of the exercise of statutory power.

  Ontario v. Gratton-Masuy Environmental Technologies Inc. (c.o.b. EcoFlo Ontario)
  2010 ONCA 501
    - This case involved a direct suit against the Tribunal and its members for damages flowing from a decision. Ultimately, it was struck out on the basis that

the Tribunal is not a legal entity and the members of the Tribunal are immune from such suits, unless malice is shown.

- Building Materials Evaluation Commission does not have the legal capacity to be sued – remedies of declaration & injunction cannot be obtained by way of action against a 'non-suable' entity– judicial review is an adequate alternative remedy
- Tort of misfeasance in public office – claim against individual members of Commission struck for failure to plead particulars of malice.

Terrence O'Sullivan: What are the Key Requirements of Acceptable Written Decisions?

Decisions supported with well crafted reasons will provide a security blanket when faced with judicial review.

Clifford v. Ontario Municipal Employees Retirement System 2009 ONCA 670
(This case already has a substantial following outside of Ontario.)

Clifford: decision of the Tribunal

- Issue: Pension entitlement under OMERS legislation
- Facts: Divorced wife, designated beneficiary under deceased's OMERS plan, versus alleged common-law spouse who would be successful if she proved that the relationship was subsisting at the time of death.
- Decision: Tribunal found that a common law relationship existed and that it was in place at the time of death. Ultimately, found in favour of the common-law spouse.

Clifford: Divisional Court

- The Tribunal failed to give adequate reasons. Decision quashed.

Clifford: Court of Appeal

- Issue: Were the reasons of the administrative tribunal (composed entirely of non-lawyers) sufficient, or should the matter be sent back for re-hearing?
- When are reasons required?
  - When the duty of procedural fairness requires them. The *Baker* factors guide the analysis:
    - The nature of the decision being made and the process followed by making it.
    - Nature of the statutory scheme and the terms of the statute pursuant to which the tribunal operates.
    - Importance of the decision to the individual or individuals affected.
    - Legitimate expectations of the person challenging the decision.
    - The choices of procedure made by the agency itself.
- What purposes are the reasons intended to serve?
  - The reasons must allow the parties and a reviewing court to understand, in a fair and transparent manner, what the decision is and why it was made.

- On a judicial review or appeal, what is the standard of review for adequacy of the reasons?
    - The test as to whether a tribunal has complied with the duty of procedural fairness is one of **correctness**.
    - With regard to the sufficiency of the reasons, the court asks: did the reasons meet the tribunal's legal obligation.
- How to determine if the reasons are sufficient to meet the tribunal's legal obligations:
    - "The basis of the decision must be explained and this explanation must be logically linked to the decision made."
        - Flexible assessment, alive to the day-to-day realities of administrative agencies (*Baker* 1999 SCC)
        - Functional assessment, are the reasons sufficient to fulfill the purpose required of them? (*REM* 2008 SCC)
- Goudge J.A. the reasons were sufficient:
    - The Tribunal identified the live issues in the case.
    - The Tribunal 'grappled' with the live issues.
    - The Tribunal provided answers to the live issues raised.

Lessons from Clifford

- Sufficient reasons require:
    - Identification of the issues before the tribunal.
    - Identification of the relevant legal principles.
    - The key issues at play.
    - The evidence relied upon in coming to the decision.
    - The decision.
- Where there is contradictory evidence:
    - Refer to the contradictory evidence on key issues (though not necessarily all of it).
    - Address why the tribunal/decision-maker resolved the evidence in the way that it did.
    - Reviewing courts will recognize that findings of credibility may be difficult to articulate.
- Other considerations:
    - Avoid:
        - Generic findings: a finding that could apply equally to any other case involving any other allegation against any other person.
        - Conclusory statements: these are the opposite of transparent, they are frustratingly opaque.
- What is <u>not</u> required:
    - Perfection: "if the language used falls short of legal perfection in speaking to a straightforward issue that the tribunal can be assumed to be familiar with, this will not render the reasons insufficient."

- Volume: “Reasons need not refer to every piece of evidence to be sufficient, but must simply provide an adequate explanation of the basis upon which the decision was reached.”