Plenary A – Administrative Law Blast 2012: Rowing Upstream

Moderator: **Janice Vauthier,** Health Professions and Health Services Appeal and Review Boards
Speakers: **David Jacobs**, Watson Jacobs McCreary LLP
Freya Kristjanson, Cavalluzzo Hayes Shilton McIntyre & Cornish LLP
Margaret Leighton, Social Justice Tribunals Ontario

Freya Kristjanson

Impartiality, the Charter and Administrative Proceedings

Ms. Kristjanson began the plenary with a discussion of the topic of impartiality, the *Charter* and administrative proceedings.

She noted that there are five specific situations where the relationship between the decision maker and the particular facts of the case may automatically give rise to a reasonable apprehension of bias.

- decision makers often have overlapping functions in a given case;
- the tribunal employs staff giving rise to bias concerns;
- a party's institutional role may bias outcome;
- the tribunal or its members may be thought to have a financial interest in the outcome; and
- the tribunal engages in improper internal consultations (Guy Regimbald in *Canadian Administrative Law*).

In those cases, the conduct may be deemed to be at least problematic even if the decision maker maintains his impartiality. The test is whether the institutional structure gives rise to reasonable apprehension of bias in the mind of a well-informed person in a substantial number of cases. (*Regie*, para 44)

She discussed four cases relating to the concept of institutional bias: *Xanthoudakis, Jogendra, Rudinskas* and *Summit.* She then went on to discuss two *Charter* cases which dealt with the issue of bias; *Doré v Barreau du Quebec* and *Rowan v Ontario Securities Commission*.

Xanthoudakis v Ontario Securities Commission, 2011 ONSC 4685 (CanLII) related to Securities Act violations by persons involved in the Norshield investment scheme. The Chair of the OSC was interviewed on television during the course of the hearing and made a statement indicating that while 99% of the time the cases before the OSC did not involve fraud, in this particular case the people involved were fraudulent. The appellants sought a stay of proceedings on the ground of institutional bias (the concept of "corporate taint"). The Ontario Divisional Court held that there was no reasonable apprehension of bias present. There was no suggestion of bias in the actions or statements of the Commissioners hearing the matter nor was there any communication between the Panel and Chair concerning the proceeding. The court recognized that while the OSC is an integrated agency with overlapping functions, it was part of the Chair's mandate to act as a spokesperson for the organization and he did so, although his comment was inappropriate. It was determined that a reasonable person would be able to distinguish between the Chair's actions and the adjudicative function of the Panel and would not conclude that the appellants would not be able to receive a fair hearing.

Jogendra v Human Rights Tribunal of Ontario, 2011 ONSC 3307; affirmed 2012 ONCA 71; denied leave by the SCC, concerned a former part-time Justice of the Peace who was charged with ten counts of sexual assault on women he met in his professional capacity. A complaint was made against him to the Justice of the Peace Review Council. He did not dispute the complaint but instead retired and the charges were withdrawn by the Crown. Years later the former Justice of the Peace made human rights complaints against the Attorney General and others arguing that the failure to raise him to full Justice of the Peace status and to pay his legal fees amounted to discrimination on the ground of race. His complaints before the Human Rights Tribunal were dismissed and reconsideration was denied. Mr. Jogendra then applied to the HRTO claiming discrimination by the Vice-Chair who previously heard his case and the HRTO as a whole and as such, he made an application under the *Public Officers Act* to have his matter heard before the Superior Court. The Court held that where an application is made under s. 16 of the *Public Officers Act*, a two-step approach is warranted. *If* disqualification is found to be warranted, *then* an application upon summary motion can be made to a judge. A tribunal or court should determine whether any impartiality issues exist prior to a s. 16 application being made. The Court did not find that the HRTO should be disqualified in this case as a bare allegation of misconduct against a tribunal did not disqualify all of its members from acting. There had to be an evidentiary foundation.

In *Summitt Energy Management Inc. v Ontario Energy Board* 2012 ONSC 2753, the Ontario Energy Board (OEB) found that Summitt breached the *OEB Act*. Its decision was appealed and on appeal, Summitt wanted to raise a bias argument based on the involvement of outside counsel who acted as independent legal counsel to the Panel. The outside counsel was employed at a firm which represented the appellant's competitors. The applicant wanted to summons a Panel member, a member of the agency itself, and the counsel in question. The summons was quashed by the Ontario Divisional Court who accepted the defence of deliberative secrecy. The Court held that the defence of deliberative secrecy could extend to independent counsel unless there was good reason and a factual foundation to believe that counsel transgressed fairness and natural justice. Furthermore, the testimonial immunity provision of s. 10 of the *OEB Act* precluded any members and/or employees of the OEB from testifying in any civil proceeding in relation to information obtained in the discharge of their duties. This protection was found to also extend to the outside counsel in the form of privilege.

Rudinskas v College of Physicians and Surgeons of Ontario 2011 ONSC 4819 was concerned with the role of independent legal advice in the drafting of decisions. Independent legal counsel was retained to advise the Discipline Committee and assist in the drafting of reasons for a decision. The Court stated that there is no reasonable apprehension of bias as independent legal counsel can give advice on ultimate issues and the tribunal is free to accept or reject the advice as it sees fit. The Court found that it is both proper and desirable for an agency to seek the advice of its counsel so as to improve the quality of its reasons, as long as counsel poses as no interference with the agency's ultimate responsibility for authorship of those reasons. The issue of one-sidedness of counsel's advice is not concerning as, in evidentiary issues; there is often only one right answer anyway. Under the circumstances, it was reasonable for counsel to advocate for one position. The appellant sought an adverse inference on the grounds of counsel's refusal to provide details with respect to its assistance on the reasons drafted by the committee. The Court accepted the defense of deliberative secrecy and found that the mere involvement of independent legal counsel does not automatically put the propriety of the decision in doubt.

In *Doré v Barreau du Québec,* 2012 SCC 12, the plaintiff, a lawyer, wrote a private letter to a judge accusing him of using the court to launch "ugly, vulgar and mean personal attacks". The Disciplinary Council of the Barreau du Québec found that the letter was likely to offend and was a breach of the lawyers' code of conduct. Doré was suspended for 21 days and reprimanded. He then argued that the manner in which the code of conduct was applied to him was unconstitutional as his comments were protected speech under s. 2(b) of the *Charter*. The Council rejected this argument and he appealed the

matter to the Court of Appeal. The Court of Appeal upheld the reprimand. The plaintiff further appealed to the Supreme Court of Canada. The Supreme Court looked at how to protect *Charte*r guarantees and values in the context of adjudicated administrative decisions. Normally, the exercise of discretion of an administrative agency is subject to analysis on the standard of review of reasonableness. The issue, then, was whether the *Charter* issue calls for the replacement of the standard of review in the administrative law framework with the reasonable limit element of the *Oakes* test under s. 1. The Court found that the reasonableness analysis is contextual and centers on proportionality to ensure that the impugned decision interferes with the relevant Charter guarantee no more than is necessary given the statutory objective. The court further found that when a tribunal is determining the constitutionality of a law, the standard of review is correctness.

Rowan v Ontario Securities Commission (2012 ONCA 208) examined the constitutionality of section 127(1)(9) of the *Ontario Securities Act* which imposes an administrative monetary penalty for infractions up to a maximum of $1 million for each transaction. The argument before the court was that the potential size of the penalty is so large that it can amount to a penal sanction at which point the individual would essentially be charged with an offence within the meaning of s. 11(d) of the *Charter*. The penalties in the case before the court were, at the highest, $520,000. The court held that the 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. Further, where legislation confers an imprecise discretion, that legislation must be interpreted as not allowing Charter rights to be infringed. The penalties were found to be in keeping with the Commission's mandate to regulate capital markets where such sums of money are routinely involved.

Margaret Leighton

<u>Forward from Figliola: Concurrent Jurisdiction and the Human Rights Code</u>
Ms. Leighton began with a review of *Tranchemontagne v Ontario (Director, Disability Support Program)* which stated that absent legislative intent to the contrary, a body which can decide questions of law has an obligation to consider and apply human rights legislation. Ms. Leighton also reviewed s. 45.1 of the *Human Rights Code* which states that the Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application. A similar provision existed in the British Columbia Human Rights Code and both provisions require the Tribunal to engage in a two-step analysis. First, it must determine whether or not there was a proceeding and second, it must determine whether the substance of the application was appropriately dealt with.

In *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, the complainants challenged the Board's chronic pain provisions as being discriminatory. The Board rejected their arguments and the complainants did not seek judicial review. Instead, the claimants filed an application before the British Columbia Human Rights Tribunal. The Tribunal refused the Board's request to dismiss the complaints and the Board then sought judicial review of the Tribunal's decision. The Court ruled that the Tribunal should dismiss the complaints as the issues were conclusively determined in the earlier proceeding. The BCHRT dismissed the complaint. The complainants attempted to judicially review the Tribunal's decision but were unsuccessful as the action was barred due to the operation of *res judicata.* The matter then proceeded before the British Columbia Court of Appeal which ruled that it was required to make a determination as to whether the other proceeding substantively addressed the issues from the perspective of the Tribunal, informed by the policy considerations within its specialized knowledge in administering the Code. The Court concluded that the legislature contemplated subsequent adjudication by the BCHRT.

This matter was appealed to the Supreme Court of Canada. The SCC held that if the parties had a chance to take the matter to another forum to get a decision, another administrative agency cannot then deal with the matter a second time. In order to respect vertical lines of review and to prevent lateral "adjudicative poaching", it is important to observe this rule to maintain respect for the finality of a decision and to increase fairness and the integrity of the courts" and administration of justice. As such, finality is key. The Court further found that the method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature and that parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision.

Ms. Leighton then discussed the two HRTO decisions that came out after the SCC issued *Figliola*: *Gomez v Sobeys* 2011 HRTO 2297 and *Paterno v Salvation Army* 2011 HRTO 2298. *Gomez v Sobeys* 2011 HRTO 2297 was an application under s.34 of the *Human Rights Code.* The applicant was injured in the workplace. After several unsuccessful attempts to place him in accommodated work, the respondent employer concluded that it could not accommodate the applicant without undue hardship and terminated his employment. The applicant's union grieved his termination arguing that the employer's termination of the applicant's employment violated the *Code*. The collective agreement provided for arbitration. After six days of hearings which included arguments on the Code, the arbitrator dismissed the grievance.

The Tribunal held that SCC reasoning in *Figliola* applied equally to s. 45.1 and pursuant to Figliola it was not open to it to consider the procedural or substantive correctness of another proceeding under s. 45.1. Ms. Leighton noted that while s. 45.1's placement in the statute and legislative history were not identical to the situation in *Figliola*, these were not the primary factors in the Court's reasoning, which focused on the wording of the provision and the policy goals of avoiding re-litigation of matters decided in another forum. Applying the test from *Figliola*, the Tribunal held that there was no question that issues raised in this application were dealt with in the arbitration. The arbitrator had found that the respondent acted in a manner consistent with the *Code* and it was not for the Tribunal to evaluate the substance of that decision. Under the *Figliola* principles, it was not for this Tribunal to consider whether the arbitrator was correct to go beyond the grievance, applied a proper Code analysis, or whether the grievor/applicant should have or did have notice of the March conference call. The place to raise these issues would have been a judicial review.

Paterno v Salvation Army 2011 HRTO 2298 was an application under s.45.1 of the *Human Rights Code*. The applicant was disciplined and then dismissed from employment for misconduct. He filed a grievance under the collective agreement alleging discipline and termination without just cause. He also complained about discrimination but did not want the arbitrator to consider his discrimination claims. The employer asked the arbitrator to rule on whether the discipline and dismissal were discriminatory. The arbitrator found that there was just cause for discipline and no violation of the *Code*. The applicant asserted that he had a right to choose the form in which human rights issues should be raised and that he could pursue a just cause argument at arbitration and then a separate *Code* argument at the Tribunal.

The Tribunal held that previous jurisprudence that suggested that the Tribunal should consider whether the other proceeding applied proper human rights principles was no longer applicable in light of *Figliola*. The arbitrator's decision finding just cause for discipline implicitly incorporated a legal finding that the discipline was not tainted by a violation of the *Code*. The Tribunal did not agree with the applicant that the prohibition on re-litigation in s.45.1 of the *Code* applied only when it was the applicant, not the respondent, who had raised *Code* issues in another proceeding. Although the arbitrator did not specifically mention the ground of sex or reprisal it was evident that he had ruled on whether the

discipline was consistent with the *Code*. Moreover, the applicant's allegations of reprisal and sex discrimination were foreclosed by the finding of just cause for discipline.

Ms. Leighton then discussed what is considered a proceeding for the purposes of s.45.1. Proceedings before the Ontario Labour Relation Board adjudicating the *Employment Standards Act*, proceedings before the Board of Referees and Umpire adjudicating the *Employment Insurance Acts* and grievance procedures are examples of proceedings for the purposes of s.45.1. However, internal employer investigation without formal guarantees of procedural fairness, impartiality and independence are not considered a proceeding. She noted that in pre-*Figliola* decisions, the HRTO had found that front line decisions of the WSIB not dealing with the substance of the application in question were not considered as proceedings and *Whitwell v. U.S. Steel Canada,* 2012 HRTO 240 would determine whether they would be regarded as proceedings post-*Figliola*. Similarly the state of law as to whether complaints and investigations under the *Police Services Act* are proceedings post-*Figliola* will be determined in *Claybourne* 2011 HRTO 1904*.*

CUPE v Lakeridge Health Corporation, 2012 ONSC 2051 was an application by the union for judicial review of two decisions of the Pay Equity Hearings Tribunal dealing with compensation adjustments for wage grids of female job classes. In both cases, the Tribunal refused a union application to eliminate different rates of progression through the different wage grids of comparable male and female job classes, holding that the *Pay Equity Act* did not require the harmonization of wage grids. The Tribunal also rejected an argument that the interpretation it adopted was contrary to the *Code*.

The Tribunal dismissed the application, finding pay equity had been achieved for Lakeridge's employees when the top job rates in the job classes were equalized. The union applied for review of the Tribunal's decision. Before this application was heard, the Tribunal released a decision in another matter in which it concluded once again that pay equity did not require the elimination of all differences between the job grids of male and female job classes. It stated this difference did not contravene the Human Rights Code. The union subsequently sought review of this decision as well.

The PEHT held that the grids were not consistent with the *PEA* scheme and were not contrary to the *Code*. The *PEA* provided a "complete scheme for ascertaining the presence of gender discrimination in employment compensation, and directing how compensation must be adjusted in the establishments where such discrimination exists". It was "counter-intuitive" to say an employer who complied with the *PEA* contravened the *Code*.

In terms of whether the Tribunal's interpretation of s.7(1) of the *PEA* was unreasonable, the Court held that given the nature of the question before the PEHT and its expertise, deference should be accorded to the PEHT. The Court also held that the PEHT had jurisdiction to apply the *Code* to the extent that human rights issues arose directly in a complaint properly before it. The SCC's decision in *Tranchemontagne* did not go so far as to confer jurisdiction on the Tribunal to deal with human rights violations in general. Furthermore, the unions were seeking to use s.47(2) of the *Code* to change the pay equity legislation and extend its reach. However, s. 47(2) did not authorize a tribunal to read words into a statute or amend it to ensure compliance with the *Code.*

David Jacobs, Watson Jacobs McCreary LLP

The Courts and Administrative Tribunals Redux: Is reasonableness reasonable?

Mr. Jacobs' presentation focused on whether there were truly two standards of review. The Supreme Court of Canada defined judicial review as "the means by which the courts supervised those who exercised statutory powers, to ensure that they did not overstep their legal authority". The function of judicial review was therefore ensuring "the legality, the reasonableness and the fairness of the administrative process and its outcomes". He noted that the SCC in *Dunsmuir* established that there would now be two standards of review: correctness and reasonableness.

"Reasonableness" was concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. *Dunsmuir* recognized that certain questions that came before administrative tribunals did not lend themselves to one specific, particular result. Instead, they could give rise to a number of possible, reasonable conclusions. Therefore, a deferential approach was warranted. The important question to ask was whether the decision fell within a range of possible, acceptable outcomes which were defensible in respect of the facts and law.

Mr. Jacobs then discussed the two decisions the SCC released last year explaining *Dunsmuir* further: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* [2011] SCJ No 62 and *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] SCJ No 61. The former decision was concerned with the adequacy of reasons in a labour arbitrator's award. In that case the labour arbitrator had held that permanent employees could not include time previously spent as a casual employee for purposes of calculating their vacation entitlement. The union applied for judicial review of the arbitrator's decision alleging that the reasons did not set out a line of analysis that reasonably supported his conclusion.

The SCC held that a proper reasonableness review under the *Dunsmuir* criteria did not involve a separate analysis of the "adequacy" of reasons which could serve as a stand-alone basis for quashing a decision. Rather, *Dunsmuir* required an exercise in which the reasons were read together with the outcome to determine whether they showed that the result fell within a range of possible outcomes. The SCC cautioned courts not to "substitute their own reasons, but they could, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" and stated that "reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" if the reasons allowed the reviewing court to understand why the tribunal made its decision. Mr. Jacobs stated that this implied that a reviewing court could conclude that a decision was reasonable even if the reasons were inadequate or insufficient.

Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association was concerned with the Commissioner's compliance with a statutory timeline to complete the inquiry of a complaint within 90 days, unless notice was given to the parties of an extension and anticipated completion date. The Information and Privacy Commissioner was appealing from a ruling upholding a chambers judge's decision to quash an adjudicator's decision that the Commissioner had lost jurisdiction due to the failure to extend the period for the completion of an inquiry with the prescribed time.

The SCC held that although the issue of compliance with statutory timelines was not raised before the Commissioner or the adjudicator, it was implicitly decided by both the Commissioner and the adjudicator, and there was no evidentiary inadequacy or prejudice to the parties in this case. The Commissioner had expressed his views in several other decisions so the Commissioner had the opportunity to decide the issue at first instance and the court had the benefit of his expertise. When a reasonable basis for an implied decision was apparent, a reviewing court should uphold the decision as reasonable. The existence of other decisions of a tribunal on the same issue could be of assistance to a

reviewing court in determining whether a reasonable basis for the tribunal's decision existed. In this case, a review of the reasons of the Commissioner and the adjudicators in other cases allowed the SCC to determine that a reasonable basis existed for the adjudicator's implied decision.

The implied decision was reasonable given (i) the text of the provision, (ii) the purposes of the statute in general and of the subsection in particular, and (iii) the practical realities of conducting inquiries drawn from the Commissioner's experience administering the statute.

The SCC also noted that even though there may be an implied decision, the court may see fit to remit the issue to the tribunal to allow the tribunal to provide reasons. Remitting the issue to the tribunal, however, could undermine the goal of expedient and cost-efficient decision making. Accordingly, remitting the issue was not necessarily appropriate for a court when it was asked to review a tribunal's implied decision on an issue that was not raised before the tribunal. When a reasonable basis for the decision was apparent it would generally be unnecessary to remit the decision to the tribunal. Instead, the decision should simply be upheld as reasonable. On the other hand, a reviewing court should show restraint before finding that an implied decision on an issue not raised before the tribunal was unreasonable.

Mr. Jacobs then moved to the discussion of the “correctness” standard. He first noted that constitutional issues (subject to the “exception” in *Doré*); general questions of law of both central importance to the legal system as a whole and outside of the adjudicator’s specialized expertise; and jurisdictional issues are reviewed on a correctness standard.

In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, the SCC had to decide whether timeliness was a “jurisdictional” issue commanding a “correctness” review. The SCC held that “when considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness.”

He then discussed three cases determining the appropriate standard of review. In *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals*, [2011] 3 SCR 616, the labour arbitrator had found the union was estopped from asserting its strict legal rights because of its “long-standing” failure to grieve. The decision was overturned at the Manitoba Court of Appeal on the correctness standard as an incorrect application of the doctrine of promissory estoppel. The SCC restored the arbitrator’s decision. The SCC held that labour arbitrators were not bound to apply equitable and common law principles in the same manner as courts, but rather were entitled to adapt legal and equitable doctrines they found relevant in the particular context. In this case, the question was not whether the labour arbitrator failed to apply the principles of promissory estoppel, but whether he adapted and applied the equitable doctrine of estoppel in a manner reasonably consistent with the objectives and purposes of the LRA, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix.

In *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, [2011] SCJ No 53, the Canadian Human Rights Tribunal had determined that it had the power to award costs under its power to compensate. The Federal Court applied the standard of reasonableness and upheld the Tribunal’s decision that it had the authority to award legal costs. The Federal Court of Appeal set aside the decision, holding that the proper standard of review was correctness and the Tribunal’s decision was incorrect. The SCC held that the question was within the expertise of the Tribunal and did not raise issues of general legal importance. As such, the Tribunal's decision to award legal costs to the successful complainant was reviewable on the standard of reasonableness.

In *Greater Essex County District School Board v United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada,* Local 552 [2012] OJ No 3129 [CA] (Motion for leave to appeal has been filed), the issue was whether the OLRB erred in finding it had jurisdiction to extend time limits for referral to arbitration. The Court of Appeal held that the standard of review was reasonableness. The Labour Board had broad discretion to accept or refuse a grievance for referral, but there was nothing to accept or refuse if there was no grievance. In the present case, the grievance, not being filed within the 14-day time limit, was deemed settled pursuant to the terms of the collective agreement. Therefore, the Labour Board's interpretation of the *Labour Relations Act* was unreasonable.

Mr. Jacobs also referred to three cases for a discussion of the requirement for administrative tribunals to adapt legal principles in accordance with the exigencies of their statutory mandates: *Doré v Barreau du Québec*, [2012] SCJ No 12; *British Columbia (Workers' Compensation Board) v Figliola*, [2011] SCJ No 52 and *United Food and Commercial Workers Canada, Local 401 v Canada Safeway Ltd.*, [2012] AJ No 623.

He concluded that the "standard of review" analysis was based on discerning categories, which were by their nature malleable. Given the plethora of "categories" used by the courts to determine whether reasonableness or correctness analyses should govern, and at what end of the spectrum of reasonableness the analysis should begin, the future was uncertain. He advised tribunals that in order to make their decisions meet the "justification, transparency and intelligibility" reasonableness test, legal doctrines may be adapted and shaped to the exigencies of the particular statutory regime: such reasoning should be expressly situated within that context.