Some Recent Administrative Law Cases of Interest

(Prepared on November 3, 2005)

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The following are some recent administrative law cases. By no means does this purport to be a comprehensive list.

I have chosen recent cases that are from the Supreme Court of Canada, that are interesting/significant or that have particularly rich reasoning that would be of great assistance to anyone wishing to research the law on a particular point.

I have grouped these cases under four sections: "Before the tribunal", "Before the judicial review court", "Constitutional considerations" and "Civil litigation against administrative bodies".

Click on the name of any case and you will be taken to the full text of that case as it appears on the internet.

By all means, send comments, questions or suggestions to me.

A. BEFORE THE TRIBUNAL

(1) Tribunal Procedures, Natural Justice and Fairness

Bottom line observations from the recent cases: Determining the requirements of procedural fairness requires a fact-sensitive analysis using the Baker factors. The analysis is a very practical one. Courts repeatedly overlook "technical" lapses as long as the substance of the procedures has been scrupulously fair.

- *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (classic case concerning level of procedural fairness warranted in a particular case)
- *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at para. 22 (avoid a categorical approach; the old "judicial" and "quasi-judicial" distinction is of limited relevance)
- *TELUS Communications Inc. v. Telecommunications Workers Union*, 2005 FCA 262 (broad discretion of tribunal to take into account hearsay and unsworn evidence)
- *Ocean Port Hotel Ltd. v. British Columbia (The General Manager, Liquor Control and Licensing Branch)* (2002), 213 D.L.R. (4th) 273 (B.C.C.A.) (same)
- *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board* (2005), 200 O.A.C. 209 (C.A.) (same)

- *IMS Health Canada, Limited v. Information and Privacy Commissioner*, 2005 ABCA 325 (good discussion of what a tribunal should include in its return to the court when served with a certiorari application)
- *Ontario (Liquor Control Board) v. Lifford Wine Agencies Limited*, unreported, Ont. C.A., July 18, 2005 (Board should have allowed subpoenas to issue on abuse claim)
- *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 (solicitor client privilege and administrative tribunals; privileged material need not be disclosed)
- *Deloitte & Touche LLP v. Ontario Securities Commission*, [2003] 2 S.C.R. 713 (principles governing orders for production of documents and information)
- *Mattina v. Workplace Health, Safety and Compensation Commission*, 2005 NBCA 8 (when does a binding decision issue? do all have to sign?)
- *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113 (duty to conduct a full investigation when responsible for investigating; investigation found deficient)
- *Hutchinson v. Canada (Minister of the Environment)*, [2003] 4 F.C. 580 (C.A.) (disclosure is satisfactory if case to met before the tribunal is disclosed - no right to have everything the investigators had in their hands; on the facts, no unfairness in the investigation)
- *Fuda v. Ontario (Information and Privacy Commissioner)* (2003), 65 O.R. (3d) 701 (Div. Ct.) (duty to give disclosure in order to permit party to make out case)
- *Thomas v. Assn. of New Brunswick Registered Nursing Assistants* (2003), 230 D.L.R. (4th) 337 (N.B.C.A.) (exclusion from hearing of non-lawyer agent for a party was procedurally unfair)
- *Society Promoting Environmental Conservation v. Canada (Attorney General)*, [2003] 4 F.C. 959 (Fed. C.A.) (recent example, of which there are many, of a review court overlooking procedural errors when there was no real prejudice)
- *Universal Settlements International Inc. v. Ontario Securities Commission* (2003), 67 O.R. (3d) 670 (Div. Ct.) (jurisdiction to compel testimony and production of documents)
- *McNaught v. Toronto Transit Commission* (2005), 74 O.R. (3d) 278 (C.A.) (procedural fairness not infringed by consolidating two hearings; Board master of its own procedure)
- *Kalin v. Ontario College of Teachers* (2005), 75 O.R. (3d) 523 (C.A.) (procedural fairness: arbitrary failure to adjourn and failure to consider relevant factors pertaining to adjournment; decision to accept a transcript of evidence of the complainant from an earlier criminal trial rather than requiring the complainant to testify was set aside on the basis of failure to consider all relevant factors; findings of fact in earlier criminal judgment were wrongly adopted without considering factors, such as the fact that the accused doctor did not testify in those proceedings)
- *Syndicat des employés de la function publique de l'Ontario et al. v. Collège des Grands Lacs et al.* (2005), 200 O.A.C. 101 (Div. Ct.) (absent a statutory requirement, a Minister need not hold hearings or direct consultations with teachers or students before closing a college because it was a "public policy decision")
- *Graywood Investments Ltd. v. Ontario Energy Board et al.* (2005), 194 O.A.C. 241 (Div. Ct.) (person making complaint that a licensee was not complying with its licence not entitled to a hearing before "highly specialized" tribunal)
- *Manpel v. Greenwin Property Management et al.* (2005), 200 O.A.C. 301 (Div. Ct.) (denial of fair hearing because of constant interjections by tribunal and interruptions by opposing party; tribunal also

misapprehended evidence and denied party a right to call evidence without hearing submissions)

- *Spiegel v. Seneca College of Applied Arts & Technology* (2005), 194 O.A.C. 311 (Div. Ct.) (pre-hearing disclosure shortly before hearing and failure to adjourn a violation of procedural fairness)

(2) Impact of earlier proceedings, use of evidence from earlier proceedings, other evidence rulings

Bottom line observations from the recent cases: Do not automatically assume that earlier court decisions and the factual findings in them, e.g. decisions of criminal courts, are binding. In some circumstances they have to be regarded with caution. Follow the tests in the Supreme Court's recent decisions strictly.

- *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 (res judicata and issue estoppel)
- *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 (abuse of process arising from relitigation)
- *Ontario (Registrar, Motor Vehicle Act) v. Jacobs* (2004), 69 O.R. (3d) 463 (Div. Ct.) (relitigating issues in earlier criminal proceedings; board should have followed earlier decision)
- *Ontario (Liquor Control Board) v. Lifford Wine Agencies Limited*, unreported, Ont. C.A., July 18, 2005 (extremely important ruling concerning privilege over an internal Board investigation)

(3) Duty to give reasons

Bottom line observations from the recent cases: There has been an explosion of litigation in this area. Today, this is the single most frequent area where tribunals get reversed. Those making multi-faceted policy decisions are subject to less stringent requirements or no requirements at all. For all others, a counsel of prudence is to always err on the side of giving reasons that set out conclusions and findings clearly, with the rationales for them set out clearly and comprehensively, with specific reference to the evidence in the record.

- *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817
- *Gray v. Ontario (Director, Disability Support Program)* (2002), 212 D.L.R. (4th) 353 at 364 (Ont. C.A.) ("The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.")
- *Corp. of the Canadian Civil Liberties Assn. v. Ontario (Civilian Commission on Police Services)* (2002), 61 O.R. (3d) 649 (C.A.) (the test is whether the reviewing court can do its task)
- *R. v. Sheppard*, [2002] 1 S.C.R. 869
- *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 55 ("tenable explanation")
- *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650 ("...a more precise and rigorous justification ... would not only have given ... a better understanding of the municipality's decision, it also would have given its decision-making process the required transparency and the appearance of procedural fairness.")
- *Lee v. College of Physicians and Surgeons* (2003), 66 O.R. (3d) 592 (Div. Ct.) (duty to give reasons)

- *Megens v. Ontario Racing Commission* (2003), 64 O.R. (3d) 142 (Div. Ct.) (duty to give reasons)
- *N.(R.) (Litigation Guardian Of) v. Ontario (Minister of Community, Family and Children's Services)* (2004), 70 O.R. (3d) 420 (duty to give reasons; disclosure of criteria for decision in advance of the hearing)
- *Provincial Dental Board of Nova Scotia v. Dr. Clive Creager*, 2005 NSCA 9
- *Casavant v. Professional Ethics Committee of the Saskatchewan Teacher's Federation*, 2005 SKCA 52
- *Donnini v. Ontario Securities Commission*, unreported, Ont. C.A., January 28, 2005 ("cavalier" reasons on costs struck down; reasoning process not fair)
- *Kowalczyk v. Peel Access to Housing*, 2005 CanLII 1082 (Ont. Div. Ct.) (the requirement for reasons may be less demanding in the case of "polycentric" decisions)
- *Kalin v. Ontario College of Teachers* (2005), 75 O.R. (3d) 523 (C.A.) (reasons must be afforded on a significant or contentious point particularly when it will have an impact on the outcome of the hearing)
- *Syndicat des employés de la function publique de l'Ontario et al. v. Collège des Grands Lacs et al.* (2005), 200 O.A.C. 101 (Div. Ct.) (no requirement to give reasons when making "public policy decision", in this case the closing of a school)
- *Lerew v. St. Lawrence College of Applied Arts and Technology* (2005), 196 O.A.C. 363 (Div. Ct.) (a conclusion offered without reasons was inadequate given the impact of the decision on the party)
- *Smith v. Human Rights Commission (Ont.)*(2005), 195 O.A.C. 323 (Div. Ct.) (a finding that a human rights infringement was not reckless or wilful required reasons)
- *Veri v. Hamilton (City)* (2005), 192 O.A.C. 99 (Div. Ct.) (inadequate reasons: failure to identify findings of fact and the basis for them was unfair to party and hindered the reviewing court)
- *C.P. et al. v. Criminal Injuries Compensation Board* (2005), 193 O.A.C. 124 (Div. Ct.) (inadequate reasons: tribunal issued reasons with a portion blacked out for confidentiality reasons; should have issued proper reasons, with a sealing order; further, the tribunal only listed its conclusions, not the reasons for them; cannot rely on evidence kept secret from a party)

(4) Bias and lack of independence

Bottom line observations from the recent cases: Those complaining of bias or lack of independence still have to satisfy a very strict, demanding test and the complaint must not be idly made, without evidence in support. It continues to be appropriate for other regulatory functions to be mixed with adjudicative functions but problems can arise when the individuals on a particular adjudicative panel have other roles. The requirements of impartiality and independence are common law requirements that can be ousted or modified by statute. Constitutional challenges in this area have largely failed.

- *Ocean Port Hotel Ltd. v. British Columbia (Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781
- *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884
- *TELUS Communications Inc. v. Telecommunications Workers Union*, 2005 FCA 262 (good recent review of classic statements, general principles and tribunal defences)

- *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 60 (classic recent statement of principles)
- *Roeder v. British Columbia Securities Commission*, 2005 BCCA 189 (an alleged conflict of interest must be real)
- *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624 (no conflict of interest or bias if decision-maker is being sued civilly by the same party in another matter; also "political" decisions do not require the same standard of impartiality as adjudicative decisions)
- *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39 (there must an an evidentiary basis to the allegations, not speculations)
- *Ocean Port Hotel Ltd. v. British Columbia (The General Manager, Liquor Control and Licensing Branch)* (2002), 213 D.L.R. (4th) 273 (B.C.C.A.) (institutional connection between investigators and hearing panel not impermissible bias)
- *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board* (2005), 200 O.A.C. 209 (C.A.) (reviewing court dismisses bias objection that was not raised before the tribunal)
- *Gardner v. Ontario Civilian Commission on Police Services* (2005), 72 O.R. (3d) 285 (Div. Ct.) (panel exercising both investigatory and adjudicative functions found to be biased)

(5) Undue delay and abuse of process by tribunal

Bottom line observations from the recent cases: Complainants must satisfy a very strict test. It seems that establishing severe prejudice is a prerequisite to relief.

- *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (undue delay is a ground for setting aside proceedings, but this is a high standard)
- *Stinchcombe v. Law Society of Alberta* (2002), 212 D.L.R. (4th) 675 (Alta. C.A.) (high standard in Blencoe said to be met)
- *Holder v. Manitoba (College of Physicians and Surgeons)* (2002), 220 D.L.R. (4th) 373 (Man. C.A.) (high standard in Blencoe applied to dismiss delay arguments)

(6) Legitimate expectations

Bottom line observations from the recent cases: Legitimate expectations as to procedure are enforceable but legitimate expectations as to substantive outcomes are not. However, this distinction may now be blurred by the Mount Sinai case.

- *Old St. Boniface Residents Association v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (classic statement: legitimate expectations as to procedure are enforceable, but legitimate expectations as to substantive outcomes are not)
- *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (legitimate expectations as to procedure affect the level of procedural fairness)
- *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at 131 (reasonable expectations induced by a decision-maker that a person will "retain a benefit or be consulted before a contrary decision is taken" may be addressed with procedural remedies)
- *Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281

(a possible way that legitimate expectations as to substantive outcomes can be enforced; Minister could not move away from an earlier "decision")

(7) Regulatory investigations: when does *Charter* apply?

Bottom line observations from the recent cases: An administrative body that compels testimony and production of documents for purely regulatory purposes is subject to low or non-existent Charter scrutiny under ss. 7 and 8 of the Charter. However, an administrative body that does so for the purposes of "penal" or criminal purposes (as defined in Jarvis) is subject to the full limitations and/or requirements imposed by ss. 7 and 8 of the Charter. Remedies for Charter breach continues to be a very uncertain issue in this area.

- *Branch v. British Columbia (Securities Commission)*, [1995] 2 S.C.R. 3 (ss. 7 and 8 Charter protections are attenuated before tribunals performing true regulatory functions)
- *R. v. Jarvis*, [2002] 3 S.C.R. 757 (the key case: where predominant purpose is "penal", must apply Charter standards)
- *Kligman v. M.N.R.*, [2004] 4 F.C. 477 (C.A.) (what is penal?)
- *Ellingson v. Canada (Minister of National Revenue)*, 2005 FC 1068 (T.D.) (what is penal? documents are excluded under ss. 24(2) based on "seriousness of the breach")

(8) Disciplinary cases / licence violations (standard of review and penalty)

Bottom line observations from the recent cases: It is now beyond doubt that disciplinary tribunals can impose severe penalties, including penalties to achieve general deterrence within a particular discipline (e.g. a significant financial penalty which in substance is indistinguishable from the sort of "fine" imposed in criminal proceedings), and be accorded deference by reviewing courts. However, the requirements of natural justice can be most demanding.

- *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 (penalties and sanctions)
- *The British Columbia College of Teachers v. P.E.M.*, 2005 BCCA 76 (interesting decision re penalty; publication ban)
- *Hogan v. British Columbia Securities Commission*, 2005 BCCA 53 (penalty; significant application of Cartaway)
- *British Columbia (Securities Commission) v. C.W.M.* (2003), 226 D.L.R. (4th) 393 (B.C.C.A.) (good discussion of the nature of securities hearings; discussion of attenuated nature of Charter protections in the case of true regulatory proceedings as discussed by the Supreme Court in Branch v. British Columbia (Securities Commission), [1995] 2 S.C.R. 3)
- *Dr. Henderson v. The College of Physicians and Surgeons of Ontario* (2003), 65 O.R. (3d) 146 (Ont. C.A.) (high standard of fairness when "professional life" is at risk; statutory provisions to be interpreted strictly)
- *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board*, unreported, Ont. C.A., July 8, 2005 (no higher standard of proof required when "professional life" is at risk)
- *Ocean Port Hotel Ltd. v. British Columbia (The General Manager, Liquor Control and Licensing*

Branch) (2002), 213 D.L.R. (4th) 273 (B.C.C.A.) (institutional connection between investigators and hearing panel not impermissible bias)

- *Donnini v. Ontario Securities Commission*, unreported, Ont. C.A., January 28, 2005 ("cavalier" reasons on costs struck down; reasoning process not fair)

(9) Competing Tribunals

Bottom line observations from the recent cases: Follow the specific tests set out by the Supreme Court. The analysis is a very practical one based on which forum is "better" (as defined by the Supreme Court in its tests). However, as always, statutory provisions rule and in this area, words of exclusive jurisdiction in legislation will be respected by the courts.

- *Quebec (Commission des Droits) v. Quebec (A.G.)*, [2004] 2 S.C.R. 185 (contest between Human Rights Commission and labour arbitrator: former wins on the basis of a practical test similar to forum conveniens)
- *Quebec (A.G.) v. Quebec (Human Rights Tribunal)*, [2004] 2 S.C.R. 223 (contest between Commission des affaires socials and Human Rights Commission: former wins on the basis of an exclusivity clause in its statute)
- *Tranchemontagne v. Ontario (Ministry of Community, Family and Children's Services)*, unreported, Ont. C.A., September 16, 2004 (tribunal other than human rights tribunal does not have jurisdiction to apply Ontario Human Rights Code standards; procedures under the Code must be followed instead; similar to a forum conveniens approach) (on leave to S.C.C.)
- *Chase v. Nortel Networks Ltd.* (2004), 70 O.R. (3d) 494 (S.C.J.) (competition between courts and tribunals over the same subject matter - principles and tests)

B. BEFORE THE JUDICIAL REVIEW COURT

(1) Which court?

- Section 18 of the Federal Courts Act (Federal Court has exclusive jurisdiction over administrative law relief "against any federal board, commission or other tribunal")
- *Wakeford v. Canada* (2002), 58 O.R. (3d) 65 (C.A.) (matter should be in Federal Court)
- *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.) (civil action did not in substance constitute administrative law relief "against any federal board, commission or other tribunal")

(2) Procedure in judicial review proceedings

Bottom line observations from the recent cases: "Technical" rules, such as admissibility of evidence and service of notices of constitutional question, continue to matter.

- *AOV Adults Only Video Ltd. v. Manitoba Labour Board*, (2003), 228 D.L.R. (4th) 656 (Man. C.A.) (good review of the law concerning the admissibility of evidence [other than the tribunal record] in judicial review proceedings)
- *Re Keeprite Workers' Independent Workers Union et al. and Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.) (classic authority on admissibility of evidence evidence [other than the tribunal

record] in judicial review proceedings)

- *Paluska v. Cava* (2002), 59 O.R. (3d) 469 (C.A.) (consequences of failure to serve Notice of Constitutional Question, when it is required)
- *Palmer v. The Queen*, [1980] 1 S.C.R. 759 (fresh evidence)
- *York Regional Police (Chief of Police) v. Ontario Civilian Commission on Police Services*, 2005 CanLII 1415 (Ont. Div. Ct.) (whether the rules provide for it or not, it may be possible for a party to quash a judicial review that has no hope of success)
- *Ontario Secondary School Teachers' Federation v. Thames Valley District School Board* (2005), 73 O.R. (3d) 590 (S.C.J.) (record before judicial review court)

(3) Preliminary objections: jurisdiction of the reviewing court

Bottom line observations from the recent cases: More and more, reviewing courts are parsing the language of s. 1 of the JRPA in order to determine whether they have jurisdiction. This is likely to be a growth area in administrative law.

- *Children's Aid Society of the Districts of Sudbury and Manitoulin v. Ministry of Children and Youth Services* (2005), 75 O.R. (3d) 431 (Div. Ct.) (recent jurisdictional case on "statutory power of decision" concerning "the legal rights, powers, privileges, immunities, duties or liabilities of any person or party" under s. 1 of the JRPA)

(4) Preliminary objections: review of interlocutory tribunal rulings

Bottom line observations from the recent cases: There have been some very aggressive refusals by reviewing courts to consider interlocutory tribunal decisions. If a challenger tries this, try an immediate motion to quash (see York Regional Police (Chief of Police), above).

- *Schilthuis v. College of Veterinarians of Ontario*, 2005 CanLII 1083 (Ont. Div. Ct.) at para. 9 (rarely permitted; there are very limited exceptions)
- *College of Physicians and Surgeons of Ontario v. Shiu-Yuen*, 2005 CanLII 2037 (Ont. Div. Ct.) (review allowed; exceptional circumstances)

(5) Preliminary objections: delay, prematurity, mootness, adequate alternative remedy and waiver before the tribunal

Bottom line observations from the recent cases: This remains a fertile area for objection.

- *Becker v. City Park Co-operative Apartments Inc.* (2005), 193 O.A.C. 52 (Div. Ct.) (judicial review quashed because there was an adequate alternative remedy)
- *Ontario Conference of Judges v. Ontario (Chair, Management Board)* (2005), 71 O.R. (3d) 528 (Div. Ct.) (dismissal of judicial review for delay; dismissal for failure to exhaust internal remedies)
- *Sommers v. Ontario Civilian Commission on Police Services*, unreported, Ont. Div. Ct., May 10, 2005 (good discussion of prematurity and mootness)
- *Duffin Capital Corp. v. Ontario (Minister of Municipal Affairs and Housing)* (2005), 198 O.A.C. 192 (Div. Ct.) (judicial review dismissed for prematurity)

- *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board*(2005), 200 O.A.C. 209 (C.A.) (reviewing court dismisses bias objection that was not raised before the tribunal)
- *Syndicat des employés de la function publique de l'Ontario et al. v. Collège des Grands Lacs et al.* (2005), 200 O.A.C. 101 (Div. Ct.) (dismissal of judicial review for delay)

(6) Proper method of statutory interpretation

Bottom line observations from the recent cases: Most judicial reviews concern whether a tribunal has misinterpreted its statute. Recent cases from the Supreme Court supply "boilerplate wording" that should be used in every case.

- *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26
- *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21
- *Casavant v. Professional Ethics Committee of the Saskatchewan Teacher's Federation*, 2005 SKCA 52

(7) Standard of review - general

Bottom line observations from the recent cases: There has been very little new in this area. The "pragmatic and functional" test must be followed every time when conducting a standard of review analysis. There is some disquiet with the test, but the Supreme Court is showing no sign of changing it. Legislative reform in the future to clarify the area?

- *Pushanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (pragmatic and functional test)
- *Dr. Q. v. College and Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 (pragmatic and functional test)
- *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at pp. 963-64 ("patent unreasonableness" a "very strict test", which will only be met where a decision is "clearly irrational, that is to say evidently not in accordance with reason")
- *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 (pragmatic and functional test; discussion of the reasonableness standard; a "patently unreasonable decision" is "so flawed that no amount of curial deference can justify letting it stand"; "If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere.")
- *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 341 (The Court will defer "even if the interpretation given by the tribunal ... is not the 'right' interpretation in the court's view nor even the 'best' of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement".)
- *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (important on "nature of the question" part of the pragmatic and functional test)
- *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 (important on "nature of the question" part of the pragmatic and functional test)
- *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paras. 37-38

(suggestion that the literal wording of s. 18.1 of the Federal Courts Act significantly affects the standard of review in that Court)

- *Reid v. Vancouver Police Board*, 2005 BCCA 418 (thorough examination of what the "reasonableness" standard means)
- *Bucyrus Blades of Canada Ltd. v. McKinlay et al.* (2005), 194 O.A.C. 160 (Div. Ct.) (example of unreasonable decision - findings based on "facts" that were actually not facts)
- *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board*, unreported, Ont. C.A., July 8, 2005 (suggestion that if there are two administrative tribunal decisions, here a Board decision and then an administrative appeal to a Tribunal, the second of the two decisions is the proper subject-matter for review)
- *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 per LeBel J. (dissatisfaction with the current law on standard of review)
- *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (legislative reform adopted in B.C. to determine standard of review issues)

(8) Standard of review - labour arbitrations

Bottom line observations from the recent cases: Voice Construction, which some felt changed the standard of review for labour arbitrations and which suggested that "patent unreasonableness standard" might be a relatively rare standard, has been distinguished (and ignored) by provincial Courts of Appeal.

- *Voice Construction Ltd. v. Construction General Workers Union, Local 92*, [2004] 1 S.C.R. 609
- *Teamsters Local Union 938 v. Lakeport Beverages, a Division of Lakeport Brewing Corp.*, [2005] O.J. No. 3488 (C.A.)
- *Canadian Union of Public Employees, Local 1773 v. Town of Shediac*, 2005 NBCA 20
- *Newfoundland (Minister of Forest Resources and Agrifoods) v. A. L. Stuckless and Sons Ltd.*, 2005 NLCA 11 (applies "patent unreasonableness" standard despite language in Voice that that standard will be rare)

(9) First Nations issues

Bottom line observations from the recent cases: Native peoples are owed special consultation rights, in addition to the rights that exist as part of "procedural fairness" doctrine.

- *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585
- *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511
- *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550

(10) Standing of tribunals to make submissions on judicial review

Bottom line observations from the recent cases: The movement away from Northwestern Utilities continues. The Supreme Court will likely consider the issue soon.

- Northwestern Utilities Ltd. v. Edmonton (City), [1979] 1 S.C.R. 684
- *Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983
- *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 (C.A.)
- *Children's Lawyer for Ontario v. Goodis* (2005), 75 O.R. (3d) 309 (C.A.)
- *Chrétien v. Canada*, 2005 FC 591 (T.D.)
- *Genex Communications Inc. v. Canada (A.G.)*, unreported, Fed. C.A., September 1, 2005
- *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244
- *Bransen Construction Ltd. v. C.J.A., Local 1386* (2002), 39 Admin L.R. 1 (N.B.C.A.) (cannot make submissions designed to supplement tribunal's reasons for judgment)

(11) Others' standing

- *York Advertising Ltd. et al. v. Human Rights Commission* (Ont.) et al. (2005), 197 O.A.C. 185 (Div. Ct.) (standing to apply for judicial review; non-party before tribunal permitted to apply given significant impact of the decision on that individual)
- *Partridge v. Technical Standards and Safety Authority* (2005), 195 O.A.C. 71 (Div. Ct.) (affected parties should have been added as respondents in judicial review)

C. CONSTITUTIONAL CONSIDERATIONS

(1) Tribunal's jurisdiction to deal with constitutional and quasi-constitutional issues

Bottom line observations from the recent cases: Martin clarifies the law in the area. But the different tests for "invalidity" issues and s. 24(1) issues must be kept in mind. Practical and procedural issues remain.

- *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 (jurisdiction to consider Charter and other constitutional issues and make findings that legislation is invalid)
- *Ontario (Attorney General) v. Jane Patient et al.* (2005), 194 O.A.C. 331 (Div. Ct.) (recent application of Martin: Board does not have jurisdiction to consider questions of law and therefore, the Charter)
- *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 (jurisdiction to consider Charter issues and grant s. 24 (1) Charter remedies)
- *Tranchemontagne v. Ontario (Ministry of Community, Family and Children's Services)*, unreported, Ont. C.A., September 16, 2004 (tribunal other than human rights tribunal does not have jurisdiction to apply Ontario Human Rights Code standards; procedures under the Code must be followed instead; similar to a forum conveniens approach)
- *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 (ongoing supervision as a possible 24(1) remedy in constitutional cases)

(2) Standard of review in constitutional cases

Bottom line observations from the recent cases: This is an area of great uncertainty that requires clarification.

- *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at para. 31 (pure questions of constitutional law reviewable on correctness standard)
- *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 (same)
- *Pinet v. St. Thomas Psychiatric Hospital*, [2004] 1 S.C.R. 528 at para. 27 (cannot "reweigh evidence")
- *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at paras 60-63 ("Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748.")
- *Kempling v. British Columbia College of Teachers*, 2005 BCCA 327 (deferential standard applied despite s. 2(b) Charter issues)
- *TELUS Communications Inc. v. Telecommunications Workers Union*, 2005 FCA 262 (same)
- *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (mixed fact and law findings in constitutional cases (including constitutionally significant characterizations of fact - no deference)
- *Genex Communications Inc. v. Canada (A.G.)*, unreported, Fed. C.A., September 1, 2005 (language suggests deference)

(3) Use of Charter values

Bottom line observations from the recent cases: So far, there is little scope for the use of Charter values in administrative decision-making.

- *Criminal Lawyers Association v. Ontario (Ministry of Public Safety and Security)*, unreported Ont. Div. Ct., March 25, 2004 (not necessary to use absent ambiguity in legislation)
- *Medowvarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 (same)

D. CIVIL LITIGATION AGAINST ADMINISTRATIVE BODIES

(1) Cannot circumvent or avoid tribunals' jurisdiction through civil litigation (also adequate alternative remedy; collateral attack; relitigation)

Bottom line observations from the recent cases: Courts are vigilant to ensure that administrative processes are respected, not circumvented.

- *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (collateral attack - tribunal findings cannot usually be attacked later in civil litigation)

- *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 (res judicata and relitigation)
- *Toronto (City) v. C.U.P.E., Local 73*, [2003] 3 S.C.R. 77 (abuse of process arising from relitigation; earlier administrative proceedings can count)
- *Vaughan v. Canada*, [2005] 1 S.C.R. 146 (grievance regarding denial of benefits should have followed administrative process; civil action for the benefits does not lie)
- *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, [2005] 1 S.C.R. 257 at paras. 38-40 (general rule against raising constitutional issues in a judicial review or in another court proceeding when those issues could have been raised in a tribunal that had jurisdiction to deal with them)
- *Violette v. New Brunswick Dental Society* (2004), 267 N.B.R. (2d) 205 (N.B.C.A.) (A party who abandons the right to participate in a tribunal hearing does not entirely waive the right to challenge the tribunal's decision, either on its merits or with respect to issues that could have been raised during the proceedings)

(2) Immunity from suit for invalid legislation

Bottom line observations from the recent cases: Is the immunity weakening?

- *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1169 (no restitution of taxes paid under invalid statute)
- Welbridge Holdings Ltd. v. Greater Winnipeg, [1971] S.C.R. 957 (general principle of immunity from enacting invalid legislation enunciated)
- Central Canada Potash Co. v. Government of Saskatchewan, [1979] 1 S.C.R. 42 (same)
- *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405 (a narrow exception recognized)
- *Kingstreet Investments Ltd. and 501638 N.B. Ltd. v. New Brunswick*, 2005 NBCA 56 (some are seeing this as a major challenge to Air Canada)

(3) Negligence liability

Bottom line observations from the recent cases: Duties to third parties seem sharply curtailed. But duties to persons proximate to administrative bodies are vigorously (unfairly?) enforced.

- *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2 (Anns test is to be applied)
- *R. in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 (statutes can define the content of the standard of care)
- *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (policy/operational distinction; latter is actionable, former is not)
- *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 (same)
- *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 (tough to establish regulatory negligence)
- *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 (important case regarding proximity - regulator's duty to third parties)

- *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (same)
- *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298 (regulatory negligence established)
- *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (same; good discussion of the defence of statutory authority)
- *Beckstead v. Ottawa (City) Chief of Police* (1997), 37 O.R. (3d) 62 (C.A.) (police can be sued for negligent investigation)
- *Hill v. Hamilton-Wentworth Regional Police Services*, [2005] O.J. No. 4045 (C.A.) (Beckstead reaffirmed as good law)

(4) Malicious prosecution

- *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9 (liability is rare but possible)

(5) Restitution

Bottom line observations from the recent cases: will the Supreme Court grant leave in Kingstreet and revisit some of its earlier, limiting jurisprudence?

- *Pacific National Investments Ltd. v. Victoria (City)*, [2004] 3 S.C.R. 575 (an example)
- *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1169 (generally not available in the case of taxing statutes that are found to be constitutionally invalid)
- *Kingstreet Investments Ltd. and 501638 N.B. Ltd. v. New Brunswick*, 2005 NBCA 56 (seems to narrow Air Canada considerably)

(6) Abuse of public office

Bottom line observations from the recent cases: Flavour of the month in public law litigation circles. Beware the letter from an aggrieved person that warns that statutory authority is being exceeded.

- *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263

(7) Bad faith liability

Bottom line observations from the recent cases: expansion of liability due to lowering of the standard of evidence required to prove bad faith?

- *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17 (bad faith can be deduced from the circumstances)
- *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004] 3 S.C.R. 304 (same; also political reasons relied upon by municipalities are not "bad faith")

(8) Charter damages

Bottom line observations from the recent cases: continued uncertainty regarding when administrative actors can be used for damages arising from a Charter breach.

- *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405 ("clearly wrong", "bad faith" or "abuse of power" the requirement; query whether mere negligence can suffice)
- *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347 (bad faith needed)