

Selected Topics in Administrative Law

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Introduction

Rather than focus on a similar topic as is usually done for the background paper to the annual CIAJ Administrative Law Roundtable, this year we have taken a different approach. In this paper we consider not one but six different topics in administrative law:

1. The Adequacy of Reasons
2. Reconciling Conflicts & Consistency
3. Standard of Review Issues Post-*Dunsmuir*
4. Tribunal Member Accountability
5. Tribunal Standing
6. Tribunal Delay

Separately circulated stand-alone papers also explore the topics of Regulatory Negligence and Tribunal Independence.

In each of these discussions, we highlight some of the background concerns, and explore recent developments. Each of these topics features important and unsettled areas of law which we believe merit greater attention in the future. Each reflects the central tensions which animate administrative law – the proper framework for the legal accountability of administrative decision-makers.

The purpose of the review which follows is to serve as a point of departure for discussion.

(1) The Adequacy of Reasons

In *Baker v. Canada (Minister of Citizenship and Immigration)*,¹ the Supreme Court affirmed a common law requirement for administrative decision-makers to provide reasons “in certain circumstances” represented a sea-change in administrative law. In the initial aftermath of *Baker*, courts grappled with the scope of administrative decision-making settings where the duty to provide reasons would be recognized. Notwithstanding the clear indication in *Baker* that the duty would be recognized in “certain circumstances,” courts throughout Canada have concluded that reasons of some kind are required in virtually all administrative decision-making contexts.

In light of the wide array of contexts in which the duty to provide reasons will be recognized, for the past few years, the focus has shifted to the adequacy or sufficiency of reasons.

In *VIA Rail Canada Inc. v. Canada (National Transportation Agency)*,² Sexton J.A., writing for the Federal Court of Appeal, stated that

“The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., “[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons.” [See J.M. Evans, *Administrative Law: Cases, Text and Materials* (4th ed.), (Toronto: Emond Montgomery, 1995), at p. 507.]”³

In other words, whatever the threshold of adequacy might be, it is an obligation which cannot be satisfied by “merely reciting the submissions and evidence of the parties and stating a conclusion.”⁴ Reasons, in order to be adequate, must disclose the reasoning of the decision-maker, including the principal evidence or basis upon which those findings were made.

Shortly after *Via Rail*, in *Gray v. Ontario (Disability Support Plan, Director)*,⁵ then Chief Justice McMurtry made clear that courts would scrutinize with rigor not just the fact of reasons but their

¹ (1999) 2 S.C.R. 819.

² [2001] 2 F.C. 25 (C.A.), rev'd on other grounds by the SCC (2007 SCC 15).

³ *Ibid.* at 35-36.

⁴ *Ibid.*

⁵ (2002), 59 O.R. (3d) 364 (C.A.).

content as well. In *Gray*, the Ontario Court of Appeal invalidated a set of reasons offered by the administrator of a disability support plan. The administrator found an applicant did not have a disability within the meaning of the governing legislation notwithstanding that evidence was offered to establish a disability which the decision-maker indicated was credible. How could the administrator accept the evidence and yet reach a finding other than where that evidence led? The answer, McMurtry C.J. reasoned, must be that another factor, not disclosed in the reasons, was persuasive. He wrote: “It is simply unclear what relevant evidence the Tribunal accepted and what it rejected.”⁶

Two decisions have recently grappled with this question: *Clifford v. OMERS* (“*Clifford*”) and *Vancouver International Airport Authority v. Public Service Alliance of Canada* (“*Vancouver Airport*”); and appear to adopt different approaches.

In *Clifford*, Goudge, J.A., writing for the Court, held that a tribunal established to resolve pension disputes owed a duty to provide reasons. Further, he concluded that where a tribunal has a legal obligation to give reasons, the court cannot show deference to the choice of the tribunal whether to give reasons. In other words, Goudge J.A. confirmed that a correctness standard of review applies to a tribunal’s decision as to whether to issue reasons.

Goudge, J.A. relying on a criminal law reasons precedent, *R. v. R.E.M.*,⁷ held that a tribunal under a duty to provide reasons must explain its decision and its explanation must have a logical link to the decision made. Goudge, J.A. went on to clarify, however, that the tribunal need not refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision. As Goudge, J.A. put it, “To paraphrase for the administrative law context what the court says in *R.E.M.* at para. 24, the “path” taken by the tribunal to reach its decision must be clear from the reasons read in the context of the proceeding, but it is not necessary that the tribunal describe every landmark along the way.”⁸

In order to be sufficient, in other words, reasons must simply disclose that the tribunal “grappled with the substance of the matter.”⁹ This requires a functional perspective on whether the reasons are intelligible, as opposed to a substantive perspective, which asks whether a set of reasons are reasonable or correct.

In the context of *Clifford*, Goudge J.A. held that the pension issues before the tribunal had been “grapple with” and reversed the Divisional Court by upholding the reasons as adequate

⁶ *Ibid.* at para. 23.

⁷ [2008] 3 S.C.R. 3.

⁸ *Clifford*, at para. 29.

⁹ *Ibid.* at para. 30.

for the context. He concluded that the Divisional Court erred by finding that the tribunal failed to refer to evidence which it should have and may have misapprehended evidence not referred to. He stated bluntly: “The task is to determine whether what was said is sufficient, not what problems might have been with what was not said.”¹⁰ Further, Goudge J.A. noted that the question of the sufficiency of reasons must take into consideration the day-to-day realities of administrative agencies, including the reality that many decisions by such agencies are made by adjudicators without formal, legal training. Therefore, if the language used in reasons falls short of legal perfection, this will not render the reasons insufficient provided there is still an intelligible basis for the decision.

Goudge J.A. sets out functional and purposive approach. Reasons should not be construed as a formal requirement. Reasons, on this view, need not look or read like judicial pronouncements, nor do they need to cover the waterfront of issues or evidence in a matter. Their function is to provide a window into the reasoning of the decision-maker. Their purpose is both to enhance public confidence through accountability and to provide a basis by which to assess the substantive reasonableness of the reasons should that be challenged.

A somewhat different portrait of the reasons requirement emerges from the Federal Court of Appeal in its decision in *Vancouver International Airport Authority v. Public Service Alliance of Canada*.¹¹ In *Vancouver Airport*, the Canada Industrial Labour Board granted an application that 23 new job positions be included in the bargaining unit represented by the respondent union. The applicant argued that the Board’s reasons for doing so were inadequate. In some cases, the Board only indicated that a position would be excluded or included without a rationale.

The Federal Court of Appeal accepted the Applicant’s characterization of the reasons as providing no basis on which to meaningfully assess the reasons. Picking up the language from *Dunsmuir* around reasonableness, the Court held that there was no transparency, justification or intelligibility in the reasons issued by the Board. Stratas J.A., writing for the Court, was at pains to point out that the Court’s decision to quash the decision was rooted in the purposes underlying the reasons requirement. He identified four such purposes:

- 1) The substantive purpose (in order to understand the basis for the decision);
- 2) The procedural purpose (in order to determine whether to exercise further rights of appeal);
- 3) The accountability purpose (in order for a supervising court to assess the decision); and
- 4) The justification, transparency and intelligibility purpose (as discussed in *Dunsmuir*, in order to enhance public confidence in the tribunal’s decision-making).

¹⁰ Ibid. at para. 39.

¹¹ 2010 FCA 158.

Stratas, J.A. concluded that in the circumstances of the *Vancouver Airport* decision, the Board could have met those purposes “with just a handful of words” and “consistent with the practical realities facing the Board.”¹²

Thus, on the one hand, *Clifford* and *Vancouver Airport* appear at odds. In *Clifford*, Goudge J.A. applies a flexible standard which implies not every issue need be addressed if a tribunal’s reasoning, in general, is clear. While, in *Vancouver Airport*, Stratas J.A. applies a more rigid standard which implies any finding needs to be supported by reasoning, even if brief. The facts and circumstances of the two cases were, of course, different, and a subsequent court would be accurate in characterizing each decision as alive to the purposes of the reasons requirement and the need for the “practical realities” of the tribunal context to guide that requirement. *Clifford* and *Vancouver Airport* represent flip sides of the same coin – the imperative of authenticity in administrative decision-making. In other words, the desire for justification and all of its necessary implications, requires not just reasons but reasons capable of demonstrating a reasonable decision.

(2) Reconciling Conflicts & Consistency

It is well known that tribunals are not subject to *stare decisis*, and in this sense it is not a legal problem for the two different panels of the same tribunal, or two different tribunals on the same issue, to reach different and even inconsistent conclusions. That said, it may cause understandable confusion among parties and tribunal members for there to be important questions left unsettled or muddled by incoherent pronouncements, all said to be on behalf of the tribunal.¹³

As indicated above, fairness is mainly a procedural value and, in administrative law, it has been more often coupled with predictability and efficiency of the legal system than consistency. Consistency, however, is a core substantive value in tribunal policy-making, especially where policies are worked out on a case-by-case basis through the individual decisions of tribunal members. The ambivalence of tribunals to “*stare decisis*” continues to shape this issue. Tribunal members are caught in a bind. They cannot disregard past tribunal decisions for fear of undermining the goal of fairness through consistency, yet they cannot appear to have their decision-making entirely fettered by precedent either. Indeed, as Brian Simpson explains,

¹² *Ibid.* at para. 25.

¹³ This section is adapted from F. Houle and L. Sossin, “Tribunals, Fairness and Guidelines” in Laverne A. Jacobs & Anne L. Mactavish., eds., *Dialogue Between Courts and Tribunals – Essays in Administrative Law and Justice (2001-2006)* (Montreal: Les Éditions Thémis, 2008).

elaboration of rules and principles governing the use of precedents and their status as authoritative rules is relatively modern in common law courts¹⁴.

As far as administrative tribunals are concerned, this idea is even newer. Until the Supreme Court decision in *Consolidated-Bathurst*, the dominant view was that decisions of a particular quorum of members of an administrative tribunal cannot be used as a precedent by another quorum of this tribunal. As Reid J. said in *Broadway Manor Nursing Home*:

The doctrine of *stare decisis* which prevails in the courts tends to the avoidance of conflict in their decisions and such conflict as does occur may be resolved by the mechanism of appeal. But the doctrine of *stare decisis* does not apply to referees, or arbitrators, or, for that matter, to administrative tribunals generally, nor are referees, or arbitrators, or administrative tribunals generally (there are exceptions) subject to appeal. These are characteristics of tribunals which legislators have created to provide what they believe to be for certain purposes more appropriate forums for decision-making than the courts.¹⁵

This view was particularly artificial. The practice of many tribunals was to rely on their own former decisions to justify the outcome of the case. In *Domtar*,¹⁶ L'Heureux-Dubé J., writing for the Court, observed,

If Canadian administrative law has been able to evolve to the point of recognizing that administrative tribunals have the authority to err within their area of expertise, I think that, by the same token, a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals. Recognizing the existence of a conflict in decisions as an independent basis for judicial review would, in my opinion, constitute a serious undermining of those principles. This appears to me to be especially true as the administrative tribunals, like the legislature, have the power to resolve such conflicts themselves. The solution required by conflicting decisions among administrative tribunals thus remains a policy choice which, in the final analysis, should not be made by the courts.¹⁷

¹⁴ Brian Simpson, "The Common Law and Legal Theory", in William Twining (ed.), *Legal Theory and Common Law*, (Oxford, Basil Blackwell, 1986), pp.8-25.

¹⁵ *Home Services Employees International Union, loc 204 v. Broadway Manor Nursing Home* (1984), 48 O.R. (2d) 22 at 28.

¹⁶ *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.

¹⁷ *Ibid.* at para. 89.

A similar view was expressed by the majority in *Consolidated-Bathurst*¹⁸, in which the practice of full board meetings was upheld as a mechanism to achieve greater consistency. The majority stated that consistency is a valuable goal to reach for an administrative tribunal. This view is shared by scholars. For MacLauchlan consistency plays an important role. It fosters “public confidence in the integrity of the regulatory process. It exemplifies “common sense and good administration.”¹⁹ Comtois adds: “as regards administrative tribunals exercising quasi-judicial functions, that the specialized nature of their jurisdiction makes inconsistencies more apparent and tends to harm their credibility.”²⁰ From this perspective, *Consolidated-Bathurst*, in particular, had a profound impact on many tribunals for it gave them stronger authority to resort to guidelines or other means to enhance consistency of their decisions.

In the context of administrative tribunals, the proper balancing between ensuring evolution of the law at the pace of the evolution of the society and maintaining a reasonable degree of certainty and predictability in the legal system is very much present in the debate over judicial review of consistency. Although courts seem to have reached a certain common understanding of what judicial review principles related to this issue are, the question of whether fostering consistency should vary depending on the type of legislative mandate attributed to administrative tribunals remains largely unresolved.

(3) Standard of Review Issues Post-*Dunsmuir*

The standard of review continues to generate a range of issues and dilemmas which need to be resolved. Below, we consider two such areas: the standard of review for constitutional decision-making by administrative decision-makers; and the role of legislative purpose in the context of the standard of review analysis. In each case, recent case law has raised compelling new questions about the coherence of the standard of review in the future.

A. Constitutional Decision-Making and Deference

¹⁸ *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282.

¹⁹ H. Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984), 8 *Dalhousie L.J.* 435, at p. 446.

²⁰ Suzanne Comtois, "Le contrôle de la cohérence décisionnelle au sein des tribunaux administratifs" (1990), 21 *R.D.U.S.* 77, at pp. 77-78.)

In *Dunsmuir v. New Brunswick*,²¹ the Court reformulated the Standard of Review Analysis, which requires courts when reviewing administrative decisions to consider four contextual factors:

- (1) the presence or absence of a privative clause;
- (2) the purpose of the tribunal as determined by interpretation of enabling legislation;
- (3) the nature of the question at issue, and;
- (4) the expertise of the tribunal.

The Court clarified, however, that it may not be necessary to consider all of the factors, or even engage in an “exhaustive analysis” in some circumstances. One of the circumstances identified by the majority is where the constitutional interpretations are made by administrative decision-makers. The Court in *Dunsmuir* takes as widely acknowledged that administrative decision-makers will not be entitled to deference when interpreting or applying the Constitution:

[C]orrectness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867: Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322. Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; Mullan, *Administrative Law*, at p. 60.²²

In *Multani*,²³ where the majority and minority differed on the relevance of an administrative law analysis, the majority takes a categorical approach in asserting that where the *Charter* is applied, the administrative law standard of review does not apply. Charron J. stated,

The complaint is based entirely on this constitutional freedom. The Court of Appeal therefore erred in applying the reasonableness standard to its constitutional analysis. The administrative law standard of review was not relevant. Moreover, if this appeal had instead concerned the review of an administrative decision based on the application and interpretation of the Canadian Charter, it would, according to the case law of this Court, have been necessary to apply the correctness standard.²⁴

²¹ [2008] 1 S.C.R. 190, at para. 64.

²² *Dunsmuir*, at para. 58.

²³ *Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] 1 S.C.R. 256 at para. 20

²⁴ *Multani*, at para. 20.

Justice Binnie, concurring in *Dunsmuir*, however, also contemplates some degree of deference where the *Charter* analysis contains several different elements in a constitutional analysis, and one such element is a setting where deference usually applies:

Mention should be made of a further feature that also reflects the complexity of the subject matter of judicial review. An applicant may advance several grounds for quashing an administrative decision. He or she may contend that the decision maker has misinterpreted the general law. He or she may argue, in the alternative, that even if the decision maker got the general law straight (an issue on which the court's view of what is correct will prevail), the decision maker did not properly apply it to the facts (an issue on which the decision maker is entitled to deference). **In a challenge under the Canadian Charter of Rights and Freedoms to a surrender for extradition, for example, the minister will have to comply with the Court's view of Charter principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts.** The same approach is taken to less exalted decision makers (*Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11). In the jargon of the judicial review bar, this is known as "segmentation". (Emphasis added)²⁵

Now that many more tribunals will be issuing interpretations and judgments applying the Constitution (as a result of another group of cases in which the Court has expanded the jurisdiction of tribunals to hear and decide *Charter* cases including *Martin*,²⁶ *Paul*,²⁷ and most recently *Conway*²⁸), this issue has become more central to the standard of review debate.

Taken at face value, it would mean that even matters well within the tribunal's expertise (such as a labour board's interpretation of freedom of association) or findings of fact (like a refugee determination board holding that a person faced a *prima facie* risk to torture if deported) would not attract deference if those decisions were elements of applying the *Charter* or other Constitutional provisions.

In *Westcoast Energy Inc. v. Canada (National Energy Board)* ("*Westcoast*"),²⁹ Iacobucci and Major JJ., held that the National Energy Board's determination of whether a company was a federal undertaking for purposes of s.92(10)(a) of the *Constitution Act, 1867*, did not attract

²⁵ *Ibid.* at para. 142.

²⁶ *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, at para. 31

²⁷ *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585.

²⁸ *R. v. Conway*, 2010 SCC 22

²⁹ (1998) 1 S.C.R. 322.

deference. The Court rejected the notion that deference applied to the Boards characterization of the company for purposes of the federalism analysis under the Constitution. Iacobucci and Major JJ. observed:

To begin with, it is necessary to examine more precisely the nature of the Board's finding in question. While appellate courts will generally accord deference to findings of fact made by a tribunal, this is not equally true of findings of law. However, when the problem is one of mixed law and fact -- a question about whether the facts satisfy the applicable legal tests -- some measure of deference is owed. Appellate courts should be reluctant to venture into a re-examination of the conclusions of the tribunal on such questions. See Southam, supra.

Although at first glance it may appear that the finding on which this controversy centres is one of fact, modest examination reveals that it is one of mixed law and fact. The key to this determination is to consider the purpose for which the finding was made, that is, what question it was intended to answer. Clearly, the characterization of processing and gathering as independent activities was not a pure finding of fact in the true sense, but rather, an inference drawn from other, detailed findings related to the natural gas industry and the business operations of Westcoast. It was meant as a partial answer to the core of the constitutional question at issue on this appeal, which is whether the Westcoast operations constitute a single undertaking or multiple undertakings. Thus, it was not simply a statement of the facts of the natural gas industry or the business of Westcoast. It went one step further as it was an opinion as to the constitutional significance of these facts, or, to use the language in Southam, at para. 35, an assessment of "whether the facts satisfy the legal tests".

As stated above, even questions of mixed law and fact are to be accorded some measure of deference, but this is not so in every case. It would be particularly inappropriate to defer to a tribunal like the Board, the expertise of which lies completely outside the realm of legal analysis, on a question of constitutional interpretation. Questions of this type must be answered correctly and are subject to overriding by the courts. It seems reasonable to accept the proposition that courts are in a better position than administrative tribunals to adjudicate constitutional questions. It is interesting to note that this particular panel's professional training was not in law. So, although the question here was one of mixed law and fact, it follows that the Board was not entitled to deference because of the nature of the legal question to be answered.³⁰

It will often be the case that an element of the Constitutional analysis involves either findings of fact or interpretations of law that fall squarely within the tribunal's area of expertise. Given that a tribunal has no power to invalidate a statute or impose other remedies open only to courts (such as reading in or down a legislative provision), it is not immediately clear why courts would, on principle, take the view that any determination whatsoever by a tribunal is entitled to

³⁰ Ibid. at para. 38-40.

no deference simply because it forms a part of a constitutional analysis. It is open to the legislature to remove constitutional jurisdiction from tribunals (and, indeed, this has occurred in British Columbia, Ontario and elsewhere). Where this has not occurred, and the Court has affirmed tribunals have an obligation to interpret and apply the Constitution, why should it necessarily follow that the legislature could never intend for a reviewing court to defer to the distinct perspective and expertise of that tribunal?

B. The Tribunal's Policy Mandate and the Standard of Review

It is clear that however one parses the standard of review post-*Dunsmuir*, statutory purpose and legislative intent remain paramount concerns when a court determines whether to intervene in the decisions of administrative bodies. A good example of the dilemmas posed by the search for statutory purpose and how to give effect to it in the context of a judicial review is the *Montréal (City) v. Montreal Port Authority*.³¹

In *Montreal Port*, the City of Montreal was involved in a dispute with the Montreal Port Authority and the Canadian Broadcasting Corporation, two federal Crown Corporations over the calculation of payments in lieu of property taxes. The City challenged the decision by the Crown Corporations based in part on the argument that the decision was contrary to the objective of the legislation.

The governing Regulations clearly reserve discretionary decision-making power for the Crown corporations. The Court emphasized, however, that “discretion cannot be equated with arbitrariness.”³² As Lebel J. states,

While this discretion does of course exist, it must be exercised within a specific legal framework. Discretionary acts fall within a normative hierarchy. In the instant cases, an administrative authority applies regulations that have been made under an enabling statute. The statute and regulations define the scope of the discretion and the principles governing

³¹ 2010 SCC 14.

³² *Ibid* at para. 33.

the exercise of the discretion, and they make it possible to determine whether it has in fact been exercised reasonably.”³³

Lebel J. held that the discretionary nature of the power leads to the conclusion that the appropriate standard of review would be reasonableness. The Court found the Crown Corporations methodology in determining the PILT as unreasonable, based on a fictitious tax system they themselves created arbitrarily.³⁴ The Court based its finding on the legislature’s intention to deal with municipalities fairly and equitably, as evidenced in part by the Act itself, which stated that the purpose of the Act “is to provide for the fair and equitable administration of payments in lieu of taxes.” Lebel J. examined the legislative history of the PILT scheme and concluded that,

The respondents' decisions were consistent neither with the principles governing the application of the *PILT Act* and the *Regulations* nor with Parliament's intention. The way they exercised their discretion led to an unreasonable outcome that justified the exercise of the Federal Court's power of judicial review.³⁵

The *Montreal Port* judgment raises the spectre of the significance of the policy mandate of an administrative decision-maker in the standard of review analysis. As in the context of the Retired Judges case,³⁶ where the Supreme Court invalidated the appointment of retired judges as labour arbitrators notwithstanding a broad discretionary power of appointment afforded to the minister, the Court will be mindful not simply of statutory language, but also of statutory purpose. This focus may be particularly important in discretionary settings, where the legislative grant of power may appear broad and where constraints on that discretion may be implied by legislative context in a way not made explicit in the statute itself.

³³ Ibid.

³⁴ Ibid. at para. 40.

³⁵ Ibid. at para. 47.

³⁶ C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539.

(5) Tribunal member accountability

Accountability is an elusive goal for administrative decision-makers.³⁷ There are, of course, many kinds of accountability. In one sense, all members are accountable to reviewing courts when their decisions are challenged by way of judicial review. In another sense, the tribunal has to account for public funds expended to a supervising ministry or to the legislature, or both. In a real sense, however, tribunals do not view themselves as accountable in the sense of answering to another authority. Taken seriously, accountability to the public interest may be effective, even transformative. It can lead to important initiatives around transparency and openness, and to the value of consistency, clarity and coherence in decision-making. It can also, however, shield a tribunal and its members from important forms of external scrutiny. It may also lead to confusion

One form of scrutiny which has not traditionally been associated with tribunals but which appears to be on the rise is for ethical conduct. While judges are subject to the statutory jurisdiction of judicial councils and a judge-developed set of ethical guidelines, adjudicators for tribunals and regulators have had, up until recently, no shared standards for ethical conduct. The *Ontario Adjudicative Tribunals Accountability, Governance and Appointments Act* (“*ATAGAA*”) (only part of which has been proclaimed), now provides a shared template for accountability documents, including conflict of interest and ethical rules.³⁸

The Act recognizes “public accountability” documents and governance accountability documents by adjudicative tribunals. Under *ATAGAA*, every adjudicative tribunal is required to develop a mandate statement and a mission statement. Each document must be “approved” by the tribunal's responsible minister, which has led to concern that increased accountability may invite more intervention in adjudicative contexts by ministers. Accountability documents include:

- the tribunal to create a policy for consultation with the public when changing its rules or policies;³⁹

³⁷ S. Hoffman and L. Sossin, “The Elusive Search for Accountability: Evaluating Adjudicative Tribunals” (2010) *Windsor Yearbook of Access to Justice* (forthcoming)

³⁸ For discussion, see L. Jacobs, “A Wavering Commitment? Administrative Independence and Collaborative Governance in Ontario’s Adjudicative Tribunals Accountability Legislation” (2010) *Windsor Yearbook of Access to Justice* (forthcoming).

³⁹ *ATAGAA*, at s. 4.

- the creation of a service standard policy which indicates the tribunal's intended standard of service and the process for making and responding to complaints about tribunal service;⁴⁰

ATAGAA also, importantly, affirms the merit-based system of appointments to adjudicative tribunals. Additionally, the Act addresses tribunal member accountability, for example with the requirement that every tribunal create a “member accountability framework.”⁴¹ The Act also requires tribunals to develop ethics plans, which must be approved by the public service’s Conflict of Interest Commissioner.⁴² The member accountability requires the tribunal to provide a description of the functions of all members, vice-chairs and the chair of the tribunal, their skills, knowledge, experience, other attributes and qualifications and that it create a code of conduct for tribunal members

Elsewhere, one of the authors has suggested the real value underlying such initiatives is to create out of such shared norms and templates, an administrative justice system and community, as opposed to a disparate collection of isolated bodies largely shaped by the ministries (and ministers) to whom they are attached.⁴³ And yet, this system remains a patchwork quilt. B.C., Alberta and Ontario have administrative tribunal legislation aiming for cohering standards, while Quebec has for the most part used the TAQ to create greater accountability. The federal tribunal system, by contrast, has seen relatively little development in this regard.

The legal implications of this new approach to member accountability could be significant. For example, the Code of Conduct and ethics requirements may lead to a new protocol for the investigation of complaints against members, and the development of a peer-driven investigatory and recommendatory body akin to judicial councils for adjudicative tribunals. The recognition of that independence and accountability are two sides of the same public interest coin could lead to a culture change in what now appear to be opaque tribunals governed behind closed doors, appointed through an opaque executive process behind closed doors. On the other hand, the Act may turn out to be more “window dressing” than a substantive change to the operational culture either of government or tribunals.

⁴⁰ *Ibid* at s. 5.

⁴¹ *Ibid* at s. 7.

⁴² *Ibid* at s. 6.

⁴³ L. Sossin, “Reflections on the U.K. Tribunal Reform: A Canadian Perspective” (2011) 24 C.J.A.L.P. 17.

(6) Tribunal Standing

The evolution of tribunal standing on judicial review from the Supreme Court of Canada's 1979 decision in *Northwestern Utilities*⁴⁴ to the Federal Court of Appeal's 2010 decision in *Quadrini*⁴⁵ reflects an increasing appreciation of the role of administrative tribunals in the justice system and their potential contribution to the informed and just disposition of judicial reviews and appeals. The concern for impartiality expressed by Justice Estey in *Northwestern Utilities* continues, of course, tempered by an acknowledgement of the assistance that tribunals may provide to the court, particularly where the tribunal has expertise in a complex statutory scheme, the matter involves tribunal policy or practice, or where there is no one else to argue the other side.

With recent decisions from the Federal Court of Appeal and the Alberta Court of Appeal, we have seen the contextual and discretionary approach initiated by the New Brunswick Court of Appeal in *Bransen Construction*⁴⁶ and expanded by the Ontario Court of Appeal in the *Children's Lawyer*⁴⁷ case reach across the country. We conclude with a summary of leading cases, highlighting unusual or interesting factors in the cases. For the purposes of the workshop, we set out the following list of questions:

1. What is the effect, if any, of the legislative provisions or rules of court which define the status of a tribunal on judicial review or appeal? Is the judicial discretion the same?
2. What are the kinds of terms that a court should consider applying to a tribunal's participation?
3. Should a tribunal be able to seek leave to appeal from an adverse determination by a superior court if no party chooses to seek leave to appeal?

⁴⁴ *Northwestern Utilities v. City of Edmonton*, [1979] 1 S.C.R. 684

⁴⁵ *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2010] F.C.J. No. 1204.

⁴⁶ *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.* 2002 NBCA 27 (CanLII)

⁴⁷ *Children's Lawyer for Ontario v. Goodis* (2005), 253 D.L.R. (4th) 489 (Ont. C.A.); 2005 CanLII 11786

4. What kinds of submissions can a tribunal properly make in “explaining the record”? What is the boundary between “explaining the record” and making submissions on the merits?
5. Post-*Dunsmuir*, what is the scope of a tribunal’s ability to make submissions on “jurisdiction”?
6. When may a tribunal advance an argument not set out in its decision?
7. Does a tribunal have a role to play with respect to alleged failures of procedural fairness? Does this continue to be “a spectacle not ordinarily contemplated in our judicial traditions”?
8. What materials should a tribunal be required to file on an application for standing? What is the role of the court with respect to the materials?
9. When should the scope of a tribunal’s participating be determined? In advance of the hearing, or at the hearing?
10. Should there be costs consequences for parties supporting the tribunal’s standing application where the court determines the tribunal should not make submissions?
11. Should there be costs consequences for parties supporting the tribunal’s standing application?
12. What factors should tribunals consider when making a decision to seek standing on judicial review of a decision?

Background: *Northwestern Utilities and Paccar*

The Supreme Court of Canada decisions in *Northwestern Utilities* and *Paccar* framed the debate for twenty years, flagging the central and competing concerns of impartiality and assistance to the court.

Northwestern Utilities v. City of Edmonton,⁴⁸ arose from a statutory appeal from a decision of the Alberta Public Utilities Board, which set natural gas rates. At the time, section 65 of the *Public Utilities Board Act* entitled the Board "to be heard ... upon the argument of any appeal". The Court of Appeal set aside the Board’s order both on the grounds of jurisdiction

⁴⁸ [1979] 1 S.C.R. 684.

(statutory interpretation), and the failure to provide reasons as required by the Administrative Procedures Act. Both Northwestern Utilities and the Board appealed to the Supreme Court of Canada, and argued both issues. The question of standing was not separately addressed prior to the appeal. In the judgment, however, Estey, J. for the Court held:⁴⁹

This appeal involves an adjudication of the Board's decision on two grounds both of which involve the legality of administrative action. One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. **Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.**

It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, **to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction...** Where the right to appear and present arguments is granted, an administrative tribunal would be well advised to adhere to the principles enunciated by Aylesworth J.A. in *International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board*, at pp. 589, 590:

Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. **We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board,** If argument by

⁴⁹ *Northwestern Utilities* at 709-710

counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance.

....

In the sense the term has been employed by me here, "jurisdiction" does not include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions. (Emphasis added)

CAIMAW v. Paccar of Canada Ltd.

In *Paccar*,⁵⁰ the Industrial Relations Council was permitted to address the appropriate standard of review and to argue that its decision was reasonable. Justice La Forest⁵¹ held that the: "Industrial Relations Council has standing before this Court to make submissions not only explaining the record before the Court, but also to show that it had jurisdiction to embark upon the inquiry and that it has not lost that jurisdiction through a patently unreasonable interpretation of its powers."

La Forest, J. adopted the following statement of Taggart, J.A. for the court in *British Columbia Government Employees' Union v. Industrial Relations Council*:

⁵⁰ *CAIMAW v. Paccar of Canada Ltd.* [1989] 2 S.C.R. 983

⁵¹ Writing on behalf of himself and Chief Justice Dickson in a concurring decision

The traditional basis for holding that a tribunal should not appear to defend the correctness of its decision has been the feeling that it is unseemly and inappropriate for it to put itself in that position. But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a **powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area.** In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them. (Emphasis added)

Children’s Lawyer for Ontario v. Goodis

The Children’s Lawyer of Ontario had acted as court-appointed litigation guardian for a minor in civil litigation, and as legal representative for the minor in child protection proceedings.⁵² The minor requested access to her files under the *Freedom of Information and Protection of Privacy Act*, which was refused in part. The minor appealed to the Information and Privacy Commissioner, who ordered disclosure of a number of the records. The Attorney General commenced a judicial review application, brought a motion challenging the Commissioner’s standing to appear, and sought an order prohibiting the Commissioner from arguing that her decision was correct on a basis that was not given in the original decision. The requester took no part in the judicial review at Divisional Court or the subsequent appeal, although an *amicus curiae* was appointed by the Divisional Court, and participated as well at the Court of Appeal.

In Ontario, Section 9(2) of the *Judicial Review Procedure Act* reads:

For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power may be a party to the application.

⁵² *Children’s Lawyer for Ontario v. Goodis* (2005), 253 D.L.R. (4th) 489 (Ont. C.A.); 2005 CanLII 11786 (OCA)

Goudge, J.A. for the Court noted that the provision leaves to the tribunal, rather than the court, the decision of whether to become a party to the application for judicial review. However, once a party, the scope of a tribunal's standing is a matter of judicial discretion.

Justice Goudge, for the Court, adopted a context-specific approach, holding:⁵³

.... I agree with the parties that a context-specific solution to the scope of tribunal standing is preferable to precise *a priori* rules that depend either on the grounds being pursued in the application or on the applicable standard of review. For example, a categorical rule denying standing if the attack asserts a denial of natural justice could deprive the court of vital submissions if the attack is based on alleged deficiencies in the structure or operation of the tribunal, since these are submissions that the tribunal is uniquely placed to make. Similarly, a rule that would permit a tribunal standing to defend its decision against the standard of reasonableness but not against one of correctness, would allow unnecessary and prevent useful argument. Because the best argument that a decision is reasonable may be that it is correct, a rule based on this distinction seems tenuously founded at best....

Goudge, J.A. identified a number of factors to be considered in determining the scope of a tribunal's participation on judicial review, including:⁵⁴

- the importance of a fully informed adjudication of the issues before it,
- the importance of maintaining tribunal impartiality,
- The nature of the problem,
- the purpose of the legislation,
- the extent of the tribunal's expertise, and
- the availability of another party able to knowledgeably respond to the attack on the tribunal's decision.

He held at para. 44:

⁵³ *Children's Lawyer* at para. 34

⁵⁴ *Ibid*, para. 43

The last of these factors will undoubtedly loom largest where the judicial review application would otherwise be completely unopposed. In such a case, the concern to ensure fully informed adjudication is at its highest, the more so where the case arises in a specialized and complex legislative or administrative context. If the standing of the tribunal is significantly curtailed, the court may properly be concerned that something of importance will not be brought to its attention, given the unfamiliarity of the particular context, something that would not be so in hearing an appeal from a lower court. In such circumstances the desirability of fully informed adjudication may well be the governing consideration.

In balancing the considerations, the Court held that several factors in the case demonstrated the importance of full tribunal participation in order to ensure a fully informed adjudication, including:

- The requester played no part in the proceedings,
- The IPC’s “expert familiarity” with the statute,
- The IPC does not adjudicate in a traditional court-like model, but is more inquisitorial in nature, which “mutes the impartiality concern”,
- The issues involved statutory interpretation, and as a result the Commissioner’s ability to act impartially in future cases would not be adversely affected by participation in the appeal, any more than by the original decision on the same issues.

More controversially, the Commissioner raised a new ground to support its decision, in this case, that the Children’s Lawyer was not “Crown counsel” within the meaning of section 19 of the FOIPPA. Of note, the Children’s Lawyer had not advanced this argument before the Commissioner, either by evidence or argument, and the decision was silent on the point as a result. Goudge, J.A. held that the Commissioner was entitled to raise the argument as a matter of statutory interpretation on the judicial review, stating:

Clearly an administrative tribunal must strive to provide fully reasoned decisions. However I do not think the absence of the “Crown counsel” argument in the decision should prevent the Commissioner from advancing it to the court on judicial review. It is not inconsistent with the reason offered in the decision. Indeed it could be said to be implicit in it. If the Children’s Lawyer was the legal representative of the requester in the proceedings for which records are sought (the reason relied upon by the Commissioner in her original decision) it could not have been Crown counsel in those proceedings.

Moreover, the Children's Lawyer was required by this section of FIPPA to positively establish that it was Crown counsel in order to take advantage of the protection offered by the second branch of s. 19. It appears that the Children's Lawyer did not seek to do so before the Commissioner either by evidence or argument. The result was that the decision under review was simply silent on the question.

Finally, if the Commissioner's standing were to preclude her from making this argument there would be no guarantee that the Divisional Court would hear it from anyone else with a resulting risk to a fully informed adjudication.

It was therefore proper for the Commissioner to be permitted to raise this argument before the Divisional Court and equally proper for the court to decide on that basis.⁵⁵

Chrétien v. Canada (Attorney General)

A challenge was brought by the former Prime Minister to the refusal of the Honourable Justice Gomery to recuse himself as Commissioner in the Sponsorship Inquiry.⁵⁶ The Commissioner sought leave to intervene in the application under Rule 109 of the *Federal Courts Rules*, which require a proposed intervener to indicate how their participation will assist the determination of a factual or legal issue related to the proceeding, which has been interpreted to include bringing an additional or a different perspective to the proceeding.

The Commissioner sought to intervene on the following issues:

- (a) the law of reasonable apprehension of bias as it relates to federal commissions of inquiry;
- (b) the scope of mandate of the Commission as set out in the Terms of Reference;
- (c) the jurisdiction and procedural discretion of the Commission, including in relating to the Commission Rules, the calling of witnesses and the admissibility of evidence;
- (d) the law as to whether the Commissioner should be prohibited from proceeding with the inquiry pursuant to his mandate;

⁵⁵ Ibid. at para. 55-58.

⁵⁶ *Chrétien v. Canada (Attorney General)*, 2005 FC 591 (CanLII) ("Gomery Commission")

- (e) the applicable standard of review; and
- (f) to have a right of appeal.

Prothonotary Aronovitch essentially granted leave to intervene on items (b), (c) and (f).⁵⁷ In refusing to grant leave to the Commissioner to make submissions on the law of reasonable apprehension of bias and the removal of heads of public inquiries, the Prothonotary expressed a concern with the impartiality of the Commissioner, stating:⁵⁸

The Commissioner's apprehended bias and whether he will be precluded from proceeding with his inquiry are precisely the matters at issue on the merits in this judicial review. It is difficult to conceive of any submission of law, by the Commissioner, on these issues that would not be self-interested or directed to the merits. The Commissioner's impartiality in my view is best protected by precluding his participation in the very subject area in controversy between Applicant and the Attorney General.

Canada (Attorney General) v. Quadrini

In a 2009 hearing before the Public Service Labour Relations Board,⁵⁹ the respondent Canada Revenue Agency (CRA) refused to disclose a document on the grounds of solicitor-client privilege. The CRA submitted that the Board did not have the power to investigate whether the document was subject to solicitor-client privilege, nor the power to order that the document be disclosed. The Board rejected these arguments, and ordered the CRA to provide the Board with an affidavit describing the contents of the document and basis for the privilege claim. The CRA sought judicial review of this order in the Federal Court of Appeal. The Board sought standing to make submissions on “the appropriate procedure to deal with a claim of solicitor-client privilege” and “the importance of efficient rules of procedure to the functioning of the Board.”⁶⁰ The AG opposed the Board’s intervention, taking the position that the Board was trying to use its intervenor status to defend the correctness of its decision.

⁵⁷ Gomery Commission, para. 18

⁵⁸ Gomery Commission, para. 36

⁵⁹ *Quadrini v. Canada (Attorney General)*, 2009 PSLRB 104

⁶⁰ *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2010] F.C.J. No. 1204 at para. 10

In its written argument on the motion to intervene, the Board proposed to make submissions on the judicial review as follows:

- “procedural considerations need to be taken into account in deciding how a quasi-judicial tribunal should deal with a claim of solicitor-client privilege”;
- “there is a public interest” in the “expeditious resolution of the issues that arise before the Board”;
- Board proceedings should not be interrupted while privilege issues are dealt with elsewhere, with resulting costs and delays;
- in its order, the Board adopted the least intrusive means to investigate the existence of the privilege without breaching it; and
- the manner in which the Board handles solicitor-client [privilege] issues will have a direct impact on the Board’s operations and procedures.⁶¹

Stratas J.A. allowed the Board to intervene, although on more narrow grounds than originally proposed by the Board⁶² The *Public Service Labour Relations Act* provides that Board has standing to appear on judicial review “for the purpose of making submissions regarding the standard of review to be used with respect to decisions of the Board and the Board’s jurisdiction, policies and procedures.”⁶³ Justice Stratas held, however, that the provisions of the Act do not oust the two common law restrictions on tribunal standing, which he identified as (a) relevance and usefulness, and (b) finality and impartiality.

On the issue of relevance and usefulness, Stratas J.A. noted that the first restriction on potential tribunal participation is common to all parties in applications for judicial review: “the submissions must be relevant to the issues in the judicial review and useful to the Court. Useful includes the concept that the intervener will do more than simply restate what others will be arguing, for example “by assisting the Court by bringing an additional or a different perspective to the proceeding”....”⁶⁴ Stratas, J.A.held:⁶⁵

⁶¹ *Ibid.* at para. 11

⁶² *Ibid.* at paras. 25-31

⁶³ *Public Service Labour Relations Act*.C. 2003, c. 22, s. 51(2)

⁶⁴ *Quadrini*, para. 15

⁶⁵ *Quadrini*, para. 16

The second restriction aims at careful regulation of the tribunal when it appears as a party or as an intervener on judicial review. This careful regulation is grounded on two fundamental principles in the common law:

(a) *The principle of finality.* Once a tribunal has decided the issues before it and has provided reasons for decision, absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done: *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (S.C.C.), [1989] 2 S.C.R. 848. A judicial review is not an opportunity for the tribunal to amend, vary, qualify or supplement its reasons. Accordingly, attempts by the tribunal to speak further by making submissions in the judicial review have to be carefully regulated.

(b) *The principle of impartiality.* When a court allows an application for judicial review, it has a broad discretion in the selection and design of remedies: *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 (CanLII), 2010 SCC 2, [2010] 1 S.C.R. 6. One remedy, quite common, is to remit the matter back to the tribunal for redetermination. If that happens, the tribunal must redetermine the matter, and appear to redetermine it, impartially, with an open mind. Submissions by the tribunal in a judicial review proceeding that descend too far, too intensely, or too aggressively into the merits of the matter before the tribunal may disable the tribunal from conducting an impartial redetermination of the merits later. Further, such submissions by the tribunal can erode the tribunal's reputation for evenhandedness and decrease public confidence in the fairness of our system of administrative justice.....

The Court determined that “the general statements in the case law are not hard and fast rules, and that this is an area for the exercise of judicial discretion”, and previously decided cases are “sources of fundamental considerations” rather than “a set of fixed rules.”⁶⁶

⁶⁶ *Ibid*, para. 19

The Court also listed three factors that should be taken into account to determine the scope of a tribunal's submissions on a judicial review of its own decision:⁶⁷

1. An appreciation of the issues that will arise in the reviewing court;
2. An assessment of the relevance and usefulness of the tribunal's proposed submissions to the determination of those issues; and
3. a consideration of whether, and the extent to which, the principles of finality and impartiality will be offended by the tribunal's proposed submissions.

The materials filed by the tribunal will be critical to the Court's assessment as to the scope of a tribunal's standing. Stratas, J.A. held that: "The Court must have a fairly detailed description of the submissions that the tribunal proposes to advance and how they will assist the determination of the factual or legal issues in the judicial review. Rule 109(2) requires that this be stated in the notice of motion for intervention. Vague or sweeping descriptions of the intended submissions can create concerns that the tribunal will go too far, prompting the court to impose restrictions. In some cases, the descriptions of the proposed submissions can be so inadequate that the court has no choice but to refuse intervention."⁶⁸

Discussing the importance of fully informed adjudication, the Court held that due to the fact that Mr. Quadrini, who was unrepresented, was the only other party, and Mr. Quadrini was not participating in the judicial review, if the Court restricted the scope of the Board's intervention it might be deprived of hearing legal submissions that respond to the legal position of the Attorney General. Because of this, the Board was granted standing to make submissions regarding statutory interpretation, the central issue on review. These submissions were not seen by the court to prompt concerns regarding the principles of finality and impartiality, provided that the Board advanced them with "circumspection and prudence" (para 27). On the issues of the implications of the solicitor-client privilege question, the Court directed that "the Board should restrict itself to its ability to have matters heard in a just, timely and orderly way, and the possible effects that granting the application for judicial review could have on the Board's procedures. No other implications have been articulated with sufficient particularity."(para. 28)

The Board was, however, prohibited from attempting to amend, vary, qualify or supplement the reasons for its decision, and was specifically prohibited from arguing that it

⁶⁷ *Quadrini*, para. 20

⁶⁸ *Quadrini*, para. 22

adopted the least intrusive means to investigate the existence of privilege without breaching it. The court also prohibited the Board from embarking into the merits of its decision in such a way as to call into question its ability to hear, impartially, any redetermination in the event that this matter is remitted back to it.

British Columbia

There are a significant number of decisions in British Columbia, which has generally followed the *Children's Lawyer* contextual approach, starting with the *Global Securities* decision.

Global Securities Corp. v. British Columbia (Executive Director, Securities Commission)

*Global Securities Corp. v. British Columbia (Executive Director, Securities Commission)*⁶⁹ follows the “contextual approach” of the *Children's Lawyer* case. This case was an appeal by Global Securities Corp. from a decision of a disciplinary panel of the TSX Venture Exchange. The Exchange and the Executive Director of the B.C. Securities Commission applied to the B.C. Securities Commission for a hearing and review of the disciplinary panel’s decision. Global Securities challenged the standing of the Exchange to bring the application for review of the disciplinary panel’s decision.

Following the *Children's Lawyer*, the British Columbia Court of Appeal stated that standing of administrative tribunals on reviews of their own decisions must be considered contextually rather than by reference to a strict rule. The Court found that the disciplinary panel itself could not appear and make submissions on the merits on a review of its own decision. However, the Court found that the disciplinary panel and the Exchange were different in function; the Exchange investigates and prosecutes, while the disciplinary panel adjudicates. As such the Exchange was entitled to make submissions on the merits of the decision of the disciplinary panel.

Timberwolf Log Trading Ltd. v. Commissioner (Pursuant to s. 142.11 of the Forest Act)

⁶⁹ *Global Securities Corp. v. British Columbia (Executive Director, Securities Commission)* 2006 BCCA 404 (CanLII)

The delegate of the B.C. Commissioner under the Forests Act had made a decision respecting stumpage payments to the Crown.⁷⁰ The standing of the Commissioner was challenged by Timberwolf Log Trading on the subsequent judicial review application. Hinkson, J.A. for the Court identified three exceptions to the rule in *Northwestern Utilities*:

- (i) where the question is whether the tribunal has made a patently unreasonable interpretation of a statutory right to be heard;
- (ii) where the tribunal is defending a long standing policy; and
- (iii) where there is no one else to argue the other side.

Hinkson, J.A. held that the Commissioner did not have standing on the appeal, stating:⁷¹

None of those exceptions arise in this case. The Commissioner's delegate made no decision denying a right to be heard. To the contrary, he invited representations. There was no long standing policy in issue, and the Attorney General made written and oral submissions respecting the merits of the purported decision. It was unnecessary and improper for the respondent Commissioner to make submissions on the merits of the alleged decision in issue, let alone attempt to recast the appeal by raising issues that differed from those raised by the appellant. As a result of the role that the Commissioner sought to assume on this appeal, she will be disentitled to her costs.

Of note, the Court held that since the Attorney General had supported the Commissioner's participation, the A.G. would be denied his costs relating to the standing application, which the Court found to be 20% of the time spent in preparation for and argument of the appeal.

Alberta

Although the strict approach has in the past been favoured by the Alberta Court of Appeal, the Court seems to be moving to a more contextual approach in two cases released March 2011.

⁷⁰ *Timberwolf Log Trading Ltd. v. Commissioner (Pursuant to s. 142.11 of the Forest Act)*, 2011 BCCA 70 (CanLII)

⁷¹ *Timberwolf* at para. 12

1447743 Alberta Ltd. v. Calgary (City)

The corporation 1447743 Alberta Ltd. sought leave to appeal a decision by the City of Calgary Subdivision and Development Appeal Board.⁷² The impugned decision overturned the City of Calgary development authority's decision to issue a development permit to the applicant for a bottle return depot. The Court dealt with the preliminary issue of the extent to which the Board could participate on the leave application.

While holding that the overriding concern remains the preservation of the tribunal's integrity and impartiality. Martin, J.A.'s decision reflects a move toward a contextual approach. He held that the scope of a tribunal's standing is a matter of judicial discretion, which may take into account factors such as:⁷³

- any legislative provisions touching on the scope of the tribunal's authority to appear before the court,
- the extent to which other interested parties are able and willing to join issue with the aggrieved party and provide an adversarial context to the proceedings,
- the expertise of the tribunal,
- the overall context of the proceedings before the tribunal, and
- the nature of the proceeding and the issues raised on appeal or judicial review.

The court noted that in situations where there is an absence of an opposing view, a tribunal might be allowed to make fuller submissions, but that the tribunal's participation will often be "tempered" in these situations (para 16).

The legislative scheme provided that:

⁷² *1447743 Alberta Ltd. v. Calgary (City)* 2011 ABCA 84 (CanLII)

⁷³ *Ibid*, para. 6

“If an appeal is from a decision of a subdivision and appeal board, the municipality must be given notice of the application for leave to appeal and the board and the municipality

- (a) are respondents in the application and, if leave is granted, in the appeal, and
- (b) are entitled to be represented by counsel at the application and, if leave is granted, at the appeal.”

Martin, J.A. noted that the legislative scheme, which makes the Board a respondent, is one factor that suggests a greater role to be played by the Board on the leave application.⁷⁴

The Court specifically considered the rather unusual lack of adversarial submissions on the leave application. Martin, J.A. noted that: “On the hearing before me, the City stated its preference not to appear on the leave application, but that its position would be assessed depending on the scope permitted to the Board to address the issues on the leave application.” Legal Counsel for the local community association indicated that the association was content “to sit on the sidelines,” subject to the court’s ruling as to the scope of the Board’s participation. Martin, J.A. concluded that “ it appears that the Board is the only party willing to oppose the leave application on its merits, though other parties, namely the community association and the City, are waiting in the wings, and are potentially able to fill in the void should the Board’s participation be limited. Accordingly, concerns as to the lack of an adversarial setting are somewhat overstated in this matter, which suggests less scope to be accorded to the Board.”

After considering various factors the court in this case concluded that the Board was entitled to make submissions only on the scope of its jurisdiction, to explain the record and on the standard of review. The Board was not permitted to justify the correctness of its decision.

Leon's Furniture Ltd. v. Alberta (Information and Privacy Commissioner)

The Court of Appeal in *Leon's Furniture Ltd. v. Alberta*⁷⁵ makes a greater shift toward the contextual approach. This is an appeal by Leon’s from the dismissal of its application for judicial

⁷⁴ Ibid, para. 15

⁷⁵ *Leon's Furniture Ltd. v. Alberta (Information and Privacy Commissioner)* 2011 ABCA 94 (CanLII)

review of a decision of the Privacy Commissioner. One of the issues arising on appeal was the standing of the Commissioner to make submissions in the appeal.

The court found that in circumstances where the tribunal is acting in an adjudicative capacity, it is particularly important that it remain neutral, and the principles of *Northwestern Utilities Ltd.* should apply (para 20). However, the court goes on to state that some flexibility is required when defining the proper role of tribunals in judicial review proceedings, and identified a non-exhaustive list of factors that should be considered when determining the appropriate level of participation for a tribunal. These are:⁷⁶

- The existence of other parties who can effectively make the necessary arguments,
- Maintaining the appearance of independence and impartiality of the tribunal,
- The effect of tribunal participation on the overall fairness (in fact and in appearance) of the proceedings,
- The role assigned to the tribunal under the statute. Where the statute effectively gives carriage of the proceedings to the tribunal, a greater level of participation is tolerable,
- The nature of the proposed arguments. A tribunal should not be allowed to supplement its reasons for decision, or to attempt to provide fresh justifications for the result,
- While the tribunal, like any other party, can offer interpretations of its reasons or conclusion, it cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record, and
- A tribunal can, within those limits, attempt to rebut arguments about how it reasoned and what it decided.

Ultimately the court held that the Commissioner's participation was unobjectionable. The Commissioner in this situation was not merely an adjudicator, but closer to a true party. The court also found that the Commissioner was the only one in a position to rebut the judicial review application, and because of this, the Commissioner should be afforded some latitude in its submissions to the court.

New Brunswick

United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.

Bransen Construction was one of the first cases to recognize the broader scope for judicial discretion with respect to tribunal standing. This was an appeal from an order of the New

⁷⁶ Para. 29.

Brunswick Queen's Bench quashing a decision of the Labour and Employment Board⁷⁷. One issue on appeal was whether the Board had standing as of right in the appeal. The court held that, “in some tribunal settings there is no one to defend the tribunal's decision other than the tribunal. In such cases, no one should question the right of the tribunal to participate as a party to any review proceedings.” However, that was not the situation on the facts of this case. The court summarized:

[A] tribunal seeking intervener status must persuade the court that: the case is of precedential significance; the tribunal can contribute to the proceedings in a way not reasonably expected of the parties; and the principle of impartiality can and will be respected. Written submissions that address the merits of the decision do not offend this principle, except those intended to bootstrap tribunal reasons that are materially deficient. Oral submissions that respond only to questions posed by the reviewing court, or are of brief duration, qualify as non-aggressive participation that respect the principle of impartiality.⁷⁸

After analysing these factors, the court allowed the Board to participate as an inveneror, holding that the Board had something to contribute and had not overstepped the principle of impartiality.

New Brunswick (Attorney General) v. Pembridge Insurance Co.

This 2010 decision of the New Brunswick Court of Appeal follows *Bransen Construction*.⁷⁹ In this case the New Brunswick Insurance Board made an application for leave to intervene as a party in the appeal by the Attorney General of two of its decisions. The court denied the application to intervene as a party, but granted leave to intervene as a friend of the court. The court stated that the tribunal should be permitted to participate if it could contribute in a manner not expected by other parties. The Board was permitted to participate in the form of written submissions in the appeals related to the manner by which it provided written reasons for its decisions, and in terms that would respect the confidentiality owed to the respondents. As of February 2011, the judicial review hearing has not been scheduled.

⁷⁷ *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.* 2002 NBCA 27 (CanLII)

⁷⁸ *Ibid.* at para. 36.

⁷⁹ *New Brunswick (Attorney General) v. Pembridge Insurance Co.* 2010 CanLII 27414 (NB CA)

(7) Tribunal Delay

Delays are an unfortunate but inevitable part of our justice system. The question that is often raised is “how long is too long” – in other words, at what point does delay stop being unfortunate and become abusive?⁸⁰

This overview on delay in the tribunal context is organized as follows: First, we discuss the Blencoe case and the background to the treatment of delay, fair hearings and abuse of process in administrative law; second, we examine issuing mandamus to compel a decision maker to render a decision; third, we consider the issue of statutory time limits; and fourth and finally, we discuss tribunal rules.

A. **Blencoe: Background to Delay, Fair Hearings and Abuse of Process**

The leading case with respect to this issue is the Supreme Court of Canada decision in *Blencoe v. British Columbia (Human Rights Commission)*. Mr. Blencoe’s assistant filed a complaint with the British Columbia Human Rights Commission alleging sexual harassment. The hearing was set 32 months after the initial complaint was filed. Mr. Blencoe applied to quash the proceedings prior to the hearing being held, arguing the Commission had lost jurisdiction as a result of unreasonable delay, which⁸¹ delay had seriously prejudiced Mr. Blencoe and amounted to an abuse of process and denial of natural justice. The prejudice alleged by Mr. Blencoe related to the death of some witnesses and the fading memory of other witnesses as well as the psychological and economic impact of the proceedings on him and his family.

Justice Bastarache, speaking for a majority of the Supreme Court in *Blencoe*, held that at common law delay alone is not sufficient to warrant the stay of an administrative proceeding. There must be actual prejudice caused by the delay. He identified two types of prejudice which may flow from inordinate delay:

- (1) prejudice that compromises a right to a fair hearing, and
- (2) prejudice which amounts to an abuse of process in that it brings the administrative process into disrepute.

Justice Bastarache described prejudice compromising the right to a fair hearing at para. 102 of *Blencoe*, as follows:

⁸⁰ *Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission*, 2006 NSCA 63 (CanLII).

⁸¹ *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 SCR 307.

[102] ... Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy...

Justice Bastarache went on to describe prejudice amounting to an abuse of process:

I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. The difficult question before us is in deciding what is an "unacceptable delay" that amounts to an abuse of process.⁸²

Delay, *per se*, is not abusive or unfair. Rather, Bastarache, J. held that "to constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate", and "the respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings."⁸³ Factors to be considered in determining whether a community's sense of fairness would be offended by the delay include:

- the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings,
- whether the respondent contributed to the delay or waived the delay, and
- contextual factors, including the nature of the various rights at stake in the proceedings.

The Supreme Court held the delay was not inordinate and directed the Human Rights Tribunal to proceed with the hearing of the complaints.

⁸² *Ibid.* at para. 115.

⁸³ *Blencoe*, para. 121

B. Issuing Mandamus to Compel Decision-Makers to Render Decisions

In *Apotex Inc. v. Canada (A.G.)*,⁸⁴ the Federal Court of Appeal conducted an extensive review of the jurisprudence relating to *mandamus* and outlined the following conditions that need to be satisfied for the Court to issue a writ of *mandamus*:

1. There must be a public legal duty to act.
2. The duty must be owed to the applicant
3. There is a clear right to the performance of that duty, in particular:
 - (a) the applicant has satisfied all conditions precedent giving rise to the duty;
 - (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay.
4. No other adequate remedy is available to the applicant.
5. The order sought will be of some practical value or effect.
6. The Court in the exercise of discretion finds no equitable bar to the relief sought.
7. On a "balance of convenience" an order in the nature of *mandamus* should issue.

In discussing “unreasonable delay” in Factor 3(b), the Federal Court has identified the following factors:⁸⁵

- (1) the delay in question has been longer than the nature of the process required, *prima facie*;
- (2) the applicant and his counsel are not responsible for the delay; and
- (3) the authority responsible for the delay has not provided satisfactory justification.

In Federal Court, applications for *mandamus* are made frequently in the immigration and refugee context. In *Esmaeili-Tarki v. Canada (Minister of Public Safety and Emergency*

⁸⁴ *Apotex Inc. v. Canada (A.G.)*, 1993 CanLII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

⁸⁵ See *Conille v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9097 (F.C.), [1999] 2 F.C. 33 (F.C.T.D.), at para. 23.

Preparedness),⁸⁶ Justice Michel Beaudry found that a mandamus order should issue against the Minister. The applicant initially applied for ministerial relief in 1999, which was denied in 2004. That decision was set aside in 2005, remitted to the Minister for re-determination. In August of 2009, the applicant was informed that his application was in the redrafting stage and no timeline could be provided. An affidavit filed on behalf of the Minister indicated a draft recommendation had been prepared and would be disclosed to the applicant for comment within six to eight weeks. The MPS argued that the delay was not unreasonable for a number of reasons: a) the decision had to be made by the Minister, who had a wide range of other responsibilities, b) many levels of assessment and review were involved, and c) the process had been hampered by an institutional reorganization. Justice Beaudry found the delay was prima facie unreasonable and had not been adequately justified and issued the mandamus order. He concluded:

I do not accept these arguments as justifying the delay. In light of the facts that more than five years have elapsed since the matter was sent back to the Minister for redetermination and the Minister had the benefit of the previously prepared briefing note. Also, a briefing note was sent to the Applicant for comments in 2007 and there have been no further follow ups with him. There is no way to know that there won't be further delays even if the new recommendation is communicated to the Applicant in the timeline proposed in Michelle Barrette's affidavit. There is no evidence that there are any pending investigations regarding the Applicant. The Applicant has cooperated in all aspects of the process.

C. Police Statutory Time Limits: Alberta Teachers' Federation

Another tool for Court supervision of undue delay is closer supervision over statutory time limits. The 2010 decision of the Alberta Court of Appeal in *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)*,⁸⁷ now under reserve by the Supreme Court of Canada, is an example of this.

Section 50(5) of the Alberta Personal Information Protection Act sets out a time limit for the Commissioner to conduct an inquiry from “the day that the written request [for the inquiry to be conducted] was received”. It reads as follows:

50(5) An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner

⁸⁶ *Esmaeili-Tarki v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 697 (CanLII), 2010 FC 697 [Esmaeili-Tarki]

⁸⁷ 2010 ABCA 26 (CanLII)

- (a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and
- (b) provides an anticipated date for the completion of the review.

On August 1, 2007 (10 months after the request for an inquiry), the Commissioner, by letter to the complainants, purported to extend the time for completion of the inquiry to February 1, 2009. The adjudicator's decision on the complaints was rendered in March, 2008 (17 ½ months after the request for an inquiry). The adjudicator found that the Association had contravened PIPA by disclosing personal information about the complainants. The Alberta Teachers' Federation did not raise the time limit before the adjudicator.

Watson, J.A. for the majority held “...I am not persuaded that the Legislature intended that the consequence of breach of the time rules in s. 50(5) of PIPA would be an automatic and unforgivable termination of ability to complete the inquiry process. Nonetheless, I am satisfied that the Legislature intended that (a) the time rules were much more imperative than mere suggestions, (b) substantial departure from the time rules could terminate the process and a decision thereon, and (c) the scope of judicial review included assessing if there was a substantial or prejudicial departure from the time rules.”⁸⁸

Watson, J.A. summarized the relevant principles in para. 37 as follows:

(1) The Commissioner has no power to extend the time after the time limit as expired. If he does extend the time within the time limit, the exercise of that discretion will be subject to judicial review. Blanket or routine extensions seem unlikely to be regarded as reasonable if they cannot also be justified in the specific circumstances of the case. Because the points were not argued, I need not say whether the time can be extended more than once or whether in light of the possibility of prejudice from inactivity it would be appropriate for the Court to presume prejudice after a certain period of time: ...For example, a delay beyond double the 90 day period might be unreasonable for the case.

(2) Breach of the time rules creates a presumptive consequence, namely termination of the inquiry process when the default is raised. There is no “loss of jurisdiction” involved.

(3) An objection to the process should be raised at the earliest opportunity, either before the Commissioner or the adjudicator. It is not acceptable to await the outcome and then raise the objection. The Commissioner or adjudicator will have to consider whether or not the presumptive consequence should apply, and will be expected to provide reasons for the decision then made. The decision of the

⁸⁸ Ibid, para. 19

Commissioner or adjudicator will be subject to judicial review. As noted above, it is not necessary in the circumstances of this case to offer an opinion as to the standard of review applicable to such situations.

In the result, the majority held that the adjudicator's decision should be quashed given the substantial breach of the time limit, and the presumptive termination of the inquiry process.

In dissent, Berger, J.A. expressed significant concern with the failure to raise the issue of timeliness with the adjudicator, thereby depriving the Court of a proper record on judicial review, and depriving the complainants of their ability to address the issue below. He would have restored the adjudicator's decision. He noted in particular:

- Judicial review should not have proceeded without proper notice to the complainants who were denied an opportunity to tender evidence and advance argument. In addition, their absence from the judicial review proceedings precluded the conduct of a contextual analysis (para. 51)
- Quashing the Order in question without the benefit of adjudicative reasons from the Commissioner on the purported loss of jurisdiction attributable to the alleged breach of time lines compromised judicial review.(para. 52)
- PIPA's purpose is to protect individuals' rights to privacy. A strict interpretation of s. 50(5) of PIPA penalizes complainants whose rights to privacy have been affected. Even though they are not to blame for the delay, they are left without a remedy if the proceedings can be dismissed on a procedural technicality. An interpretation of s. 50(5) that allows the Commissioner to extend the ninety-day time period after it expires, ensures that the legislative intent which forms the basis of PIPA is upheld, and thus maintains the protection of the individuals' rights to privacy which PIPA strives to ensure. (paras. 50 and 64)

D. Accepting Tribunal Rules and Approaches Designed for Efficiency

Administrative tribunals are meant to provide efficient, expert, accessible and expeditious justice. Adopting procedures to enhance efficiency is an important element of delivering on the promise of administrative justice. The concern is that courts must accept alternative methods of dispensing justice within the administrative community. Where procedural fairness is interpreted as requiring the "judicialization" of administrative tribunals, delay is almost inevitable.

An example of administrative tribunal searches for efficiency include the *Thamotharem* case, where the Federal Court of Appeal upheld the reverse-order questioning Guideline adopted

by the Immigration and Refugee Board.⁸⁹ Under the (non-binding) Guideline, Refugee Protection Officers proceed to question refugee claimants first, rather than their own counsel. The Board has adopted the practice in part to make hearings more expeditious, reduce the backlog on the refugee side, and avoid “often lengthy and unfocussed examination-in-chief of claimants by their counsel.”

Conclusion

As the various areas of administrative law canvassed above shows, administrative law continues to evolve. New legislation, new common law doctrines, new administrative innovations and new realities for government, all play a role in shaping the evolution of administrative justice. We have sought to highlight that what appears to be complex in administrative law in fact turns on clear and often simple concepts, and what appears to be simple in administrative law may in fact turn out to have more layers than it appears at first glance.

Most of all, perspective matters. Administrative law to a judge, to an administrative adjudicator, to a lawyer, to the parties, to the government, all may seem to turn on quite different realities and principles. Reconciling these perspectives in the wide variety of contexts which are subject to administrative law is the topic both this Roundtable and of all those who seek to understand public law in Canada.

⁸⁹ *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198.