

Recent Developments in Procedural Fairness

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Developments in Procedural Fairness

- *Canada (Attorney General) v Mavi*, 2011 SCC 30.
- *Seli Canada Inc. v Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353.
- *Bajwa v British Columbia Veterinary Medical Association*, 2011 BCCA 265.



Canada (Attorney General) v Mavi

- Dealing with *Dunsmuir*: Part Deux.
- The character of sponsorship undertakings: contractual or statutory?
- Do *Nicholson* and *Knight* still require procedural fairness in contractual relationships outside the context of public employment?



Dealing with *Dunsmuir*: Part Deux

- *Knight v. Indian Head School Division*=there is a general, common law duty of procedural fairness which applies to all employment relationships with sufficient “statutory flavour”.
- *Dunsmuir* =where the employment relationship is set out by contract, the private law of contract governs the breakdown of the employment relationship so no public law duty of procedural fairness.



The character of sponsorship undertaking: private or public?

“I understand that all social assistance paid to the sponsored person or his or her family members becomes a debt owed by me to Her Majesty in right of Canada and Her Majesty in right of the province concerned. As a result, the Minister and the province concerned have a right to take enforcement action against me (as sponsor or co-signor) alone, or against both of us.”



The character of sponsorship undertaking: private or public?

“The Minister and the province concerned may choose not to take enforcement action to recover money from me if the default is the result of abuse or in other circumstances. The decision not to act at a particular time does not cancel the debt. The Minister and the province concerned may recover the debt when circumstances have changed.”



Canada (Attorney General) v Mavi

Big Question=does the *Dunsmuir* doctrine, which states that the public law duty of procedural fairness is trumped by the private law of contract, extend to contractual relationships beyond the context of public employment?



Canada (Attorney General) v Mavi

- Issued June 10, 2011
- Unanimous decision
- SCC holds in favour of duty of fairness(!), because the provincial government was exercising a discretionary power delegated by statute.
- However, the content of the duty is limited to notice and an opportunity to provide written submissions regarding personal circumstances.
- Bottom line=the scope of the *Dunsmuir* doctrine is limited.



SELI Canada Inc. v Construction and Specialized Workers' Union

Big Question= is a party entitled to present evidence (an imperfect and unofficial transcript) of what occurred at an administrative hearing in order to challenge the legality of the decision via judicial review?



SELI Canada Inc. v Construction and Specialized Workers' Union

- Issued August 18, 2011
- Unanimous decision
- BCCA holds that, while an unofficial transcript is not technically part of the “record”, a party is nevertheless entitled to tender the transcript in evidence on an application for judicial review.
- What are the practical implications of this decision?



Bajwa v British Columbia Veterinary Medical Assn.

Big Questions:

(1) Does an administrative tribunal have jurisdiction to hear and decide a preliminary objection regarding institutional bias?

(2) If there is a parallel human rights complaint which raises similar issues regarding systemic discrimination, should an administrative committee or tribunal refuse jurisdiction over the institutional bias objection?



Bajwa v British Columbia Veterinary Medical Assn.

- Issued June 13, 2011 (leave to SCC dismissed with costs February 23, 2012)
- Unanimous decision
- BCCA holds that an administrative tribunal generally has implied jurisdiction to hear and determine a preliminary objection regarding institutional bias. This implied jurisdiction is grounded in practical advantages of having front-line decision-makers hear evidence and produce a record of the proceedings.



Bajwa v British Columbia Veterinary Medical Assn.

- However, BCCA also holds that if there is a parallel human rights complaint which raises the same essential issue, the administrative committee or tribunal should refuse jurisdiction so as to prevent duplication and inconsistent results.
- Parties might want to consider which forum to launch a complaint regarding institutional bias or systemic discrimination.

