RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

A PAPER PREPARED FOR

THE SASKATCHEWAN ADMINISTRATIVE TRIBUNALS ASSOCIATION

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I. Standard of Review issues

Bell Canada v. AG Canada May 2018 SCC leave application

> *The Court is of the view that these appeals provide an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in **Dunsmuir v. New Brunswick**, [2008] 1 S.C.R. 190, 2008 SCC 9, and subsequent cases. To that end, the appellants and respondent are invited to address the question of standard of review in their written and oral submissions on the appeal, and shall be allowed to file and serve a factum on appeal of at most 45 pages.*

There are many critics who have commented on the lack of certainty respecting what standard of review will be applied in particular situations.

On example is Paul Daly, former Assistant Professor, Faculty of Law, University of Montreal.

He commented in the article *The Scope and Meaning of Reasonableness Review (http://www.administrativelawmatters.com/publications/the-scope-and-meaning-of-reasonableness-review/)*:

> *Questions continue to abound about the standard of review of administrative action in Canada. For something apparently simplified in Dunsmuir v. New Brunswick and subsequent cases, it provokes a great many questions.*
>
> *The key question now, in light of the "triumph" of reasonableness, is the scope and meaning of reasonableness review. To what does the standard of reasonableness apply and, when it does, what does it mean? Unfortunately, we have had little concrete guidance from the Supreme Court of Canada ("the Court") in recent years.*

Pushpanathan v. Canada – 1998

The court adopted the "pragmatic and functional test" for judicial review and established three standards of review, correctness, reasonableness simpliciter and patent unreasonableness

Dunsmuir v New Brunswick – 2008 SCC standard of review – two standards of review

Reasonableness applied unless:

a) It relates to a question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker
b) If the question of law is a constitutional question, a correctness review will probably apply because of the unique role of section 96 courts as interpreters of the Constitution:
c) Administrative bodies must be correct in their determinations of true questions of jurisdiction or *vires*

Generally reasonableness applies when a body interprets its own statute or one closely related to its functioning, the issue is a factual issue or an issue of mixed fact and law

Reasonableness requires the court to look to transparency of the reasoning process and the reasonableness of the result.

> *In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law* (*Dunsmuir*)

The issue has been expressed as: Does the decision fall within a range of possible acceptable outcomes that were defensible in respect of both the facts and the law.

Law Society of New Brunswick v. Ryan, 2003 SCC 20 at para 55

A reasonableness review means that the court must demonstrate deference towards the Council's decision and can only overturn that decision if there is "no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere."

II. Standard of Review –appeals to administrative tribunals

Robin v. Saskatchewan (Police Commission), 2016 SKCA 159

At issue was the appropriate penalty for misconduct by the police officer. The police chief dismissed Robin on the basis that he was unsuitable for police service. That was appealed to a hearing officer who decided that dismissal was too harsh as he had an otherwise good service record over three years, had apologized, and had not been provided with a reasonable opportunity to bring his performance up to standard. The hearing officer ordered that Robin be suspended for 9 months and be on probation for one year. The Chief appealed to the Commission which found Robin unfit for service based on all of the evidence suggesting an overarching scheme of deliberate and reckless behaviour, lack of credibility, and his persistent efforts to minimize and justify his behaviour. The Commission restored the dismissal.

The Commission applied the standard of review from Dunsmuir and concluded that the hearing officer's decision was unreasonable. The Commission reduced the appeal before it to a narrow question: whether the hearing officer's conclusion about the appropriateness of remedial measures was objectively reasonable based on her findings of fact. The hearing officer had failed to adequately address whether the reputation of the police service might be damaged or public confidence might be undermined if the appellant were reinstated.

The Court of Queen's Bench concluded that the court's role was to review the decision of the Commission to determine whether it was reasonable. Its role was not to review the hearing officer's decision to determine whether it was correct or reasonable. The court of Queen's Bench rejected the argument that the court should review the hearing officer's decision to determine whether it was reasonable. It rejected the argument that if the court determined that the hearing officer's decision was reasonable it must uphold the hearing officer's decision.

The Court of Appeal determined that its role was to review the decision of the Court of Queen's Bench to determine whether the application judge selected the correct standard of review and applied it correctly. It concluded that the reviewing court had done both correctly:

> ***133*** *In conclusion, the application judge properly applied the standard of reasonableness in her approach to reviewing the decision of the Commission. The application judge made no reviewable error in coming to the conclusion that the Commission's decision on penalty was reasonable, that its line of analysis was transparent and intelligible, and that its decision fell within a range of possible, acceptable outcomes*

III. Standard of review – issues of fairness

I think that there is inconsistency in how courts have described their approach to reviewing allegations that a tribunal has not acted fairly.

You can find support in the court decisions for all of the following:

- A standard of review analysis is not appropriate as the court will itself determine if the applicant was treated fairly;
- Questions of fairness are to be determined on a standard of correctness;
- Questions of fairness are to be determined question of fairness on a standard of reasonableness;
- The court will accord deference to the tribunal's decision on the basis that the tribunal had a discretion how to carry out its functions;
- The court will accord deference to finding of fact, but no deference to a determination whether, based upon those facts, the process was fair.

Risseeuw v Saskatchewan College of Psychologists, 2017 SKQB 8

The court stated that it would apply a "hybrid standard of review" to determining if the applicant had been accorded fairness. The review should consider that the tribunal is to be accorded a measure of deference in the procedures which it has chosen. Further, the applicant was not entitled to a process which mirrored that court process.

The court also commented on the interpretation of the bylaw. The court rejected the argument that the mobility bylaws had to be interpreted in such a way that a professional regulator was required to ignore the past failures of the applicant to demonstrate professional competence and to blindly register her for Saskatchewan membership based solely on a new mobility provision.

IV. Reasonableness may require the tribunal to adopt principles of statutory construction used by courts – considering the purpose of the statute

Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36

> ***64*** *In my view, the Minister's interpretation of the term "national interest", namely that it is focused on matters related to national security and public safety, but also encompasses the other important considerations outlined in the Guidelines and any analogous considerations, is reasonable. It is reasonable because, to quote the words of Fish J. from Smith v. Alliance Pipeline Ltd., 2011 SCC 7, [2011] 1 S.C.R. 160, it "accords ... with the plain words of the provision, its legislative history, its evident purpose, and its statutory context" (para. 46). That is to say, the interpretation is consistent with Driedger's modern approach to statutory interpretation:*
>
> > *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

British Columbia Hydro and Power Authority v. Workers' Compensation Board of British Columbia, 2014 BCCA 353:

> *[45] A reasonable decision must be both factually and legally defensible. Where the legal issue under examination is one of statutory interpretation, the common objective of both administrative decision makers and courts must be to ascertain the intent of the legislature by applying the "modern principle" of statutory interpretation. This requires an examination of the words of the provision under consideration according to their grammatical and ordinary sense, in their entire context, and in harmony with the scheme and object of the Act. The fact that the choice between reasonable interpretations falls to the administrative decision maker does not absolve it from following this cardinal principle…*

Nelson v Regina Police Service, 2017 SKQB 192

The decision of the Human Rights Commissioner to refuse to accept a complaint from a person with an acquired brain injury was quashed.

The court concluded that the discretion conferred by the Code must be exercised in way that was consistent with the purposes and policies underlying its grant. When the exercise of discretion frustrated the very legislative scheme under which the power was conferred, it was unreasonable.

V. The emphasis on deference has increased the scrutiny on the reasons provided for the decision – Sufficiency of reasons

In **Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)**, 2011 SCC 62, the court rejected the argument that there was a separate, stand-alone, requirement that the reasons provided meet a fairness requirement. The headnote states:

> *Dunsmuir did not stand for the proposition that the "adequacy" of reasons was a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses - one for the reasons and a separate one for the result. It was a more organic exercise - the reasons had to be read together with the outcome and serve the purpose of showing whether the result fell within a range of possible outcomes*

Since then, a number of decisions have addressed whether reasons are adequate for judicial review and the remedy to be provided if reasons are inadequate.

Trinity Western University et al. v. Law Society of Upper Canada, 2016 ONCA 518

> *[70] Finally, the adequacy of an administrative tribunal's reasons is not a "stand-alone basis for quashing a decision": Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), [2011] 3 S.C.R. 708, [2011] S.C.J. No. 62, 2011 SCC 62, at para. 14. It also does not change the applicable standard of review. While the nature of the reasons certainly can have a bearing on whether a decision meets the requirement for justification, transparency and intelligibility, set out in Dunsmuir, at para. 47, it does not subject a decision that would otherwise be reviewed on the reasonableness standard to a review for correctness.*

VI. Assessing credibility – reasons for decisions to accept or reject evidence

Karkanis v. College of Physicians and Surgeons of Ontario, 2014 ONSC 7018 (Div.Ct.)

The court concluded that the decision that the physician had acted in a sexually improper manner with the patient was unreasonable.

That conclusion was based on the cumulative effect of errors by the discipline committee which included:

a) The Discipline Committee appeared not to have recognized, or properly understood, the distinction between the honesty of the patient (loosely referred to as credibility by the Discipline Committee) and the reliability of her evidence.

b) It was not clear on what basis the committee rejected the physician's evidence that he may have accidently touched the patient's clitoris. The committee did not specify what expertise it had in conducting vaginal examinations.

c) The Discipline Committee accepted evidence of the patient's emotional upset when recounting the experience but failed to appreciate that after the fact conduct can only provide circumstantial evidence that an event occurred where there are no other explanations for the conduct.

Ahmed v College of Registered Nurses of Manitoba, 2017 MBCA 121

The court concluded that the decision that the nurse had committed a sexual assault on the patient was unreasonable. There were two errors in the assessment of the evidence:

1. the Discipline Committee failed to consider the reliability of the complainant's evidence when it assessed her credibility; and

2. the Discipline Committee used the complainant's evidence of her prior consistent statements for an improper purpose.

Where there are significant inconsistencies in a witness's evidence, an administrative tribunal must address both the honesty and the reliability of that evidence.

There were a number of inconsistencies in the evidence presented at the hearing and what she had said on other occasions. The committee was required to consider whether all of the inconsistencies, taken together, demonstrated an absence of reliability.

There was evidence that raised a concern that the complainant may not have been able to accurately observe, recall and recount what was occurring. The discipline committee's reasons did not consider the complainant's capacity and/or ability to form accurate observations at the time of her visit to the hospital.

To the extent that the Discipline Committee's reasons failed to explain why the complainant's evidence was reliable, its analysis was flawed and incomplete. It is not sufficient to simply say

that “In considering [the complainant]’s evidence as a whole, the [Discipline Committee] finds her to be credible.” Such a bald assertion does not provide any explanation and does not meet the justification, transparency and intelligibility standard.

These Discipline Committee’s reasons clearly indicated that it dealt with the complainant’s reports to others as evidence of the truth of those reports.

When the Discipline Committee used the prior consistent statements to determine “the probability that the alleged assault actually occurred”, and to determine whether “something inappropriate occurred during the examination”, it used the statements for an impermissible purpose, namely as evidence of the truth of the complainant’s in-hearing testimony.

VII. Assessing credibility – differential scrutiny applied to the evidence of one party

A court may conclude that a decision is unreasonable if the tribunal exercises a greater degree of scrutiny over one party’s evidence than the other.

R. v. Gravesande, 2015 ONCA 774

The court allowed the appeal from conviction, in part because the trial judge applied a much lesser degree of scrutiny to the evidence of the corrections officers than the evidence of the accused.

Noriega v. College of Physicians and Surgeon of Ontario, 2016 ONSC 924 (Div.Ct.)

The court concluded that the discipline committee’s conclusion that Dr. Noriega had sexually stimulated an adolescent patient during a medical examination in 1979 was reasonable. Dr. Noriega argued that:

- The committee erred in finding that the patient’s evidence was credible and reliable;
- The committee applied a more stringent standard to review his evidence than it used to assess the patient’s evidence;
- The committee provided inadequate reasons to demonstrate how it used similar fact evidence in concluding the charge was proved.

The court rejected each of those arguments.

The court rejected Dr. Noriega's argument that the Discipline Committee had imposed a higher standard of scrutiny on his evidence than the evidence led by the College. If that had occurred, that could have been legal error in the assessment of credibility justifying appellate intervention. Case law determined that there must be clear proof that occurred for the argument to succeed. The court determined that the Committee's assessment of the evidence was reasonable.

Karkanis v. College of Physicians and Surgeons of Ontario, 2014 ONSC 7018

Among the reasons for setting aside the decision of the discipline committee was that the Court also had serious concerns regarding whether the Discipline Committee applied the same scrutiny to the complainant's evidence that it did to Dr. Karkanis' evidence.

VIII. Assessing credibility - process

Brar and others v. B.C. Veterinary Medical Association and Osborne, (No. 22), 2015 BCHRT 151

http://www.canlii.org/en/bc/bchrt/doc/2015/2015bchrt151/2015bchrt151.html?resultIndex=1

If there are credibility issues to be addressed, the discussion by the British Columbia Human Rights Tribunal in the decision may be of assistance. The tribunal stated:

> *[78] More recently, in Bradshaw v. Stenner, 2010 BCSC 1398, the Court said:*
>
> > *Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (Raymond v. Bosanquet (Township) (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (Wallace v. Davis, [1926] 31 O.W.N. 202 (Ont.H.C.); Farnya v. Chorny, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)).*
>
> > *Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).*
>
> *It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness' testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events*

is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd. (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful. …

[79] The Tribunal has applied a number of factors in assessing a witness' credibility including "their motives, their powers of observation, their relationship to the parties, the internal consistency of their evidence, and inconsistencies and contradictions in relation to other witnesses' evidence". …

[80] Generally, I found the witnesses to be credible in some areas but not others. For example, some witnesses had a clear recollection of the events while giving their direct evidence, but that recollection became more vague, evasive or self-serving in crossexamination. However, I note that the failure of a witness to be consistent in his or her evidence does not necessarily indicate untruthfulness. Some witnesses became argumentative while giving their evidence or unnecessarily embellished and exaggerated their evidence to support their theory of the case. In some cases, when the documents differed from the witness' recollection or his or her theory of the case, the witness strained their evidence in order to make the written document reflect their view of the events. I will outline these concerns in more detail when I review the evidence before me and make my findings of fact.

[84] ... I have attempted to be restrained in my comments and was guided by the Supreme Court of Canada's statement in R. v. R.E.M., 2008 SCC 51 (CanLII):

> *While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization. (para. 49; see also Mariano v. Campbell, 2010 BCCA 410 para. 39)*

IX. Standard of Proof

The issue of standard of proof has now been conclusively determined by the Supreme Court of Canada in the decision **F.H.** v. **McDougall** 2008 SCC 53 http://www.canlii.org/en/ca/scc/doc/2008/2008scc53/2008scc53.pdf. The court rejected the argument that there is more than one civil standard of proof.

> *...I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof...*
>
> *...An intermediate standard of proof presents practical problems. As expressed by L. Rothstein et al., at p. 466:*

> *As well, suggesting that the standard of proof is 'higher' than the 'mere balance of probabilities' leads one inevitably to inquire what percentage of probability must be met? This is unhelpful because while the concept of '51% probability', or 'more likely than not' can be understood by decision-makers, the concept of 60% or 70% probability cannot.*

Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur. As Lord Hoffman explained in ***In re B*** *at para. 2:*

> *If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.*

In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in ***In re B*** *at para. 72:*

> *. . . Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.*

Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffman observed at para. 15 of In re B:

> *. . . Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.*

> *It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.*
>
> *In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.*

X. Fairness – Use of a tribunal's expertise – tribunals performing their own research

One of the vexing problems related to judicial review of tribunal decision is the extent to which a tribunal can utilized its expertise in making a decision.

When dealing with professional discipline matters, a discipline committee can utilize its expertise to assess the evidence before it. It may not be able to use its expertise to determine the standards relating to the practice of the profession or to reach a conclusion that is contrary to the evidence before the committee (*Ali*).

However, courts have generally been willing to accept the conclusion of a discipline committee that facts which have been proved constitute unprofessional conduct (*Hesje*).

Courts will generally not uphold a tribunal decision if the tribunal has based its decision, in part, on its own research not led by the parties (*Saskatoon Co-op*).

College of Physicians and Surgeons of Saskatchewan v. Ali, 2016 SKQB 42

The court accepted the decision of the College that Dr. Ali's licence should be revoked on the basis that he was ungovernable was reasonable.

The court rejected the argument that the Council had inappropriately used its expertise and its knowledge of medicine to determine that the medical evidence presented by Dr. Ali did not demonstrate a causal link between Dr. Ali's medical condition and his professional misconduct. The Council could employ its expertise to interpret, understand and, in appropriate circumstances such as where the factual foundation for an opinion was faulty, reject the evidence before it. It was not open to Council to utilize its expertise to formulate a professional opinion disagreeing with the reports if they opined that there was a causal link between a medical condition and Dr.

Ali's conduct unless there was some evidence of that nature presented to Council at the penalty hearing.

Hesje v. Law Society of Saskatchewan, 2015 SKCA 2

The court rejected the argument that failure to include additional particulars in the charge breached principles of fairness. Principles of fairness only require that the member is aware of the case to be met, and do not require those particulars to be set out in the charge. Procedural fairness will only be violated by inadequate particulars if the member is deprived of knowledge of the facts alleged to constitute misconduct, and is therefore deprived of knowledge of the case to meet.

The discipline committee concluded that he failed to serve his client in a conscientious, diligent and efficient manner. The court rejected the argument that a finding of conduct unbecoming could not be made if there was an isolated decision made in good faith. The court rejected the argument that a wilful and reckless failure to maintain even the most minimal standards of competence and quality of service is required for conduct unbecoming. Rather, the court concluded that the discipline committee was not required to decide that the lawyer had wilfully or recklessly or that he acted with *mala fides*. The standard of conduct unbecoming encompasses acts of negligence and does not require moral turpitude.

Finally, the court rejected the argument that the Law Society was required to lead evidence about what a competent lawyer in a circumstance similar to the lawyer's would do. The Benchers, as a group of practising lawyers were in the best position to determine what constitutes professional misconduct.

The court approved the statement that "[w]hat is and what is not professional misconduct is a matter for the benchers to determine, and the court must be very careful not to interfere with the decision of the benchers for their decision is, in theory, based on a professional standard which only they, being members of the profession, can properly apply."

Karkanis v. College of Physicians and Surgeons of Ontario, 2014 ONSC 7018 (Div.Ct.)

The court seems to have accepted that an expert tribunal can reject evidence based upon the tribunal's expertise, but must set out the basis upon which it has acted.

Swart v. College of Physicians and Surgeons of Prince Edward Island, 2014 PECA 20

The court discussed the use of the tribunal`s expertise. Members of the profession are in the best position to judge professional conduct, and to understand the technical evidence that can come before a tribunal. However, tribunal findings must be based on evidence. The members cannot use their technical knowledge in such a way that it infringes the basic rule that a disciplinary tribunal is to base its decision only on the evidence presented before it. This assures the professional being judged has a proper opportunity to hear the evidence and reply to it.

Saskatoon Co-operative Association Ltd. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, 2016 SKCA 94

The court overturned the Queen's Bench decision which had held that there was no unfairness when the Board relied on website evidence and a report not tendered in evidence. The Queen's Bench Court had ruled that the result would have been the same if the board had not looked at the website.

The board functions at or near the judicial end of the spectrum and therefore a high level of procedural fairness was required. The parties did not have an opportunity to address the board with respect to the website and the reliability of the information on the website was not tested

SEIU-West v. Saskatoon Regional Health Authority, 2015 SKQB 61

The court ruled that the arbitrator breached procedural fairness by reaching a decision that the grievor had voluntarily resigned – an argument that was not raised or addressed by either party to the arbitration.

XI. Fairness – Cross-Examination and the right to make a personal appearance

It is clear that an administrative body is not always required to allow cross-examination or allow a person to make a personal appearance. In some situations decisions can be made upon written submissions or other limitations may be placed on the ability of someone to participate in a hearing.

Two recent decisions discussed what right a person may have to cross-examine or appear in person in relation to an issue that affects them.

Tsimidis v. Certified General Accountants of Ontario, 2014 ONSC 4236 (Div.Ct.)

Tsimidis was discharged from the training program after being found in possession of unauthorized material during an examination. He stated that he had not used the material in the examination.

The Student Handbook prescribed two possible penalties for being in possession of unauthorized material – a zero mark on the examination and a reprimand or a zero mark on the examination and expulsion from the program.

The court concluded that the failure to allow Tsimidis to appear in person before the Vice-President of Student Services to present his explanation was a serious breach of procedural fairness. If fact finding and credibility are central issues, fairness requires those issues to be examined at an oral hearing even if the procedure before the administrative decision-maker does not specifically require an oral hearing.

The defects in the initial decision were not cured by the appeal to the Appeals Committee. Tsimidis was only permitted to present a two page written submission that would be considered by the Appeals Committee. The information before the court did not indicate whether the appeal was an appeal *de novo* or a review of the decision made by CGA Ontario.

The procedure adopted by the Appeals Committee denied Tsimidis procedural fairness as his explanation for possession of the material involved his credibility, especially in view of the allegation of dishonesty and the consequences of the penalty.

Gallone v. Canada (Attorney General), 2015 FC 608

Ms. Gallone was convicted of criminal charges and received a period of imprisonment and a long term supervision order (LTSO). On three occasions her LTSO was suspended which resulted in further periods of imprisonment.

Ms. Gallone asked for a hearing before the Parole Board to assess her behaviour, explanations, and intellectual capabilities. That was refused and the Parole Board recommended an additional criminal charge be filed against her. The Parole Board made its decisions based on the written record.

The Court concluded that the Parole Board had breached procedural fairness by refusing to hear Ms. Gallone in an oral hearing. The most important criterion is the importance of the decision for the person affected. The duty of procedural fairness was particularly onerous because Ms.

Gallone was the subject of highly restrictive constraints during her re-admissions in a maximum security penitentiary and was placed in solitary confinement. The Court held the Parole Board should have held an in-person hearing. The Court commented that Ms. Gallone's counsel raised the possibility that Ms. Gallone was suffering from a psychiatric or psychological problem which could have impacted on the Parole Board's decision.

XII. Dealing with unrepresented litigants

Pintea v. Johns, 2017 SCC 23

The court also approved the principles from the Canadian Judicial Council in the document *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf

Challans v. Timms-Fryer; 2017 ONSC 1300

The complaint to the Ontario Civilian Police Commission (OIPRD) raised a number of issues including that the applicant unlawfully arrested the respondent, that he used unnecessary force and that he acted in a manner prejudicial to the discipline by using profane, abusive and insulting language. The charge was dismissed at hearing and Mr. Timms-Fryer appealed to the Ontario Civilian Policy Commission (OCPC).

The OCPC allowed the appeal concluding that the Hearing Officer breached the respondent's rights to natural justice and procedural fairness as Mr. Timms-Fryer, who was unrepresented at the original hearing, was not provided the minimum level of assistance throughout the hearing according to the OCPC.

The court accepted that the decision of the OCPC that the hearing officer had failed to provide Mr. Timms-Fryer with appropriate assistance was reasonable and, indeed, "was the correct one". The failures included that:

(a) the Hearing Officer did not confirm with Mr. Timms-Fryer that he was entitled to have legal counsel;

(b) the Hearing Officer did not explain the roles of the parties, the procedure, the right of each party to call witnesses and to introduce evidence; and

(c) the Hearing Officer did not invite Mr. Timms-Fryer to cross-examine any of the witnesses called at the hearing, save and except when Cst. Challans gave evidence, but, even then, the Hearing Officer refused to give the Mr. Timms-Fryer a reasonable time to prepare.

The court rejected the argument that Mr. Timms-Fryer had not demonstrated "actual prejudice" and that there was consequently no denial of natural justice or a breach of procedural fairness. The court concluded that actual prejudice is not required in order to establish a breach of natural justice or procedural fairness. Breaches of natural justice and procedural fairness are inherently prejudicial as the party is denied a meaningful role in the proceeding.

The court noted that Mr. Timms-Fryer was an actual party to the hearing, not merely an observer and consequently he was entitled to a high level of procedural fairness; arguably this was the same as the entitlement of Cst. Challans to procedural fairness.

The court rejected affidavits which appear to have been intended to provide information about the discussions with Mr. Timms-Fryer which were not recorded in the record.

[9] The OCPC dismissed the Amherstburg Police Service's motion to adduce this fresh evidence. They concluded that the issue regarding procedural fairness could be determined on the basis of the record of the hearing. It should be noted that the OCPC had earlier dismissed a motion by Mr. Timms-Fryer, who also wished to put an affidavit before the OCPC regarding the same issue, a request that both the applicant, and the OIPRD, had opposed.

[10] I cannot find any fault in the conclusion, that the OCPC reached, regarding the motion to adduce fresh evidence. The proposed evidence failed to satisfy the very high hurdle for the admission of such evidence, that was established in Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd. (1980), 1980 CanLII 1877 (ON CA), 29 O.R. (2d) 513 (C.A.) where Morden J.A. said, at p. 521:

> *Having just completed the exercise of examining, in this fashion, the evidence that was before the arbitrator I would express the view, which is in agreement with that of Pennell, J., that the practice of admitting affidavits of this kind should be very exceptional, it being emphasized that they are admissible only to the extent that they show jurisdictional error. I would think that the occasions for the legitimate use of affidavit evidence to demonstrate the exacting jurisdictional test of a complete absence of evidence on an essential point would, indeed, be rare.*

[11] There is a reason why hearings, such as the one here, are conducted "on the record". It is to avoid disputes, later on, regarding what occurred before the tribunal or court, including when the proceeding is the subject of an appeal. It is to avoid the spectacle of warring affidavits being filed, as to what occurred outside of the formal proceedings, of the type that both Mr. Timms-Fryer, and the Amherstburg Police Service, attempted to file in this case. If any of the discussions occurred involving Mr. Timms-Fryer, as are alleged in these affidavits, then the contents of those discussions ought to have been repeated by counsel on the record, so that everyone had the opportunity to confirm, or refute, the contents of those discussions. None of that occurred in this case.

> *[12] The OCPC was correct to reject those proffered affidavits, and decide the issue on the record that was before it. I would also note, in passing, that the affidavit of the Hearing Officer would be inadmissible in any event. It would amount to what Stratas J.A. described as "an after-the-fact attempt to bootstrap his decision, something that is not permitted" – Stemijon Investments Ltd. v. Canada (Attorney General), [2011] F.C.J. No. 1503 (C.A.) at para. 41.*

Malton v. Attia, 2016 ABCA 130

The court set aside a decision in favour of a self-represented plaintiffs and ordered a new trial. Among the reasons for this was that the trial was procedurally unfair and liability was imposed based upon a theory not in the plaintiff's pleadings.

In relation to the fairness of the trial and the judge's assistance to the self-represented plaintiffs, the court commented:

> *There is a balance to be struck. While affording self-represented litigants "leeway" in court, judges must never lose sight of the fact that both sides are entitled to a fair trial. Judges must guard against descending into the arena from the bench and advocating for the self-represented litigant:*
>
> *The extent to which judges should afford an unrepresented litigant additional "leeway" with respect to court procedures and the rules of evidence is an increasingly vexing problem for courts at all levels. It is generally recognized that the court should provide some assistance to an unrepresented litigant ... <u>But at the same time this must be done in such a way as not to breach either the appearance or reality of judicial neutrality</u>. ... How to balance the sometimes competing imperatives of helping a litigant who is in need of assistance while maintaining impartiality is a recurring dilemma for both trial and appellate courts.*

Moore v. Apollo Health & Beauty Care, 2017 ONCA 383

The small claims judge understood Moore to be limiting her claim for damages for wrongful dismissal and abandoning her claim for unpaid wages. Her claim was dismissed. The judge had misunderstood what she had said in relation to the unpaid wages.

The court commented about the duties of judges dealing with unrepresented litigants.

> ***41*** *The new reality of civil litigation in public courts is the significant number of parties who are not represented by a lawyer, but present their own cases. Presiding over a trial where a party is not represented by a lawyer poses distinct challenges for a trial judge, and also brings with it distinct responsibilities.*
>
> ***42*** *Both the challenges and responsibilities are succinctly described in the Statement of Principles on Self-represented Litigants and Accused Persons (the "Statement") issued by the Canadian Judicial Council in September 2006. The Supreme Court of Canada endorsed the Statement in Pintea v. Johns, 2017 SCC 23.*

43 *The main challenge faced by a trial judge when a party is not represented by a lawyer lies in the difficulty of managing an adversarial proceeding when one party lacks formal training in the law and its procedures. As described by the Statement, at p. 3:*

> *Self-represented persons are generally uninformed about their rights and about the consequences of choosing the options available to them; they may find court procedures complex, confusing and intimidating; and they may not have the knowledge or skills to participate actively and effectively in their own litigation.*

44 *While self-represented persons vary in their degree of education and sophistication, I think it safe to say that most find court procedures "complex, confusing and intimidating." That state of affairs gives rise to the responsibility of judges to meet the need of self-represented persons for "simplicity" and to provide "non-prejudicial and engaged case and courtroom management" to protect the equal rights of self-represented persons to be heard: Statement, pp. 4 and 6.*

45 *The Statement, at p. 7, offers specific advice to judges about how to meet their responsibilities to self-represented persons in the courtroom environment:*

> *Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices.*
>
> *In appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court.*
>
> *Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons. [Emphasis added.]*

46 *In the present case, the trial judge did several things to discharge his responsibility to protect the right of the self-represented person to be heard. Ms. Moore had not prepared a formal calculation of damages to place into evidence. However, the trial judge: clarified that some of the documents appended to Ms. Moore's Claim were ones she wanted put into evidence; drew on the resources of the court staff to make copies of the relevant documents; assisted Ms. Moore in marking them as formal exhibits; and asked questions to clarify some of the details of her claim for Unpaid Wages.*

47 *However, the trial judge did not make sufficient inquiries before concluding Ms. Moore had abandoned her claim for Unpaid Wages. Where the evidence of a self-represented party raises a question in the trial judge's mind about the specific relief the party is seeking, a trial judge must make the appropriate inquiries of the party to clarify the matter. Those inquiries must be made in a clear, unambiguous, and comprehensive way so that several results occur: (i) the trial judge is left in no doubt about the party's position; (ii) the self-represented person clearly understands the legal implications of the critical choice she faces about whether to pursue or abandon a claim; and (iii) the self-represented person clearly understands from the trial judge which of her claims he will adjudicate.*

48 *Deputy judges of the Small Claims Court operate under significant time and volume pressures. As well, they daily face the challenge of trying to modify an adversarial civil litigation process historically predicated on representation by counsel to the increase in self-representation by parties. Nevertheless, such is the new reality. And it often requires a trial judge to take the time to ask those few extra questions to nail down, with clarity for all, the claims of the self-represented person upon which he will adjudicate. Trial fairness requires no less.*

> ***49*** *In the present case, the trial judge did not make those clear, unambiguous, and comprehensive inquiries. As a result, he proceeded on the erroneous basis that Ms. Moore had abandoned her claim for Unpaid Wages, while Ms. Moore -- quite reasonably -- thought she had done no such thing. As well, the trial judge failed to inform Ms. Moore clearly that he would not consider her claim for Unpaid Wages, which she had just spent a considerable amount of time reviewing for him. His failure to do so resulted in an unfair trial.*

XIII. Fairness – Adjournments

Bayfield v. College of Physiotherapists of Ontario, 2015 ONSC 6808 (Div. Ct.)

The court set aside a penalty decision on the basis that the appellants were denied procedural fairness.

The College delivered its penalty brief to the appellants the day prior to the hearing. The committee denied the member's request for an adjournment to prepare to respond to the material and consult counsel.

The court concluded that the committee failed to consider the factors which are relevant to a decision whether to grant an adjournment. Those are:

Factors which may support the denial of an adjournment:

a) lack of compliance with prior court orders;
b) previous adjournments that have been granted to the applicant;
c) previous peremptory hearing dates;
d) the desirability of having the matter decided; and
e) a finding that the applicant is seeking to manipulate the system by orchestrating delay;

Factors which may support the granting of an adjournment:

a) the seriousness of the consequences of the proceeding on an individual;
b) prejudice to the individual if the adjournment is not granted;
c) a finding that the applicant was honestly seeking to exercise a right to counsel; and
d) where an individual had been previously represented in the proceeding.

> *It was clear that, as a self-represented litigant, he could not have been expected to have been able to absorb or respond to the material that had just been served on him by the College between the time of receipt and the commencement of the hearing. He should have at least been given some reasonable opportunity to do so.*

Law Society of British Columbia v. Sas, 2015 LSBC 38

The discipline committee rejected the lawyer's request for an adjournment of her penalty hearing until her appeal to the Court of Appeal from the finding of professional misconduct was heard. The primary reason advanced for the request was the cost associated with both matters.

The committee ruled that the primary consideration in determining whether an adjournment should be granted was whether there was prejudice to the lawyer's right to a fair hearing. That had to be balanced against the public protection mandate of the Law Society that required timely and expeditious resolution of matters before them. The public, the profession, and complainants expect that matters before the Law Society Tribunal will be dealt with in a timely way.

Other factors to be considered include:

(a) prejudice to a person;

(b) the timing of the request or motion for an adjournment;

(c) the number of prior requests and motions for an adjournment;

(d) the number of adjournments already granted;

(e) prior directions or orders with respect to the scheduling of future hearings;

(f) the public interest;

(g) the costs of an adjournment;

(h) the availability of witnesses;

(i) the efforts made to avoid the adjournment.

Law Society of British Columbia v. Chiang, 2014 LSBC 43 (CanLII)

The discipline panel discussed the factors which should be considered when deciding whether to grant an adjournment requested by the member:

1) The fact that the proceeding may have a significant impact on the member
2) The regulatory body's public protection mandate requires that the administration of justice move forward in a timely and expeditious manner. The public, the profession and complainants expect that matters before the Law Society Tribunal will be dealt with in a timely way.

3) Minimizing adjournments is also important to effective administration of the Tribunal. All adjudicators at the Law Society Tribunal, other than the Chair, are part-time. When a hearing is scheduled, they set aside time and prepare for the hearing when materials are filed in advance. When a hearing is adjourned at the last minute, their time often cannot be used for other matters and a new panel must be found for another date.
4) Counsel for the Law Society, witnesses and the public may have prepared for a hearing and set aside time to be there. Adjournments, particularly at the last minute, often lead to cost and inconvenience and impede the effective administration of justice at the Tribunal.
5) Factors which may support denial of an adjournment request may include:
6) Factors which may support the denial of an adjournment may include
    a) a lack of compliance with prior court orders,
    b) previous adjournments that have been granted to the applicant,
    c) previous peremptory hearing dates,
    d) the desirability of having the matter decided; and,
    e) a finding that the applicant is seeking to manipulate the system by orchestrating delay.
    7) Factors which may favour the granting of an adjournment include:
        a) the fact that the consequences of the hearing are serious;
        b) that the applicant would be prejudiced if the request were not granted; and
        c) a finding that the applicant was honestly seeking to exercise his right to counsel and had been represented in the proceedings up until the time of the adjournment request.
8) In weighing these factors, the timeliness of the request, the applicant's reasons for being unable to proceed on the scheduled date and the length of the requested adjournment should also be considered.

The discipline panel denied the adjournment and commented that the onus always has been on the member to be diligent in making positive efforts to limit the likelihood of delay.

XIV. Fairness – Reasonable apprehension of bias

The test for a reasonable apprehension of bias is easily stated, but the application is much more of a challenge. Whether a reasonable apprehension of bias exists is dependent on a number of factors.

Administrative proceedings can be negated if there is a reasonable apprehension of bias associated with the proceedings.

The test for a reasonable apprehension of bias was established in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. The applicable principles are:

a) The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information;
b) The test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude;
c) The test requires that the person considering the alleged bias must be reasonable;
d) The test also requires that the apprehension of bias itself must also be reasonable.

Subsequent decisions have further explained the requirements.

a) The reasonable person knows and understands the judicial process and the nature of judging;
b) The grounds for this apprehension must be substantial and the test will not be related to the very sensitive conscience;
c) The reasonable person will know and consider the context surrounding the impugned behaviour, including the length and difficulty of the proceedings;
d) There is a strong presumption of judicial impartiality and integrity. The onus rests on the applicant to demonstrate a reasonable apprehension of bias, and the threshold is a high one.

Recent decisions appear to have adopted the same requirements to establish a reasonable apprehension of bias against an administrative tribunal as are required to establish a reasonable apprehension of bias against a judge.

DeMaria v. Law Society of Saskatchewan, 2015 SKCA 106

The court criticized the close relationship between legal counsel for the Law Society and the Benchers but concluded that it did not give rise to a reasonable apprehension of bias.

After a hearing, the applicant was denied membership in the Law Society.

The affidavit evidence stated that among other things:

a) the Law Society's in-house counsel ate breakfast in the hearing room with the Benchers immediately before the Benchers dealt with the review of the decision denying admission

and remained in the hearing room with the Benchers for at least ten minutes after the hearing had concluded and the applicant had had left;

b) the Bencher who served chaired the admissions hearing had contacted the Law Society's in-house counsel directly about the decision before that decision had been released to the applicant and invited the in-house counsel to play golf;

c) one Bencher was a "friend" of the Law Society's in-house counsel on Facebook.

The court commented:

> ***34*** *What I mean is the system was set up such that in-house counsel for the Law Society might be called upon on the same day at the same Benchers' meeting to give legal advice to the Benchers--in their role as the directing-minds of the Law Society--and then to later make submissions before the Benchers--in their role as adjudicators--on behalf of the Law Society in an administrative or disciplinary hearing. In other words, the Law Society had not structured its affairs under its old Rules so as to clearly preclude the 'disturbing' possibility that counsel who has made submissions before the Benchers might then advise them in respect of the same matter.*
>
> ***35*** *I do not mean to suggest that the rules ought to specifically preclude counsel from acting in one of these two capacities. That, for a law society, should be a common sense practice regularly exercised to preserve at least the appearance of procedural fairness in administrative and disciplinary proceedings. But, recognising the risk and the obvious institutional limitations at play here, the Benchers should have been particularly keen to abstain at all times when acting as adjudicators from public displays of too-cosy familiarity with the Law Society's counsel, whether in-house or a retained private lawyer, in all administrative and disciplinary matters. As is evident from the facts of this case, behaviour of that nature not only undercuts the appearance of procedural fairness, but is unseemly in an adjudicator sitting in judgment of the integrity or character of another individual. If anyone ought to know better, it is those persons who are statutorily charged with setting and upholding standards of practice and conduct for the legal profession; but, that is also what--in some measure--saves this matter from giving rise to a reasonable apprehension of bias, as I will explain later. But, in order to do that, I need to clearly lay out the groundwork for the explanation.*

Among the reasons to conclude that the evidence did not lead to a reasonable apprehension of bias was that most Benchers are lawyers who are familiar with the requirements of procedural fairness and natural justice, including the requirement that decision-makers remain independent and impartial. They are skilled at compartmentalising their minds, expertly divorcing themselves from friendship and affinity to dispassionately assess a matter on the basis of advocacy and reasoned argument on the facts and law. The evidence did not demonstrate a real likelihood or probability of bias on the part of the chairman and "a mere suspicion is not enough". The evidence did not overcome the strong presumption of impartiality by the decision-maker.

Aalbers v Aalbers, 2013 SKCA 64,

The Saskatchewan Court of Appeal stated the following in relation to the test to determine the legitimacy of a claim of reasonable apprehension of bias:

> *[74] On numerous occasions, the Supreme Court of Canada has adopted the test for a reasonable apprehension of bias established by de Grandpré J. in dissenting reasons in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369 at pp. 394-95. See: R. v. R.D.S., [1997] 3 S.C.R. 484 at para. 31; R. v. Valente, [1985] 2 S.C.R. 673 at para. 12 and Wewaykum, [2003] 2 S.C.R. 259, at paras. 60 and 76. See also from this Court R. v. Dickhoff (1998), 172 Sask. R. 1 (Sask. C.A.) at para. 11.*
>
> *[75] The test is whether an informed person, viewing the matter realistically and practically -- and having thought the matter through, -- would think that is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly (Committee for Justice and Liberty at p. 394). The grounds for an apprehension of bias must be "substantial" (Committee for Justice and Liberty at p. 395). A real likelihood or probability of bias must be demonstrated; a mere suspicion is not enough (R.D.S. at para. 112). The Supreme Court of Canada has also consistently rejected the notion that the reasonableness of an apprehension of bias depends on the "very sensitive or scrupulous conscience" (Wewaykum, para. 76).*
>
> *...*
>
> *[77] When these principles are applied the outcome can vary depending on the context. As the court stated in Wewaykum, whether an apprehension of bias exists is a "highly fact-specific" inquiry for which there are no shortcuts:*
>
> *77 ... As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.*

Kalo v. Law Society of Manitoba, 2014 MBQB 109

The court stated that the applicable legal principles to determine whether a reasonable apprehension of bias exists are the same for an administrative tribunal exercising judicial functions as for a judge.

Bailey v. Barbour, 2014 ONSC 3698 (Sup. Ct. J.)

A party sought special costs against a lawyer based upon the lawyer's presentation of a biased expert witness. The lawyer argued that there was a reasonable apprehension of bias. He argued that the court had predetermined matters that should have been left for the application to determine whether special costs should be awarded. The lawyer argued that the court's

comments had been unduly critical of the expert and this raised the question whether the trial judge could consider submissions made on his behalf with a fair and objective mind.

The court rejected the argument that a reasonable apprehension of bias arose. There is a strong presumption of judicial integrity.

The lawyer had failed to demonstrate that by making findings in the course of the trial and by initiating the hearing to determine whether special costs should be awarded the reasonable and objective person would believe that the trial judge's mind would be tainted or that the trial judge would be unable to hold a fair hearing.

Law Society of British Columbia v. Boles, 2014 LSBC 47

Boles claimed that she had a reasonable apprehension of bias as she was counsel in a litigation matter in which close relatives of the tribunal chair were parties.

It was not clear when she had accepted the retainer to act in the litigation. The tribunal rejected the argument as either she failed to raise the allegation in a timely manner or, more likely than not based on the timing of the application, created the apprehension of bias through her own conduct by accepting the retainer knowing that the litigation involved the chair's family members.

A party cannot manufacture an apprehension of bias through their own conduct.

University of Saskatchewan v. Canadian Union of Public Employees, Local 1975, 2014 SKQB 190

At issue was a concern that the union nominee in a tripartite arbitration had conducted herself in such a way that it gave rise to a reasonable apprehension of bias.

The court concluded that when applying apprehension of bias concepts to the parties' representatives to tripartite boards in the unionized labour setting, unique and nuanced considerations apply. The degree of partiality that is acceptable in an interest arbitration is greater than the degree of partiality that is acceptable in a grievance arbitration.

However, the nominee so conducted herself that a reasonable apprehension of bias was established.

> ***76*** *I accept that the parties' nominees to a grievance arbitration will bring to the task the philosophical and experiential perspectives of their respective management and union side*

> *of the relationship, but in doing so, they must nonetheless be prepared to bring good faith, informed, mature and responsible judgment to bear on the matters in controversy. As stated by Cameron J.A., it is a question of the degree of partiality. The element of innate partiality aside, the arbitrators must not act in such a manner as to create in a party a reasonable apprehension that they are of a closed mind. I am of the opinion that in this case the evidence demonstrates sufficient concerns that the Union nominee was not bringing to the matter good faith, informed, mature and responsible judgment to her role and that the University had in the circumstances a reasonable apprehension of bias. The Union nominee went beyond asking questions to clarify, beyond the permitted scope of being invested with a full appreciation for her nominator's proper interests in the process and apparently saw her role as being to support and supplement the efforts of the grievors' counsel. She in effect assumed the role of support counsel.*

Law Society of Upper Canada v. Totera, 2014 ONLSTA 45

The tribunal rejected the argument that the lawyer had a reasonable apprehension of bias arising from the lack of institutional independence of the chair of the Law Society Hearing and Appeal Tribunals. He was a full time employee of the Law Society. His responsibility was to oversee the discipline process and to name the panels to hear specific matters.

Two principles which differentiate the institutional independence requirements of a tribunal from that of a court are that:

a) Like other aspects of procedural fairness the requirement of independence of a tribunal depends upon the context and nature of the administrative tribunal and decision at issue
b) Unlike judicial independence which is constitutionally guaranteed, the degree of independence required of a tribunal may be determined by its enabling statute.

The chair's independence on adjudicative matters was not compromised by the organizational structure. The fact that he was accountable to the Law Society for the operational aspects of his position did not mean he lacked independence.

Faulkner v. Newfoundland and Labrador (Eastern Newfoundland Regional Appeal Board), 2015 NLTD(G) 118

Karwood was granted conditional approval for a building approval. Faulkner appealed the decision granting he permit to the Eastern Newfoundland Regional Appeal Board. He claimed that there was a reasonable apprehension of bias as one councilor had received a campaign contribution from Karwood and the other councilor was a senior employee of a company which was financing the proposed development.

The Board dismissed the appeal without addressing the alleged reasonable apprehension of bias. The court quashed the decision and returned the matter to the board to deal with the allegation of bias and provide reasons for its decision.

In its decision the court commented on the distinction between a conflict of interest and a reasonable apprehension of bias. A conflict of interest is a statutory concept allowing for the removal of a councilor. A reasonable apprehension of bias is a common law concept permitting an appellate body to vacate a decision. The allegations raised by the applicant were more properly characterized as involving a reasonable apprehension of bias.

Heffel v. Registered Nurses Assn., 2015 NWTSC 16

The court rejected the argument that a reasonable apprehension of bias arose because a member of the Board knew a witness and were Facebook friends. The listing as friends on each other's Facebook pages added nothing of significance.

The court contrasted the situation with that in *Canadian Union of Postal Workers v. Canada Post Corp.*, 2012 FC 975 where a reasonable apprehension of bias was found based upon a combination of factors, including that the Facebook page of the arbitrator listing federal government ministers as friends, the Facebook page showing the arbitrator's activities and interests to be connected to the ministers' political party and the arbitrator had previously been counsel for Canada Post in a similar dispute.

A reasonable person informed of the circumstance would not be concerned that Ms. Snyder would be pre-disposed to favour Ms. Flood’s testimony or the respondent's position. The Board was correct in dismissing the rejection regarding reasonable apprehension of bias.

XV. Fairness – legitimate expectations

The doctrine of legitimate expectations states that if an administrative body has led someone to believe that a particular process will be followed, it is unfair for the body not to follow that process. That is true even if, in the absence of the legitimate expectation, fairness would not have required the body to follow that process.

It can establish procedural rights, but cannot establish a substantive right, such as an expectation that a decision-maker will make a particular decision on the merits.

Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36

The court summarized the doctrine of legitimate expectations.

> *If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.*
>
> ***95*** *The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled* ***Judicial Review of Administrative Action in Canada****:*
>
> *The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified.*
>
> ***96*** *In* ***Mavi****, Binnie J. recently explained what is meant by "clear, unambiguous and unqualified" representations by drawing an analogy with the law of contract (at para. 69):*
>
> *Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.*
>
> ***97*** *An important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights.*

XVI. The effect of another tribunal's decision/investigation

Since the decision in *Figliola* there are a number of issues which have arisen where two or more authorities may have the authority to investigate a matter.

The court in *Figliola* concluded that a complainant, having had a complaint rejected by a body with authority to investigate, cannot generally file a complaint based upon the same allegations with another body, hoping for a different result.

One of the concerns that appears to have given rise to the decisions discussed below is the concern that the reputation of the legal system will be harmed if irreconcilable decisions are made by two different authorities, each of which has the authority to decide.

This has given rise to a number of issues, not all of which have been resolved:

a) In which circumstances can an individual who claims to have been aggrieved file a complaint with an administrative body, notwithstanding that the complaint was dismissed by another administrative body?

b) Is a person prohibited from relitigating a conclusion reached in a court or tribunal in a matter addressed in another court or tribunal? What principles apply?

c) Is the fact finding of another court or tribunal binding, admissible as proof but subject to being challenged or inadmissible? If admissible but subject to being challenged, what principles apply to the circumstances in which it can be challenged and what principles apply in determining whether the challenge will be successful?

It appears that in Saskatchewan, but not in Ontario, an allegation of a human rights violation that has been dismissed by a tribunal that has authority to determine the issue prevents the Human Rights Commission from investigating that complaint and then potentially reaching a different conclusion (*Hebron* and *de Lottinville*).

I don't think that the reasoning in all of the decisions which follow are compatible.

British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC 52

The Workers' Compensation Board Review Division had awarded compensation to the applicants for chronic pain. The Review Division rejected an argument by the applicants that the policy under which the calculation was made infringed the *Human Rights Code* of British Columbia.

After their claim of discrimination was rejected by the Workers' Compensation Board Review Division, the applicants filed complaints with the Human Rights Commission alleging discrimination on the same basis as had been rejected by the Workers' Compensation Board Review Division.

The Human Rights Commission directed a hearing to determine if there was discrimination.

The Supreme Court of Canada upheld the order quashing the decision to hold a hearing.

The court noted that the legislation gave the Human Rights Tribunal a discretion to refuse to hear a complaint if the substance of that complaint had already been appropriately dealt with in another proceeding.

The court commented that litigation should result in legal issues being resolved as equitably and expeditiously as possible by an authoritative adjudicator. Subject only to rights of review or appeal, litigants should be able to rely on the outcome as final and binding. Litigants do expect to have the same issues relitigated by a different adjudicator in a different forum at the request of a losing party seeking a different result.

Parties should not try to impeach findings by the impermissible route of relitigating in a different forum.

The Human Rights Commission had decided allow the complaint to proceed to hearing based upon its conclusion that it was not comfortable with the process and merits of the Review Officer's decision. That was a predominantly irrelevant factor which made the decision to hold a hearing patently unreasonable. The decision to hold a hearing would have resulted in the unnecessary prolongation and duplication of proceedings that had already been decided by an adjudicator with the requisite authority.

Penner v. Niagara (Regional Municipality) Police Services Board, 2013 SCC 19

Penner filed a complaint alleging police misconduct. After a hearing, an internal appeal, and an appeal to the court, the allegations of police misconduct were dismissed. The hearing officer concluded that Penner's arrest was lawful and found no unnecessary force was used. Penner then sued the officers for unlawful arrest, unnecessary use of force, false imprisonment and malicious prosecution.

The Ontario Court of Appeal struck the claim on the basis of *res judicata*. The Supreme Court of Canada overturned that decision and reinstituted the action.

The court ruled that there is no principle of law that precludes applying the principle of issue estoppel to civil litigation where the issues have been the subject of a final discipline decision. However, the doctrine must be applied flexibly so that it will not be applied if it will work an injustice, even where the preconditions for its application have been met. The court is required to perform a case-by-case review of the circumstances to determine whether its application would be unfair or unjust. The preconditions for issue estoppel were established. The disciplinary hearing was itself fair and the complainant participated in a meaningful way.

However, the court concluded that the Court of Appeal had erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the discipline proceedings on their broader legal rights. It would not have been in the reasonable expectation of the parties that the result of the discipline proceedings would determine the ability of the complainant to recover damages in a civil action. Further, it is unfair to use the decision of the Chief of Police's designate to exonerate the Chief in a subsequent civil action. In the circumstances of the case, it was unfair to Penner to apply issue estoppel to bar his civil action.

Hebron v. University of Saskatchewan, 2015 SKCA 91

Hebron was dismissed from his program on the basis of his poor academic performance. He appealed that decision through the University's appeal process. The court ruled that the Human Rights Commission could not investigate a complaint by Hebron that he was the subject of discrimination based upon the same issues which had been reviewed and rejected by the University appeal process.

The court held that the Human Rights Commission did not have exclusive jurisdiction over matters of human rights. The University Council had the jurisdiction to address human rights matters arising within an appeal brought pursuant to the Appeal Board process. The chambers judge did not err when he found the Commission had unreasonably concluded the appellant's human rights complaint and the appeal were not essentially the same. In reaching the conclusion that these complaints were not essentially the same, the Commission relied on factors extraneous to the subject matter of the complaints themselves and only relevant to an appeal from the Appeal Board panel's decision, and on factors that impinged upon jurisdiction and natural justice.

Samaroo v. The Queen, 2016 TCC 290

Samaroo had been acquitted of tax evasion (**R. v. Samaroo**, 2011 BCPC 503). Samaroo sought to have the findings of fact from the criminal trial admitted at the tax appeal and sought an order that no party could adduce evidence at the appeal which challenged, rebutted or enhanced any finding of fact from the criminal trial.

The court declined to make the requested order, but admitted the findings of fact from the criminal trial into evidence at the tax appeal. It also ruled that as the findings of fact from the criminal trial impugned and/or potentially demolished the Minister's assumptions of fact, the order of presentation in the appeal would be altered so that the Minister would first present its case and first present its argument.

The trial judge in the criminal trial found that the Crown's case was weak and supported by unreliable and highly uncertain evidence that contained significant flaws and discrepancies. The trial judge concluded that Mr. Samaroo was a credible witness and accepted much of his evidence.

The court concluded that issue estoppel did not apply as there wasn't issue symmetry – the questions or determinations were not exactly the same in the two proceedings.

The court referred the jurisprudence regarding the transfer of findings among and between standards of proof, burdens of proof and outcomes or verdicts ("transferral") in the context of issue estoppel and abuse of process as "vague, evolving and tangential". An issue estoppel can arise from fact findings made in a criminal trial, whether the result of the trial was a conviction or an acquittal.

The court concluded that issue estoppel did not apply as the onus in a tax court proceeding is on the appellant to demonstrate on a balance of probabilities that the Minister's assessing assumptions are incorrect. If Samaroo's position was accepted, the only information before the court would be the findings from the criminal trial. That would be inconsistent with the court's responsibility to make its own fact findings with respect to the issues before the court.

The purpose of a criminal trial and a tax assessment are fundamentally different. A hearing before the Tax Court is not a re-litigation of the issues before the criminal court.

Issue estoppel did not apply to preclude the Crown from leading evidence that was inconsistent with the findings of fact from the criminal trial.

The doctrine of abuse of process also did not apply to preclude the Crown from leading evidence inconsistent with the fact-findings from the criminal trial. While the judge in the criminal trial commented favourably upon Mr. Samaroo's credibility and accepted much of his evidence, it was not clear that it was accepted to a standard of proof of a balance of probabilities.

Abuse of process should only be applied in clear cases. This was not such a case.

The court ruled:

> *[48] In this context, this Court shall apply the Findings to the Tax Appeals. In doing so, it will guard the exclusive and originating jurisdiction of this Court, give voice and effect to the Findings in the lengthly, but asymmetrical criminal proceedings and face directly the equally undesirable results of either granting or refusing, in toto, the voir dire motion. The Findings are admitted and with impact, but not to the exclusion of contrary or enhancing evidence where such further evidence meets the normal test of being probative, relevant and necessary to the unique determination of this Court: the correctness and extent of the levied assessments and the validity of penalties all against multiple appellants and all to the evidential threshold of the balance of probabilities. This reconciliation preserves and respects the integrity of all the courts which have dealt and will deal with these matters, but upholds the integrity of the overall judicial system, while recognizing the differing roles played by each part.*

Ontario (Ministry of Community Safety and Correctional Services) v. De Lottinville, 2015 ONSC 3085 (Div. Ct.)

The Human Rights Tribunal decided to conduct an investigation into complaints that the police and a physician had discriminated against him.

The complaint against the police had previously been dismissed by the Ontario Civilian Police Commission. The College of Physicians and Surgeons of Ontario had cautioned the doctor, but not referred the matter to hearing.

Section 45.1 of the *Human Rights Code* gave the commission the authority to dismiss an application where the substance of the application had been appropriately dealt with in another proceeding.

The court rejected the application for judicial review.

The court treated the issue of the interpretation of section 45.1 as an issue of exercise of the tribunal's discretion. It rejected the argument that the authority of the commission to investigate should be determined on a standard of correctness. It rejected that the issues were issues of central importance to the legal system, or that it involved determining the boundaries between two competing tribunals. Rather, it characterized the issue as one of interpreting the tribunal's home statute.

The court reviewed the three reasons given by the tribunal when it decided section 45.1 did not prevent it from dealing with the complaints:

The court in *British Columbia (Workers' Compensation Board) v. Figliola* stated that the role of a human rights tribunal in applying and interpreting a statutory provision like s. 45.1 is to have regard to the principles underlying the common law finality doctrines such as issue estoppel, collateral attack, and abuse of process. Fairness forms an important part of the analysis.

The tribunal was also required to consider the principles from *Penner v. Niagara (Regional Police Services Board* as to do otherwise could result in a s. 45.1 decision that constitutes a "serious affront to the basic principles of fairness". The *Code* is remedial legislation that should be construed broadly and purposively. The Tribunal reasonably decided that a purposive interpretation of s. 45.1 did not support dismissing an application if to do so would lead to unfairness.

The tribunal looked to the results that thought would follow if it decided that section 45.1 required it to dismiss the complaint. The *Code* provided for a civil action for an infringement of a *Code* right. If the *Penner* principles only apply to a civil action, then someone who commences a civil action for damages for a *Code* infringement would have a better chance of not having that action dismissed than someone who filed a complaint under the *Code*. This would not have been the Legislature's intention when it introduced the legislation. The other effect of holding that section 45.1 required it to dismiss the complaint could be to discourage people from laying complaints before disciplinary tribunals. Complainants could be discouraged from filing complaints with a regulatory authority where they could not obtain a personal remedy, if such a complaint could bar their ability to seek a remedy from a human rights tribunal. It is in the public interest that people be encouraged, rather than discouraged, to let regulatory bodies know when the members of those bodies have engaged in discriminatory conduct.

The human rights tribunal had also rejected the argument that the Inquiries, Complaints and Reports Committee of the Ontario College of Physicians and Surgeons had decided the human rights issue before the tribunal.

The ICRC had assessed whether the physician had made a discriminatory statement to the complainant and concluded that it was not demonstrated that the physician had intentionally done so. The human rights tribunal concluded that it was not necessary to demonstrate intention in order to find discrimination and the ICRC decision did not therefore prevent it from dealing with the complaint.

The court concluded that Human Rights Tribunal's decision was reasonable. It was possible based upon the conclusions of the ICRC that the physician could have made the comments that he was alleged to have made because he was overwhelmed and frustrated, and not because he intended to discriminate against the complainant. If the Tribunal were to find that, on a balance of probabilities that the physician made the alleged discriminatory remarks to the patient, this finding would not be inconsistent with the finding of the ICRC.

A. C. v College of Physicians and Surgeons of Ontario, 2017 CanLII 44047 (ON HPARB)

The Ontario College of Physicians and Surgeons refused to grant Dr. Chauhan a licence after he was acquitted on a charge that he had sexually assaulted a women after drugging her.

The Court quashed that decision.

The court concluded that the Registration Committee disregarded findings of fact of the trial judge. The trial judge had expressed concerns about the reliability of the complainant's evidence and had commented that even had she not found there was a reasonable doubt whether the complainant consented, she would have found that the accused had an honest belief that the complainant consented to the sexual activity. By failing to accord considerable deference to the trial judge's findings of fact and credibility, the Registration Committee acted improperly and without justification. While there may be instances where a professional registration body might properly arrive at a finding contrary to that made by a judge in a criminal trial, where that is the case, there must be a clear and justifiable basis for so doing. There was no clear and justifiable basis for the Registration Committee to make a decision contrary to that of the trial judge.

Calgary (City) v. Alberta (Human Rights and Citizenship Commission), 2011 ABCA 65

The grievance procedure under the collective agreement and the subsequent judicial review resulted in a decision that the City was required to terminate the employment of firefighters who were totally disabled for them to claim benefits under a supplementary pension plan.

The applicants, who were totally disabled, filed a Human Rights complaint alleging the termination was discriminatory. The Human Rights officer concluded that there was a basis to refer the matter for further investigation. The City of Calgary argued that the matter was *res judicata*.

The court held that the human rights panel was not entitled to proceed with the complaints as they related to terminations arising from the operation of the supplementary pension plan. All of the core issues were already decided. It would be an abuse of process to permit re-litigation of those issues even in the absence of specific mutuality of parties. It was equally unacceptable to permit an attack on previous decisions by allowing proceedings that assumed the possibility of accommodation inconsistent with the previous decisions. Considerations of economy, consistency, finality and the integrity of the system of administration of justice required an end to the dispute.

Canada (Canada Human Rights Commission) v. Canada (Canadian Transport Agency), 2011 FCA 332

Morton was a deaf and partially blind person who Air Canada required to travel with an attendant. He complained to the Transportation Agency which dismissed his complaint on the basis that this was not an undue obstacle to his mobility, given safety-related concerns in the event of an emergency evacuation or decompression.

He then filed a complaint with the Human Rights Commission which found discrimination and ordered a remedy.

That decision was set aside by the Federal Court of Appeal.

The court held that while the principles from *Figliola* were in response to a specific statute, the Supreme Court of Canada had held that those principles were the same as common law principles. A tribunal sharing concurrent jurisdiction should not "judicially review" another tribunal's decision, or reconsider a legitimately decided issue in order to explore whether it might yield a different outcome.

> ***28.*** *… The Human Rights Tribunal was "complicit" in an attempt to collaterally appeal the merits of the Agency's decision and decision-making process. The Tribunal dismissed Air Canada's motion for a stay on technical grounds, without considering the unfairness inherent in serial forum shopping. The Tribunal failed to consider whether Mr. Morten should be allowed to ignore the review mechanisms provided in the Act and to instead use the Tribunal to relitigate essentially the same legal issue in an effort to obtain a more favourable result. It did not engage in the required analysis. Specifically, the Tribunal failed to consider that, before the Agency, Mr. Morten knew the case to be met and was afforded the opportunity to meet that case. Any concern on the part of Mr. Morten about the Agency's application of human rights principles ought to have been addressed through the redress provided under the Act for decisions of the Agency …*

> ***29*** *For these reasons, the Tribunal's decision to proceed with Mr. Morten's complaint was unreasonable and should be set aside.*

Saskatchewan Union of Nurses v. Saskatchewan Registered Nurses Assn. (Investigation Committee), 2014 SKQB 27

The nurse grieved termination of his employment following allegations that he sexually harassed coworkers. The same allegations were the subject of discipline proceedings before the Saskatchewan Registered Nurses Association.

The court rejected an application for a stay of the disciplinary proceedings pending the outcome of the grievance process.

The court held that although the issues in the two proceedings had a common factual foundation, it was premature to suggest that either tribunal would relitigate "issues that have been previously decided in an appropriate forum". The court commented that the Discipline Committee is statutorily mandated to inquire into complaints of professional misconduct and it would be inconsistent with that responsibility to delay its proceedings indefinitely because of the possibility it may make a legal error in future.

Heffel v. Registered Nurses Assn., 2015 NWTSC 16

Similar allegations were the subject of a grievance arbitration related to termination of a nurse's employment and charges of unprofessional conduct.

The arbitrator found that the factual allegations were not made out on the evidence before her.

The nurse argued that the investigation by the nurses' association was an abuse of process as the hearing amounted to re-litigation of facts that had already been determined by the arbitrator.

The court ruled that the determination whether an abuse of process existed was a question of law and that the registered nurses association decision on that issue would be reviewed on a standard of correctness.

The court concluded that there was not an abuse of process.

The parties to the two proceedings and the issues were not the same. In the grievance arbitration, the parties were the employer and the union on behalf of the nurse. In the disciplinary proceedings the parties were the nurses' association and the nurse. Although the initial issue to be decided was the same in both proceedings - did the nurse do the acts complained of - the

ultimate issues were not. In the grievance arbitration, the ultimate issue was whether the nurse's conduct justified dismissal by the employer. In the disciplinary proceeding, the ultimate issue was whether the nurse's conduct was unprofessional.

The court distinguished **British Columbia (Workers' Compensation Board) v. Figliola** on the basis that **Figliola** involved parties who unsuccessfully argued the discrimination claim before the Review Officer trying to bring the same argument before the Human Rights Tribunal, hoping for a different result. The grievance arbitration was initiated by Heffel's union in an effort to overturn the termination of her employment. The disciplinary proceeding was initiated by the Registered Nurses' Association pursuant to its mandate to deal with complaints.

Bergeron v. Canada (Attorney General), 2013 FC 301

The human rights commission concluded the complainant's grievance addressed the same issues as were the subject of her human rights complaint. It dismissed the human rights complaint as frivolous or vexatious. The court agreed that conclusion was reasonable.

College of Nurses of Ontario v. Trozzi, 2011 ONSC 4614 (Div. Ct.)

Trozzi's Certificate of Registration was subject to conditions pertaining to future medical treatment and notifying future employers of her medical condition. She appealed the imposition of the conditions to the Health Professions Appeal and Review Board. The HPARB dismissed her appeal. While her appeal to HPARB was pending, she filed a complaint with the Human Rights Commission alleging that the conditions violated her right to be free from discrimination.

The HPARB ruled that the College had discharged its duty of accommodation, and that the conditions imposed were reasonable and within the College's mandate. Despite that, the Human Rights Commission concluded that it would hold a hearing into the complaint.

At issue was the effect to be given to section 45.1 of the *Human Rights Code* which stated that a human rights tribunal could dismiss a complaint if the tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the complaint.

The Divisional Court concluded that the tribunal erred in not dismissing the complaint.

The tribunal failed to take into account HPARB's specialized expertise and public protection mandate. Also the tribunal asked whether HPARB adequately addressed the complaint, using the Human Rights Tribunal's yardstick of "accommodation to the point of undue hardship".

The decision of HPARB was only reviewable by appeal or judicial review. The Human Rights Tribunal is not an appellate body for other tribunals and it cannot supervise other tribunals which have exercised a public protection mandate based on their own expertise. The Human Rights Tribunal has no expertise in protecting public health. It should not assume jurisdiction in order to substitute its statutory mandate for the mandate of another tribunal having responsibility and expertise in that area.

The court also decided that the decision to proceed with the hearing should be reviewed on a standard of correctness as an issue of jurisdiction. There were two reasons for this:

a) The Human Rights Tribunal's decision constituted a determination of the jurisdictional boundaries between competing specialized tribunals. It was the type of jurisdictional questions which **Dunsmuir** contemplates will be reviewed on a standard of correctness;

b) Even though the Human Rights Tribunal was interpreting a provision of its core statute, in order to reach its decision the Human Rights Tribunal was required to interpret the *Registered Health Professions Act* as well as consider general legal principles and doctrines such as abuse of process, collateral attack, adjudicative immunity and deliberative secrecy in its analysis.

Tingling v. College of Psychologists of Ontario, 2017 HRTO 384 (CanLII)

The tribunal dismissed a human rights complaint based upon the same allegations as had resulted in a HPARB decision which upheld a decision refusing to grant her a licence.

Section 45.1 of the *Human Rights Code* is not a strict as the res judicata and abuse of process principles that apply in other forms of litigation. There are five considerations in determining whether to dismiss a complaint under section 45.1:

a. whether there was concurrent jurisdiction to decide human rights issues;

b. whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal;

c. whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself;

d. whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute; and,

e. whether it would be unfair in all of the circumstances to prevent the re-litigation of an issue having regard to the factors articulated in *Penner* and *Claybourn*, above.

The *Penner* factors did not support relitigation of the issues. In *Penner* the court recognized that complainants should be encouraged to bring complaints forward, a process from which they cannot receive a benefit. It would not be in the public interest to hold that dismissal of a complaint results in an inability to pursue compensation as that would discourage individuals from filing complaints.

The applicant was the only person pursuing the complaint and was seeking a similar outcome in both the HPARB and the human rights forums – obtaining licensure as a psychologist. That is a personal, rather than a public interest. There is a public interest in the competent authority to determining licensure address that issue, rather than the Human Rights Tribunal. The procedures before the Human Rights Tribunal are functionally indistinguishable from the proceedings before HPARB.

The tribunal also determined that section 36 of the *Registered Health Professions Act* which prohibits a "record of a proceeding" from being considered in another proceeding did not apply to reviewing the public record of the decision to determine if the same issues were addressed by HPARB as were the subject of the complaint to the Human Rights Tribunal.

Bajwa v. British Columbia Veterinary Medical Assn., 2011 BCCA 265

Dr. Bajwa attempted to raise the issue of institutional bias before the Inquiry Committee, alleging that as an Indo-Canadian he was the subject of institutional bias by the Veterinary Medical Association.

He previously filed a discrimination complaint with the Human Rights Commission.

The Inquiry Committee concluded that the legislation only gave it the authority to determine if the charge had been proved, and not the authority to inquire into the allegations of institutional bias.

The Court of Appeal stated that generally, in the absence of a legislative directive to the contrary, a tribunal should be taken to have jurisdiction to resolve legal issues that may arise before it in

the course of a hearing. The Inquiry Committee and the Council would normally be considered to have the capacity to adjudicate on issues of bias raised at a hearing notwithstanding that the legislation did not expressly grant that authority.

However, it would be an abuse of process to permit Dr. Bajwa to argue institutional bias due to discrimination on the basis of race before the Veterinary Medical Association when that issue was the subject of an investigation before the Human Rights Commission.

The doctrine of abuse of process exists to prevent duplication and waste of resources and the possibility of inconsistent findings by different adjudicative bodies passing upon similar facts and issues.

Bhullar v. British Columbia Veterinary Medical Assn., 2012 BCCA 443

In 2004, Bhullar and several other members of the Association had commenced a complaint before the Human Rights Tribunal alleging discrimination against them by the Association. No decision had yet been rendered by the Human Rights Tribunal.

The Council declined to consider Bhullar's allegations of institutional bias on the basis that it lacked jurisdiction. The chambers judge set aside the decision of the Council, and remitted the issue to the Council to decide whether there had been institutional bias.

The Court of Appeal allowed the appeal on the basis of the reasoning in *Bajwa*.

The issues in the discipline hearing were the same issues that were brought before the Human Rights Tribunal. To allow proceedings to continue at the Council concurrently with the Tribunal would constitute an abuse of process. If the Tribunal decided in Bhullar's favour, he would have a remedy as the Tribunal had the ability to set aside the disciplinary process that struck him from the register.

Law Society of Upper Canada v. Dzelme, 2014 ONSC 4652 (Div.Ct.)

The Law Society brought and injunction application to enjoin Dzelme from practising law. Dzelme denied that what he was doing constituted the practice of law. The Law Society included in its evidence to support the injunction a Small Claims Court decision which dismissed Dzelme's claim for fees on the basis that his services violated the Law Society Act. The court concluded that the doctrines of *res judicata* and issue estoppel prevented Mr. Dzelme from

challenging the findings made against him that the services that he provided to that client amounted to legal services provided in breach of the Act.

Tapics v. Dalhousie University, 2015 NSCA 72,

Tapics was a Ph.D. student who sued Dalhousie arising from an alleged breach of contract in relation to the ending of her research into sea turtles and subsequently the ending of her research into right whales. She appealed the University's decision relating to the discontinuance of her supervisor for her right whales project following the University's internal appeal process. The discontinuance of the sea turtle project was not part of that appeal.

The court ruled that the effort to sue in relation to the right whales project was an abuse of process as it was an effort to relitigate what had been determined in the academic appeal. The claim in relation to the sea turtle project was allowed to continue as it was not addressed in the academic appeal.

Groia v. Law Society of Upper Canada, 2016 ONCA 471

Mr. Groia was found to have committed professional misconduct by incivility towards prosecution counsel during the prosecution of his client, Mr. Felderhoff.

One of the issues in the discipline proceedings and the appeals from the discipline decision was the effect which should have been given to the trial judge's comments criticizing Mr. Groia's conduct.

The Appeal Panel concluded that the Hearing Panel had erred by holding that it would be an abuse of process to allow Mr. Groia to relitigate the Reviewing Courts' findings. The Hearing Panel concluded that the court's reasons, although admissible, should be given limited weight in the circumstances of this case.

The Divisional Court concluded that the Reviewing Courts' Reasons were entitled to "limited weight" because Mr. Groia had not been a party to the Application in which the ruling was made and because neither Reviewing Court had addressed whether Mr. Groia's conduct amounted to professional misconduct.

The Court of Appeal concluded that it did not have to address the issue as limited weight had been given by the Appeal Panel to trial court's ruling.

Harrison v. Law Society of British Columbia, 2015 BCCA 258

The court dismissed Harrison's application for leave to appeal from dismissal of his judicial review application. His judicial review application challenged a decision of the Law Society to dismiss his complaint against a lawyer.

He sued the Province of British Columbia alleging breach of his privacy. After that action was dismissed he filed a complaint with the Law Society which alleged that his lawyer had misled him about a previous court decision related to his action against the province.

The court refused leave to appeal. Among the reasons was that the appeal was an abuse of process. The judicial review application was being used to collaterally attack a final decision of the court. The appeal was another attempt by Gunn to have the court revisit the dismissal of his civil action.

Opara v. Law Society of Upper Canada, 2015 ONSC 3348

The Law Society appeal panel applied a standard of reasonableness when it reviewed, and overturned, a decision of the hearing panel. The court appears to have accepted that the correct standard of review to be used by the appeal panel was reasonableness for issue of fact and mixed fact and law, and correctness for issues of law.

One of the issues in the hearing was whether the lawyer had acted with incivility before the human rights tribunal. The hearing panel erred by failing to accord weight to the findings of fact and opinions of the human rights tribunal. While the lawyer can deny fact findings by another tribunal, the expectation should be that the denial would have to be specific and believable to overcome the weight one would expect to be accorded to a factual finding of matters within the tribunal's knowledge.

Vachon v. Canada (Revenue Agency), 2015 ONSC 6096

The plaintiff had been disciplined by the Certified General Accountants Association for filing a complaint against other members which was not substantiated. He sued for defamation and breach of privacy, alleging that allowing the notice of hearing to remain accessible by internet search for an unduly long time was defamatory.

The court dismissed the claim on the basis that it was an abuse of process as the action was an effort to relitigate the original discipline action. The plaintiff could not plead the tort of intrusion

upon seclusion to circumvent the defences such as absolute or qualified privilege available in a claim for defamation. There weren't sufficient facts alleged to overcome the statutory immunity for actions taken in good faith.

M.K. Engineering Inc. v. Plecash, 2015 ABCA 311

The Engineering firm was subject to a disciplinary action in which allegations of misconduct had been referred for a hearing. It sued the investigator and the regulatory body alleging misfeasance in public office and interference with economic relations. Among the reasons for dismissing the claim was that it was a collateral attack and an abuse of process.

> ***6*** *This action is clearly a collateral attack on the disciplinary process. It was Plecash's duty to investigate the complaint, form an opinion, and make recommendations. Merely because he recommended certain disciplinary consequences does not amount to malice. Even if he realized that those recommendations might "injure the professional", that is an inevitable consequence of his role as a legally empowered investigator. To the extent that APEGA's disciplinary process has interfered with the appellant's economic relations, that is an inevitable consequence of professional discipline. The appellant is not without its remedies, because if the ultimate outcome of the disciplinary proceedings is adverse to it, a further appeal is available. The order dismissing this action, however, discloses no reviewable error.*

TN v RMS, 2014 CanLII 61674 (ON HPARB)

The complainant filed a complaint with the City of Toronto Labour Relations Department and the Local 79 Union related to the physician's role as a public health official. He alleged that she had not fulfilled her duty as Associate Medical Officer of Health in overseeing a needle exchange program.

When the complaint was dismissed the complainant filed a complaint with the College of Physicians and Surgeons based upon the same allegations.

The Board concluded that the College's decision to dismiss the complaint on the basis that it had been investigated and dismissed by City of Toronto was reasonable. The College has a discretion to decide not to investigate a complaint in such circumstances.

Issac v. Law Society of Upper Canada, 2014 ONSC 6813 (Sup. Ct. J.)

A lawyer who had been suspended sued the Law Society alleging a number of causes of action. The action was dismissed on the basis that it failed to plead sufficient facts to support the claim

of bad faith and on the basis that it was an abuse of process and an attempt to relitigate matters previously decided.

The court concluded that the action was brought on the same facts and legal grounds as actions previously heard and determined. The plaintiff was seeking to re-litigate proceedings that have already been adjudicated and for which appeals were no longer available. If the doctrine of issue estoppel did not apply to the circumstances, abuse of process did.

XVII. Interpreting the authority of an administrative tribunal

Statutes are sometimes unclear with respect to the extent of a regulatory body's authority. A court may then be required to determine whether the regulatory body has the authority to do something not clearly set out in the legislation. The court may be required to determine whether the power contained in the legislation should be given a generous or a restrictive interpretation.

Before the Supreme Court decision in *Binet*, there were a number of court decisions which interpreted the authority of an administrative body restrictively, using the analysis that such bodies were creatures of statute and only had the authority specifically given to them in the statute.

After the Supreme Court decisions in *Binet* and *Celgene* (summarized below) one of principles that is to be used is whether the authority claimed by the administrative body is reasonably necessary to fulfil the mandate assigned by the legislature to that body.

Binet v. **Pharmascience Inc.**, 2006 SCC 48

This Supreme Court decision, although decided under Quebec law, can potentially provide significant support for arguments that a regulatory body's powers should be interpreted in such a way as to provide the body with the authority to carry out its responsibilities under its legislation.

The court stated that the privilege of professional self-regulation places the individuals responsible for enforcing professional discipline under an onerous obligation. The regulatory body should have the tools to carry out its responsibility. The court rejected a narrow interpretation of the Syndic's power, which would not have allowed the Syndic to obtain some documents relevant to its investigation.

Celgene Corp. v. Canada (Attorney General), 2011 SCC 1

Celgene had distributed a drug in Canada since 1995 pursuant to the Special Access Programme. A physician would order the drug, the drug would be packed in the United States and shipped to the doctor, and any unused portions would be returned to one of the appellant's facilities. The drug was never redistributed in Canada.

Celgene argued that the Patented Medicine Prices Review Board did not have the authority under its legislation to investigate the price at which the drug was sold.

The court concluded that the Board's interpretation of the statute giving it authority was consistent with its consumer protection purpose and should not be disturbed. Within that context, the commercial law definition of "sold" was not determinative. If the legislation was interpreted to exclude the Board's authority, it would undermine the Board's consumer protection objectives by preventing it from protecting Canadian purchasers of medicine entering Canada through the Special Access Program.

Churko v. **Law Society of Saskatchewan**, 2011 SKQB 327

Churko sought to act as a principal of an articling student. There were concerns whether the firm was an appropriate environment for articling students.

At issue was the interpretation of the Law Society Rules and whether they provided the authority for the Executive Director to refer the request to the Admissions and Education Committee.

The Law Society's duty is to protect the public by assuring the integrity, knowledge, skill, proficiency and competence of members of the Law Society

The court held that the rule should be interpreted in a manner that facilitates rather than restricts the exercise of the Committee's jurisdiction. Adopting the liberal and expansive interpretation of the rule would best serve the purpose and intent of the Act.

The court ruled that the Executive Director had the authority to refer the request to the Admissions and Education Committee.

B.C. College of Optics Inc. v. College of Opticians of British Columbia, 2016 BCCA 85

One of the requirements of the legislation was that the B.C. College of Opticians was required to determine which training programs it was prepared to accept. The College of Optics Inc. sought recognition as a training program for opticians. It was advised that before its application for

recognition would be considered, it was required to undergo a review by the National Association of Canadian Optician Regulators.

The motions court (2014 BCSC 1853) concluded that this requirement fettered the discretion of the College of Opticians, as there was nothing in the legislation which required an assessment by NACOR as a precondition for the College of Opticians to consider an application for recognition. The motions court granted an order in the nature of *mandamus*, directing the College of Opticians to "receive and consider such evidence as the [College of Optics] chooses to submit" in support of its application for recognition.

The Court of Appeal allowed the appeal.

The College of Opticians did not have the expertise to conduct its own assessments of training programs and relied on third parties to do that. A review by NACOR was a requirement to apply for recognition; accreditation by NACOR was not a precondition to applying for recognition.

The court held that the doctrine of doctrine of "jurisdiction by necessary implication" applied. That doctrine states that the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature.

The College of Opticians was established to serve and protect the public. The doctrine of jurisdiction by necessary implication allowed it to establish a policy that it would not consider applications for recognition unless the applicant's program has been reviewed by NACOR. The power to recognize educational programs must by necessary implication include the power to set minimum criteria and procedures for applicants who seek recognition.

Gore v. **College of Physicians and Surgeons of Ontario**, 2009 ONCA 546 (CanLII); 96 OR (3d) 241; 310 DLR (4th) 354

The Ontario Court of Appeal adopted the *Binet* principle to conclude that Ontario legislation provided authority for the Ontario College to observe physicians while they were performing cosmetic surgery procedures.

Rassouli-Rashti v. College of Physicians and Surgeons of Ontario, 2009 CanLII 62055; 256 O.A.C. 186 (ON Div. Ct.)

The court referred to *Binet* in concluding that there was a need to interpret the College's investigatory powers broadly. The College has a duty to serve and protect the public interest. As a result, courts determining the scope of the investigative powers of a self-regulating profession have emphasized the need for a flexible interpretation that will allow investigators to effectively discharge their responsibility to obtain relevant information pertaining to a member's conduct

Joshi v. **British Columbia Veterinary Medical Assn.**, 2010 BCCA 129

Joshi argued that the Council did not have the authority to direct an oral hearing at which the individuals who supported his application for a licence would be cross-examined under oath. The trial court concluded that, as the statute provided that right in the discipline section of the statute, but not in the licensing section of the statute, there was no right to require evidence on oath or cross-examination.

The British Columbia Court of Appeal held that the power to conduct an oral hearing with evidence under oath and cross-examination was implicit in the power given to assess suitability of an applicant for a licence.

> *In my view, that position is not tenable as it would effectively negate the ability of Council to meaningfully satisfy itself of the good character of applicants, as required by the Act.*
>
> *...*
>
> *I think that procedural fairness requires that the Council have the discretion to take evidence on oath or affirmation and allow cross-examination where credibility is in issue. The Council may also be required to grant those rights to an applicant in the interests of natural justice when credibility is in issue, and an applicant so requests.*

Di Pietro v. Law Society of the Northwest Territories, 2016 NWTSC 11

The Law Society made an error in assessing Di Pietro's application for licensure with the result that he was issued an unrestricted licence for which he should not have been eligible. After realizing the error, the law society unilaterally changed his status to that of a Canadian Legal Advisor.

The court quashed that decision and remitted the issue of his licensure status to the Law Society for redetermination. The lawyer had not applied to be a CLA and there was no ability to grant him a status that he had not requested.

The court rejected the lawyer's argument that once a licence was issued the Law Society had no ability to correct an error. The Law Society has a mandated to regulate the profession and protect the public. It would be inconsistent to hold that if the Law Society erroneously issues a licence it has no ability to correct that error.

XVIII. The Charter – its application by administrative tribunals

A number of decisions of the Supreme Court of Canada have established that administrative tribunals that have the authority to make decisions on points of law have the ability and the obligation to apply the *Charter* to proceedings before them. While only a court can grant a general declaration of invalidity, tribunals are required to disregard legislation which is inconsistent with the *Charter* and grant *Charter* remedies where that is appropriate.

Those principles are expressed in *Mills v. The Queen*, [1986] 1 S.C.R. 863, *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570, *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 and *R. v. Conway*, 2010 SCC 22.

R. v. **Conway**, 2010 SCC 22

Conway was detained in a mental health facility following a determination that he was not guilty of criminal charges by reason of insanity. He alleged that his *Charter* rights had been infringed. He sought remedies under section 24 of the *Charter***.** He sought an order directing the facility to provide psychotherapy treatment and an order discharging him from the facility. At issue was whether the Ontario Review Board had the authority to determine whether his *Charter* rights had been breached and the authority to grant a discharge from the facility as a *Charter* remedy.

The court concluded that the Board had the jurisdiction to decide whether Mr. Conway's *Charter* rights had been breached but did not have the authority to grant a discharge as a remedy.

The court commented that there isn't one *Charter* for the courts and another for administrative tribunals. Expert tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction and must comply with the *Charter* in exercising their statutory discretion.

When a tribunal is deciding whether it has the authority to grant a requested *Charter* remedy, the first question to be answered is whether the tribunal has the jurisdiction to grant *Charter* remedies generally. If the tribunal has the power to decide questions of law, and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate.

The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought based on its statutory mandate. The answer to this question will depend on legislative intent. Unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* – and grant *Charter* remedies - when resolving the matters properly before it.

The court held that the Board was given the authority to determine questions of law and therefore could consider whether an inmate's *Charter* rights had been breached. The Board could grant *Charter* remedies under section 24.

However, the statute specifically withdrew certain remedies from the Board's statutory arsenal. The statute specifically prevented the Board from granting an absolute discharge to a dangerous patient. The statute also prevented the Board from directing that a hospital authority provide a patient with particular treatment.

Therefore, the Board did not have the jurisdiction to grant the remedies sought by Mr. Conway.

Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11

The Saskatchewan Human Rights Commission concluded that flyers distributed by Mr. Whatcott to the public contravened s. 14 of the Saskatchewan Human Rights Code as they exposed persons to hatred and ridicule on the basis of their sexual orientation. The Tribunal concluded that s. 14 of the *Code* was a reasonable restriction on the respondent's rights to freedom of religion and expression as guaranteed by ss. 2(a) and (b) of the *Charter*. The Saskatchewan Court of Appeal concluded that s. 14(1)(b) of the *Code* was constitutional but the flyers did not meet the test for hatred and were not prohibited publications within the meaning of s. 14(1)(b).

The Supreme Court of Canada concluded that the section of the Code was constitutional as it impaired freedom of expression “no more than reasonably necessary, having regard to the

practical difficulties and conflicting tensions that must be taken into account". The benefits of the suppression of hate speech and its harmful effects outweigh the detrimental effect of restricting expression which, by its nature, does little to promote the values underlying freedom of expression.

The court reviewed the decision that the decision of the Human Rights tribunal on a standard of reasonableness. If concluded that the decision with respect to two of the flyers was reasonable, but that the decision with respect to two other flyers was unreasonable. It could not reasonably be found that the other flyers contained expression that a reasonable person, aware of the relevant context and circumstances, would find as exposing or likely to expose persons of same-sex orientation to detestation and vilification.

Cousineau c. Québec (Procureur général), 2014 QCCS 2916

The hearing aid technician was charged with breaching advertising rules. He brought an application before the discipline committee to challenge the rules as contrary to the **Charter**. Shortly before the hearing he brought an application in Superior Court for a declaration that the rules were invalid as infringing the **Charter** and an injunction to prevent the discipline committee from conducting the hearing.

Both requests were rejected in the Superior Court and on appeal. The discipline committee had the authority to disregard the advertising rules if the committee concluded that they contravened the **Charter**. There wasn't sufficient reason to prohibit the discipline committee from proceeding based upon the information before the court.

Hanif v. Ontario College of Pharmacists, 2014 ONSC 2598 (Sup. Ct. J.)

Mr. Hanif admitted engaging in a consensual sexual relationship with a patient who also worked at the store where he worked. The legislation defined that conduct as sexual abuse and mandated a penalty of revocation. The College of Pharmacists reached an agreement with Mr. Hanif that he would admit the conduct, appeal the penalty, and bring a court action alleging that the mandatory revocation provisions in the legislation contravened the *Charter* and were criminal in nature. The discipline committee ordered the revocation stayed pending the outcome of the constitutional challenge.

The court refused the application by the Attorney General to consolidate the appeal and the constitutional challenge. In doing so, the court commented that the Discipline Committee had the power to consider a constitutional challenge but did not have a legal duty to do so, particularly as it could not order a general declaration of invalidity, the remedy sought by Mr. Hanif.

Comment: the court subsequently decided that mandatory licence revocation for sexual abuse of a patient does not infringe the criminal law power (**Hanif v. Ontario**, 2015 ONCA 640)

Beaudette v. Alberta (Securities Commission), 2016 ABCA 9

The court rejected the applicant's argument that that the combined effect of the power of the Commission to compel him to provide information to the Commission, and the ability of the Commission to provide that information to American criminal authorities to use that information in a criminal prosecution offended section 7 of the *Charter*.

The evidence did not establish that there was a predominant purpose of supporting a criminal investigation. The court will assume a legislative objective that is appropriate and lawful, absent evidence to the contrary.

The objective of securities regulation could not be achieved without the securities commission having the power to compel individuals to provide information to it. Requirements of fundamental justice are not immutable, but vary according to the context in which they are invoked.

When analyzing legislation that is alleged to contravene principles of fundamental justice the objectives of the statute should be read fairly and correctly and its implication for potential injury to the identified principle must be realistically assessed. The fact that the law may make it easier for a foreign criminal authority to conduct a prosecution does not *per se* mean that the legislation offends the *Charter*.

The court characterized the applicant's argument as asserting one of three things:

a) There was some sort of *Charter* obligation on American authorities to give use or derivative use immunity to the applicant and therefore either to not seek such information or to guarantee its inadmissibility in court; or
b) The securities commission was a voluntary agent for the American police or prosecutorial authorities at the time of the acquisition of the information and documents and therefore

the securities commission must be impeded in its own acquisition or use of such information; or

c) If the securities commission shared information with the American Securities Commission it would be tantamount to participation in American breaches of fundamental human rights or would violate Canada's international human rights obligations.

The court rejected each of those arguments.

XIX. The application of the *Charter* – balancing *Charter* interests against other interests

What I understand from recent decisions is that where what is at issue is the constitutionality of legislation that the tribunal is asked to apply, a traditional *Charter* analysis will be used by the tribunal. Where instead, the issue is whether certain action taken by the tribunal would be inconsistent with the *Charter*, the tribunal will be expected to apply *Charter* values. If the tribunal has applied *Charter* values to a matter before it, their application of those *Charter* values to the facts which they have found will be reviewed by a court on as standard of reasonableness.

Doré v. Barreau du Québec, 2012 SCC 12

Defence counsel in a trial wrote a letter to the presiding judge which included insults and personal attacks. He was found guilty of unprofessional conduct for writing a disrespectful letter which lacked objectivity, moderation and dignity.

The lawyer claimed that the decision infringed his freedom of expression under section 2 of the *Charter*. The Supreme Court of Canada upheld the finding of unprofessional conduct.

The court described the process by which administrative tribunals should apply *Charter* values when their decision may affect a person's *Charter* rights.

The administrative decision-maker should consider the nature of the statutory objectives and consider how the *Charter* value can best be protected in view of the statutory objectives. This requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.

The court will review the tribunal's exercise of that balancing on a standard of reasonableness.

The court commented:

> *…An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing* ***Charter*** *values. As the Court explained in* ***Douglas/Kwantlen Faculty Assn.*** *v.* ***Douglas College****, [1990] 3 S.C.R. 570, adopting the observations of Prof. Danielle Pinard:*
>
> > *…administrative tribunals have the skills, expertise and knowledge in a particular area which can with advantage be used to ensure the primacy of the Constitution. Their privileged situation as regards the appreciation of the relevant facts enables them to develop a functional approach to rights and freedoms as well as to general constitutional precepts.*

If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

Loyola High School v. Quebec (Attorney General), 2015 SCC 12

Quebec legislation required schools to teach a program on ethics and religious culture which taught the beliefs and ethics of different world religions from a neutral perspective. The legislation allowed the minister to exempt private schools from the program if they offered an alternative program that the Minister deemed to be equivalent.

Loyola was a private Catholic high school which was refused an exemption. It proposed an alternative program that placed greater emphasis on Catholic beliefs and ethics.

Loyola challenged the decision on the basis that the decision denying the exemption violated its freedom of religion because it was incompatible its character as a Catholic school.

The court held that the Minister's decision which required all aspects of the program be taught from a neutral perspective limited freedom of religion more than was necessary. Religious freedom was founded on the idea that no one could be forced to adhere to or refrain from a particular set of religious beliefs. This included both the individual and collective aspects of religious belief.

The test was whether the Minister's decision reflected a proportionate balance between the objectives of promoting tolerance and respect for difference, and the religious freedom of the Loyola members.

The Minister`s decision was unreasonable because it was disproportionate. By forcing religious schools to teach their own religions from a non-religious perspective, the Minister was not

advancing the program's goals of encouraging respect for others and openness to others. It was reasonable for the Minister to require Loyola to teach about the ethics of other religions in a neutral way. The Minister's decision amounted to requiring a Catholic institution to speak about Catholicism in terms defined by the state rather than by its own understanding of Catholicism. There was insufficient demonstrable benefit to the furtherance of the state's objectives in requiring Loyola's teachers to teach Catholicism from a neutral perspective to justify the refusal.

Trinity Western University v. Law Society of Upper Canada, 2016 ONCA 518

The Ontario Court of Appeal upheld the decision of the Law Society of Upper Canada that it would not approve the degree to be granted by Trinity Western University (TWU) for the purposes of licensure in Ontario. Attendees of TWU were required to agree to a covenant which, among other things, prohibited sexual conduct that "violated the sacredness of marriage between a man and a woman". That prohibited sexual relationships between unmarried individuals and sexual relationships involving lesbian, gay, bisexual or transgendered students.

The Court of Appeal upheld the decision as reasonable. The Law Society had made the decision informed by *Charter* and human rights values. The Law Society's conclusion that the public interest in ensuring equal access to the profession justified a degree of interference with the appellants' religious freedoms was reasonable.

Trinity Western University v. Law Society of British Columbia, 2016 BCCA 423

The court concluded that the Law Society's decision not to approve law degrees granted by Trinity Western University was unreasonable.

The first reason for doing so was because the Benchers, by agreeing to be bound by a referendum of its members, had fettered its discretion which required it to consider *Charter* values when it decided whether to approve TWU (discussed earlier in this paper).

The court then concluded that the decision to refuse to recognize TWU was unreasonable. It limited the right to freedom of religion in a disproportionate way, significantly more than was reasonably necessary to meet the Law Society's public interest objective. The impact of non-approval on the religious freedoms at stake was severe in comparison to the minimal impact of approval on the access of LGBTQ persons to legal education and the profession. The TWU law school would provide an expanded number of positions for law students. It would therefore not

limit the ability of LGBTQ persons to obtain access to a law school, but would likely have the opposite effect.

Law Society of Alberta v. Sidhu, 2016 ABQB 142

Sidhu was convicted of trafficking based upon having delivered drugs to an inmate at a correctional center. The Law Society sought production of his cel phone and computer which contained personal information in addition to information relevant to the investigation.

The legislation authorized an investigator to request items and if that was refused to apply to the court for an order compelling the lawyer to comply with the request.

The court rejected the argument that the provisions authorizing an investigator to request documents were unconstitutional. The court rejected the argument that the legislation should be read to require "reasonable and probable grounds" established by sworn evidence to believe that relevant information would be found, as would be required in a criminal investigation.

The court commented that documents and information requested in relation to a regulatory scheme carry a low expectation of privacy. "Search and seizure that might run afoul of the *Charter* when conducted in the context of a criminal investigation may not do so in the context of a regulatory investigation."

The court questioned whether, in light of the lawyer's criminal conviction, a search of the cel phone and computer was necessary. The court ordered the cel phone and computer be delivered to the Law Society but that they could not be examined by the Law Society without the court's permission. The court also provided direction with respect to any application by the Law Society to obtain judicial authorization to review the information on the cel phone or computer:

34 Should an application be made in the future seeking authorization to review and utilize the cell phone and computer records being produced and preserved hereunder, it should be supported by an Affidavit that sets out the status of the criminal proceedings, the need for review of such records in order to complete the investigation report as directed by the Executive Director, and whether less intrusive investigatory methods are available to complete the investigation. This will enable the Court to make an informed decision in weighing the public interest of an expansive investigation into Mr. Sidhu's activities as a practicing lawyer, and private citizen, and balancing that against the intrusion of privacy inherent in search and seizure of mixed personal and business records.

XX. Stare decisis – is a tribunal required to follow previous tribunal or court decisions?

Generally a tribunal is not required to follow previous tribunal decisions. However, it may be unreasonable for a tribunal to fail to follow a court decision which is directly on point.

A tribunal which departs from a previous tribunal decision may be required to justify why it did so.

There is some authority for the proposition that two competing lines of inconsistent reasoning from a tribunal cannot be permitted. The court will find one line of reasoning to be unreasonable.

Canada (Attorney General) v. Bri-Chem Supply Ltd.*,* 2016 FCA 257

The Canadian International Trade Tribunal ruled in a decision, *Frito-Lay*, that importers could correct certain customs declarations in order to obtain more favourable tariff treatment. Customs Boarder Officials had initially appealed the *Frito-Lay* decision but then discontinued their appeal.

In the *Bri-Chem* hearing CBSA sought to relitigate the reasoning in *Frito-Lay*. The Tribunal found that the attempted relitigation was an abuse of process.

The Tribunal's decision that there was an abuse of process was appealed to the Federal Court of Appeal. CBSA argued that administrative tribunals are not subject to the same constraints of precedent as are courts. If a panel of a tribunal can decline to follow a previous panel's decision, there can be no abuse of process in relitigating an issue.

Paul Daly analyzed the court's reasoning as follows (*The Principle of Stare Decisis in Canadian Administrative Law* (http://www.administrativelawmatters.com/publications/the-principle-of-stare-decisis-in-canadian-administrative-law/):

> *Rejecting this argument, Stratas J.A. upheld the Tribunal's conclusion that an abuse of process had occurred. He explained that the principle of* stare decisis *operates in a nuanced way in the administrative setting: panels are not bound by previous decisions, but in the interests of finality, certainty and predictability, "later panels should not depart from the decisions of earlier panels unless there is good reason" (at para. 44). From the point of view of a front-line administrator, the decisions of those who sit in the higher echelons of the administrative hierarchy should generally be respected, but can be challenged in some circumstances. For if they were obliged to accept all decisions unthinkingly, "a serious error might persist, possibly perpetually" (at para. 49).*
>
> *Stratas J.A. proposed the following general framework:*
>
> *In my view, an administrator can act or take a position against an earlier tribunal decision only if it is satisfied it is acting bona fide in accordance with the terms and purposes of its legislative mandate and only if a particular threshold has been crossed. This threshold*

> *should be shaped by two sets of clashing principles discussed above: the principles of certainty, predictability, finality and tribunal pre-eminence on the one hand, and, on the other, ensuring that potentially meritorious challenges of arguably wrong decisions can go forward.*

United Food and Commercial Workers, Local 1400 v. Sobeys Capital Inc., 2014 SKQB 360

The court rejected the argument that the Labour Relations Board had committed an error by failing to follow its previous decisions relating to what is a technological change.

The court commented:

> ***30*** *One can argue whether or not the Loraas decision actually stands for what is stated at para. 57 of the Board's decision in Off the Wall Productions or not. However, I find that it is not essential to make that determination. The Court of Appeal in the Loraas decision at para. 16 stated:*
>
> > *16 ... the Board is not required to follow its previous decisions. As Culliton C.J.S. said in Burt, Davis, Popoff, et al. v. Armadale Publishers Limited et al. [1976] 1 W.W.R. 350 at 353 "[h]owever helpful uniformity might be, the Board is not bound by its previous decisions and may decide each case in the light of its particular circumstances." ...*
>
> ***31*** *The Supreme Court of Canada also emphasized the now oft cited principle of board autonomy in Domar Inc. v Quebec, [1993] 2 SCR 756 at 800-801, which is cited by the Board in Re Saunders Electric Ltd., 178 CLRBR (2d) 44 at para 34:*
>
> > *34 ... 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.*
>
> ***32*** *Given the foregoing direction of the Court of Appeal and the Supreme Court, I find the Board's application of vertical precedent was reasonable, and the decision cannot be overturned on this ground.*

Saskatchewan Joint Board Retail Wholesale and Department Store Union v. K-Bro Linens System Inc., 2015 SKQB 300

The court rejected the argument that the decision was unreasonable as the Board failed to follow its previous decisions.

> ***28*** *Fourth, the applicant argues that the Decision is unreasonable on the ground that the Board did not follow previous jurisprudence. A decision of the Board will not be found to be unreasonable merely because it interprets or applies the Act in a manner which differs from another decision of the Board. That issue was addressed in Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Loraas Disposal Services Ltd. (1998), 172 Sask R 227 (CA), at para 16, and more recently in United Food and Commercial Workers*

Local 1400 v Sobeys Capital Inc., 2014 SKQB 360, at paras 30-31. Indeed, that is so regardless of whether that conflicting decision has been found not to be unreasonable by the court, a point that was also made by Jackson J.A. in Prairie School. As she there commented:

> *30 ... The Union argued before this Court that the Board's decision must be considered unreasonable because it is now in conflict with a later decision of the Board: Sun West School Division No. 207 and Canadian Union of Public Employees, Local 4802, (2008), 162 C.L.R.B.R. (2d) 286, 2008 CanLII 64110, which was subsequently found by the Court of Queen's Bench not to be unreasonable in Sun West School Division No. 207 v. Canadian Union of Public Employees, Local 4802, 2010 SKQB 1, [2010] 8 W.W.R. 286. Prairie South acknowledges that Sun West granted the Union relief similar to that sought from the Board in this case.*
>
> *31 I would not give effect to this ground of appeal. It is well established that courts applying the deferential standard of "reasonableness" may find two conflicting outcomes to be equally reasonable. In such circumstances, the court's task is to defer to the reasonable decision chosen by the Board in the instant case, assuming it meets the criteria described in Dunsmuir referring to the quality of the reasoning and the outcome.*

Nova Scotia (Human Rights Commission) v. Grant, 2016 NSCA 37

The tribunal concluded that it could not accept a resolution of a human rights complaint unless as part of the resolution the respondent admitted discrimination.

The court concluded that the tribunal's interpretation of the legislation was unreasonable.

Among the reasons for concluding that the decision was unreasonable is that two conflicting lines of decisions within an administrative body should not be permitted:

> ***18*** *Furthermore, the Board's interpretation of these provisions renders this decision unreasonable. In other words, when there are two conflicting lines of authority flowing from the same administrative tribunal, they cannot function together. One interpretation has to be unreasonable. Here, I endorse the approach taken by the Alberta Court of Appeal in Altus Group Limited v. Calgary (City), 2015 ABCA 86:*
>
> > *31 Assuming reasonableness applies as the standard of review of administrative tribunals in the interpretation of their home statute or closely connected legislation, while an administrative decision maker is unconstrained by the principles of stare decisis and is free to accept any reasonable interpretation of the applicable legislation, the reasonableness standard does not shield directly conflicting decisions from review by an appellate court. In assessing the reasonableness of statutory interpretation by the administrative tribunal, the appellate court should have regard to previous precedent supporting a conflicting interpretation and consider whether both interpretations can reasonably stand together under principles of statutory interpretation and the rule of law.*

XXI. Standing to participate in an appeal or judicial review of one's own decision

Historically courts were reluctant to permit a tribunal to appear to before the court in relation to a decision that tribunal had made. Generally tribunals were limited to making representations related to the jurisdiction of the tribunal, the standard of review and, where appropriate, to clarify the record.

Recent decisions demonstrate a much more nuanced approach to determining the extent to which a tribunal can appear and make representations in relation to the merits of a decision which the tribunal made. One of the important considerations is whether any of the parties will be supporting the tribunal's decision. If no party will appear before the court to support the decision, it is more likely that the tribunal will be granted standing to appear and defend the merits of its decision.

Also important is the nature of the decision. Where the decision arises from an adversarial proceeding it is less likely that the tribunal will have standing to appear. Where the decision is based on the policy-making, regulatory or investigative activities, it is more likely that the tribunal will have standing to appear.

Construction Workers Union, Local 151 v Saskatchewan Labour Relations Board, 2017 SKQB 197

> *[34] Here, while the Board may have had some limited standing, it was not appropriate for the Board to appear in opposition to Local 15 1 and Technical and make submissions for the purpose of defending the Board's conduct in respect of the issue of breach of procedural fairness. Further, it was not appropriate for the Registrar of the Board to defend the correctness of the decision, make arguments on the merits, reargue the evidence and advance arguments not implicit in the reasons. The Boards conduct in this regard was not appropriate.*
>
> *[56] The legitimate expectations of the parties here would be that the Board would confine its decision to the assessment of the evidence and the arguments made before it. While courts must r espect a tribunal's choice of procedure, the Board's statute does not permit the course of action that the Board followed in this case.*
>
> *[66] The failure of the Board to identify to the parties the issues and give the parties an opportunity to call evidence or present argument on those issues was a breach of procedural fairness and natural justice. The Board here developed a new line of authority in coming to a key findi ng without disclosing that these were pivotal issue s and without seeking evidence or submissions about the issues from the parties at the hearing.*

Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44

The court rejected a formulaic approach to determining whether a tribunal can defend its decision in an appeal or judicial review.

The court conducting the first-instance review must take a principled and contextual, discretionary approach in determining whether to grant the tribunal standing. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

The court stated the following considerations when the standing issue is not determined by the tribunal's enabling statute:

a) it can be helpful to the court to grant standing where no one else is defending the decision under review;
b) it can be helpful to the court to grant standing where the tribunal has a policy-making, regulatory or investigative role, or acts on behalf of the public interest, as distinct from being primarily engaged in adjudicating individual conflicts between two adversarial parties;
c) concerns about a tribunal's impartiality are likely to weigh more heavily where the tribunal was engaged in adjudication, rather than regulation;
d) tribunals defending their decisions on appeals or judicial review may not amend, vary, qualify or supplement their reasons to bolster deficient decisions.

18320 Holdings Inc. (c.o.b. Automotive Training Centres) v. StudentAid BC, 2014 BCCA 494 (also cited as **18320 Holdings Inc. v. Thibeau**

The trial court imposed special costs against the tribunal which argued in support of its decision. The trial court ruled that the tribunal should not have done so. The award of special costs was set aside in the Court of Appeal.

The court canvassed the decisions addressing when a tribunal may be permitted to address the merits of its decision. Whether a tribunal can do so is within the discretion of the judge but will consider the following factors:

The need to maintain tribunal impartiality will generally be more important, and it will be less likely to be appropriate for a tribunal to argue the merits, if:

a) the tribunal is strictly adjudicative in function, rather than also inquisitorial or investigative;
b) the matter will be referred back to the tribunal for reconsideration if the petitioner is successful; or,
c) the tribunal seeks to make arguments on review which are not grounded in, or which are inconsistent with, the published reasons for its decision.

The need to facilitate fully informed adjudication will generally be more important, and it will be more likely to be appropriate for a tribunal to argue the merits, if:

a) there is no other respondent able and willing to defend the merits of the decision;
b) there is a challenge to the legality of procedural policies or guidelines that have been formally adopted by the tribunal;
c) a detailed analysis of matters within the specialized expertise of the tribunal is necessary and the court is unlikely to be able to comprehend or analyze those matters without the assistance of counsel for the tribunal.

The court concluded that the chambers judge had erred in awarding special costs against the tribunal on the basis that the tribunal had improperly addressed the merits of its decision. The tribunal was required to do so, as no other party was supporting the decision.

In the circumstances of this case, the tribunal had standing to make those submissions and no position was taken *contra* by the petitioners.

Imperial Oil Ltd. v. Calgary (City), 2014 ABCA 231

The Privacy Commissioner sought to appeal a decision of a chambers judge which set aside the Commissioner's order which required Alberta Environment to disclose a remediation agreement which had been reached between Imperial Oil and Alberta Environment. The court quashed the appeal as the Commissioner had no standing to appeal.

As the Commissioner was required to be fair and neutral, it was inappropriate for him to be actively involved in litigation about the validity of his decision.

The court commented:

> *Standing to Appeal*
> ***23*** *Imperial Oil applied, as a threshold issue, to strike this appeal on the basis that the Commissioner has no standing to appeal a judicial review decision quashing one of the Commissioner's orders, relying on* ***Brewer v Fraser Milner Casgrain LLP****, 2008 ABCA 160*

at paras. 54-6, 90 Alta LR (4th) 201, 432 AR 188, leave refused [2008] 3 SCR vi. ***Brewer*** *concluded that a statutory tribunal whose own decision has been quashed on judicial review cannot appeal from that order unless its own jurisdiction is in question.*

30 *This appeal is indistinguishable from* ***Brewer****, which is binding authority in this province. An appeal from the decision of the chambers judge was available to the City of Calgary, which declined. Even if the City was unwilling or unable to launch an appeal, that does not establish a right of appeal in the Commissioner. The appeal should accordingly be quashed. While that is sufficient to dispose of this appeal, some further comment on the other issues is warranted given their importance.*

XXII. Expert evidence

There has been much more scrutiny of the role of expert witnesses to ensure that they are independent and do not adopt an advocacy role. Unless they meet that criteria, they are not permitted to testify. If, during a hearing, it becomes obvious that the expert has not maintained objectivity and has become an advocate for one party, the tribunal may be required to disregard that witness' evidence.

That approach was stated in **R. v. Mohan**, [1994] S.C.R. 9 and has been clarified and elaborated in a number of decisions since that time.

R. v. Bingley, 2017 SCC 12

The court confirmed the four Mohan requirements for admissibility of expert evidence - relevance, necessity, absence of an exclusionary rule and special expertise**. C**ertified drug recognition experts are trained in the administration of the test to detect impairment, but not in the science underlying the test.

The court rejected the argument that the evidence of the certified drug recognition expert was inadmissible as the person was not familiar with the science underlying the test. Knowledge of the underlying science was not a precondition to the admissibility of a DRE's opinion. The basic requirement of expertise for an expert witness is that the witness has expertise outside the experience and knowledge of the trier of fact, which the DRE had.

White Burgess Langille Inman v. Abbott and Haliburton Co., [2015] 2 SCR 182, 2015 SCC 23

The court expanded on the requirements for expert evidence in **R. v Mohan**, [1994] 2 S.C.R. 9.

Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her. These concepts, of course, must be applied to the realities of adversary litigation.

The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

Bruff-Murphy v. Gunawardena, 2017 ONCA 502

During the trial it became obvious that a psychiatrist, called as an expert witness, had lacked objectivity and had adopted the role of advocate. The trial judge did not comment to the jury about the psychiatrist's evidence.

The court commented both about the qualifying an expert to give evidence and what should occur if, after that person is qualified, there are concerns about the witness's evidence.

The Court of Appeal commented that the principles from **R. v. Mohan**, [1994] S.C.R. 9 apply to determine the threshold requirements to admit opinion evidence: (i) relevance, (ii) necessity in assisting the trier of fact, (iii) absence of an exclusionary rule, and (iv) the need for a properly qualified expert.

The second component is a "discretionary gatekeeping step" where "the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks". It is a cost-benefit analysis under which the court must determine whether the expert evidence should be admitted because its probative value outweighs its prejudicial effect.

The witness's prejudice was only obvious after the witness was qualified. The court concluded that the trial judge could have taken one of two steps:

- Advised counsel that he was going to give either a mid-trial or final instruction that the expert's testimony would be excluded in whole or in part from the evidence; or,
- Asked for submissions from counsel on a mistrial, again in the absence of the jury, and ruled accordingly.

The judge did neither, so a new trial was ordered.

XXIII. Application of Human Rights Principles

Mosaic Potash Colonsay ULC v. United Steel Workers, Local 7656, 2016 SKQB 195

The arbitrator held that a "last chance" agreement was not binding on the arbitrator as neither the employee nor the employer could contract out of the Human Rights Code.

The court upheld that decision as reasonable. (see also *Fossum v. Society of Notaries Public of British Columbia*, 2011 BCHRT 31).

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