

Procedural Fairness at the McLachlin Court: The First Decade

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*The McLachlin Court's First Decade: Reflections on the Past and
Projections for the Future*

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Introduction

In 1998, shortly before her elevation to the position of Chief Justice, McLachlin J. delivered a paper on “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law.”¹ She recognized the integral role of administrative tribunals in the maintenance of legal order, and spoke of the “ethos of justification” meaning that the exercise of public power must be justified to citizens in terms of rationality and fairness. The Chief Justice stated that:

Fair procedures, equitable treatment, and responsiveness to the public are the cornerstones of a system of administrative tribunals built according to the Rule of Law. I suggest that, in many important ways, it falls to the members and support

¹ Beverley McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1999) 12 Canadian Journal of Administrative Law and Practice 171 at 174.

staff of those administrative boards to ensure that every person dealing with the state is treated fairly and with respect.²

The question which arises is whether and how the Supreme Court's procedural fairness jurisprudence has provided guidance to administrative tribunals enabling them to justify, or legitimize, exercises of public power, by providing fair procedures, equitable treatment and responsiveness to the public.

My short answer is that in the last decade, the Court has been distracted by the debate over standard of review. My hope for the next decade is that the Court will return to the basics of administrative law, providing guidance to tribunals and those who seek to assert rights before them.

Procedural fairness is the central concern for administrative decision makers, justice seekers, regulated parties and lawyers involved in administrative law. The requisite level of procedural protection is considered every day, by a bewildering variety of decision makers: How much disclosure is required? How can I limit irrelevant cross-examination without breaching fairness? Will a written hearing suffice? Are my reasons sufficient? What consultation does a policy change require, if any? How do cutbacks affecting services affect tribunal independence? These are practical issues that are not particularly "sexy", but are of great importance in the daily dispensing of administrative justice across the nation.

The ability of administrative decision-makers to provide "fair procedures, equitable treatment and responsiveness to the public" requires that the Supreme Court engage more directly in the practical issues facing tribunals, provide procedural appeals the same attention that historically standard of review/substantive appeals have received, and where possible speak with one voice.

Another important element in improving the quality of administrative justice is potential tort liability. Administrative bodies must consider issues relating to regulatory negligence, and develop practices in response to the developing jurisprudence. The Supreme Court has

² *Ibid.* at 186

considered regulatory negligence in a number of cases in the last decade. The jurisprudence, however, is in a “state of lamentable confusion.” I suggest that a legislative solution might be preferable to the contemporary uncertainty in this area, and refer to an ongoing U.K. Law Commission consultation on redress for substandard administrative action.

A. Baker: The Perfect Case?

Is *Baker v. Canada (Minister of Citizenship and Immigration)*³ the perfect administrative law case? Does it provide sufficient guidance to administrative decision-makers on issues of procedural fairness? Is that why in the last decade the Supreme Court has spent so little time on issues of procedural fairness, and comparatively so much time on issues of standard of review and jurisdiction?

In *Baker v. Canada (Minister of Citizenship and Immigration)*, L’Heureux-Dubé J. established the common law’s modern approach to the duty of fairness. There is no longer any bright line between administrative decision-makers subject to fairness duties and those which are not, nor is there any strict application of those rights once triggered. Administrative decision-making is now seen as falling somewhere on a spectrum between quasi-judicial and legislative decision-making, with procedural entitlements varying according to placement on the spectrum. The decision in *Baker* has provided a flexible framework within which these practical issues may be addressed. In other words, fairness works. Administrative decision-makers are able to assess the hearing-related requirements of procedural fairness in a stable framework. Lawyers can come reasonably close to predicting the outcome of a court challenge. This is in contrast to the last decade of standard of review jurisprudence, which until *Dunsmuir* was wildly unpredictable.

There are, however, concerns with the lack of engagement by the Supreme Court in procedural fairness issues, and these relate in part to the significant deference contained in the fifth *Baker* factor. The five “*Baker* factors” that are now the benchmark in assessing the level of procedural fairness to be afforded in any given proceeding are:

³ [1999] 2 S.C.R. 817 [*Baker*]

- (i) The nature of the decision being made and the process followed in making it;
- (ii) The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- (iii) The importance of the decision to the individual or individuals affected;
- (iv) The legitimate expectations of the person challenging the decision; and
- (v) The choices of procedure made by the agency itself and its institutional constraints.

The fifth *Baker* factor causes concern with respect to maintaining the integrity of the concept of procedural fairness. In *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, this factor was described as “the nature of the deference due to the decision maker.”⁴

Baker Factor #5 may limit the procedural protections required to be afforded by administrative decision-makers, tempering judicial review of agency processes which may be deficient or compromise fairness. There are no limits to the justifications an administrative body may offer when compromising procedural protections in the name of an agency’s “choice of procedures.” There is no *Oakes* test. There is no requirement to consider other measures more supportive of participatory rights, for example.⁵

The concept of “institutional constraints” built into the fifth Baker factor is of particular concern in an era of ever-increasing demands on an ever decreasing public purse.⁶ Government

⁴ [2004] 2 S.C.R. 650, 2004 SCC 48 at para. 11 [*Lafontaine*]

⁵ For a discussion of the application of the fifth *Baker* factor to the Ontario Labour Relations Board see, L. Marvy and D.A. Wright. ““Master of It’s Own House”: Procedural Fairness and Deference to Ontario Labour Relations Board Procedure.” (2008) 21 Canadian Journal of Administrative Law and Practice p. 361

⁶ See *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2008] 1 F.C. 385 and also *Benitez v. Canada (Minister of Citizenship and Immigration)* [2008] 1 F.C. 155. These companion decisions affirmed the right of the Refugee Protection Division to adopt a policy of denying counsel the right to conduct examination-in-chief during refugee claim hearings. The RPD maintained that this policy was necessary to address backlogs in the

allocation of resources may be used to justify the failure to provide procedural protections – all in accordance with procedural fairness. A good example is empirical work conducted by Prof. Sossin into whether or not interviews are provided to those claiming immigration status on humanitarian and compassionate grounds.⁷ The failure to provide such an interview, or an “oral hearing”, was one of the grounds on which Mavis Baker unsuccessfully asserted a failure of procedural fairness in the *Baker* case. His research suggests that interviews are afforded in smaller regional offices, but not in the busy urban offices of Citizenship & Immigration Canada. One has to ask whether “institutional constraints” built into the fifth Baker factor are being used to defend arbitrary decisions made on the basis of unjustifiable differences in regional resource allocation, for example.

In *Dunsmuir*, the Court has reaffirmed the concept that we are entitled to procedural fairness in administrative decision-making. The standard of review analysis does not apply to decisions involving procedural fairness. However, *Baker* factor #5 creates a “back-door”, importing deference to institutional choice of procedures into the very test for common law procedural fairness. This is an area ripe for consideration by the Court in the future.

B. The Right to a Hearing

There have been surprisingly few decisions involving the right to a hearing – the *audi alteram partem* aspect of procedural fairness - in the last decade. The only hearing-related procedural protection which has received any significant consideration by the Court in the past decade is disclosure. On this point, I consider three decisions in the classic disclosure context, *May v. Ferndale Institution*,⁸ *Charkaoui v. Canada (Citizenship and Immigration)*,⁹ *Deloitte & Touche v. Ontario Securities Commission*,¹⁰ and two disclosure decisions made in the context of the Court’s evolving solicitor-client privilege concerns, in *Pritchard v. Ontario (Human Rights*

hearing and processing of claims. The court cited a variety of reports and studies conducted by the government, one of which recommended dispensing with examination-in-chief in order to increase efficiency.

⁷ Lorne Sossin, “From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion” (2005) 55 U.T.L.J. 427

⁸ [2005] 3 S.C.R. 809, 2005 SCC 82 [*May*]

⁹ [2008] SCC 38 [*Charkaoui*]

¹⁰ [2003] 2 S.C.R. 713 [*Touche*]

Commission)¹¹ and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*.¹² I briefly review the requirement for reasons in the administrative context as well.

1. Disclosure: *Stinchcombe* or Not?

In *May v. Ferndale Institution*,¹³ LeBel and Fish, JJ. for the majority¹⁴ considered the duty of disclosure in the context of the reclassification leading to transfer from minimum to medium security institutions. LeBel and Fish, JJ. held that “*Stinchcombe* principles do not apply in the administrative context,”¹⁵ distinguishing such proceedings from the “innocence at stake” principle in the context of criminal law. In the administrative context, the procedural fairness requirement is that the individual know the case he or she has to meet, and the administrative decision-maker disclose the information he or she relied upon. Failure to provide adequate disclosure means that a decision will be void for lack of jurisdiction. Further, the Court confirmed that statutory obligations may impose an additional informational burden, which must also be met. In *Ferndale Institution*, the Court held that correctional services officials had failed to disclose relevant information, and indeed had “concealed crucial information” in violation of their statutory duty.¹⁶ The transfer decisions were held to be null and void; the applications for habeas corpus were granted.

What is interesting to note, however, is that despite this strong comment that *Stinchcombe* disclosure obligations do not apply in administrative proceedings, the Federal Court has been reluctant to follow. The Federal Court of Appeal almost immediately distinguished *May v. Ferndale Institution* in its 2006 decision in *Sheriff v. Canada (Attorney General)*¹⁷ in the context of the professional conduct of a trustee in bankruptcy. The Court held, referring to *May*, that:

¹¹ [2004] 1 S.C.R. 809, 2004 SCC 31 [*Pritchard*]

¹² 2008 SCC 44 [*Blood Tribe*]

¹³ *Supra* note 6.

¹⁴ Major, Bastarache and Charron JJ. dissenting

¹⁵ *May*, *supra* note 6 at para. 91

¹⁶ *Ibid.* at para. 120

¹⁷ 2006 FCA 139 (CanLII) [*Sheriff*].

While the Court is unequivocal in stating that “[t]he *Stinchcombe* principles do not apply in the administrative context,” it clearly is not referring to a licensing review hearing, where a loss of livelihood and damage to professional reputation are at stake. In contrast, in the present appeal, the innocence, i.e. the reputation of the Trustees, is under review. Accordingly, I would classify a review of a trustee in bankruptcy’s licence by the OSB as an exception to the rule established in *May*.¹⁸

These cases are hard to reconcile. I thought the Supreme Court was clear in *May*. The issue in that case was a restriction on liberty, a value typically protected at common law. The failure of the Federal Court of Appeal to follow one of the few clear, basic and direct administrative law cases of the last decade certainly makes it harder for lawyers to advise their clients about the predictability of administrative decisions.

2. The *Charter* to the Rescue: *Charkaoui*

In two interesting decisions in the national security context, the *Charter* has been effectively used to supplement administrative law disclosure requirements. *Charkaoui v. Canada (Citizenship and Immigration)*,¹⁹ was a challenge to provisions in the *Immigration and Refugee Protection Act*²⁰ authorizing the Minister to issue “security certificates.” The issuance of a security certificate on national security or other grounds renders an individual inadmissible to Canada and subject to immediate detention in Canada. These certificates were reviewable by Federal Court judges, sitting in *ex parte*, *in camera* hearings. An individual named in a security certificate was not entitled to disclosure of the case against him.

In a unanimous decision in 2007, the Supreme Court found aspects of the security certificate regime contrary to section 7 of *Charter*, insofar as it deprived individuals of liberty without providing for disclosure required by the principles of fundamental justice. Nor, the Court found, could it be saved under s.1 of the *Charter*, because less liberty-impairing alternatives were available. While the decision is to be lauded for establishing that the principles of fundamental justice require that individuals held in custody receive some form of disclosure, it can also be criticized for failing to establish when “the implications for liberty or security of the

¹⁸ *Ibid.* at para. 29.

¹⁹ *Supra* note 7.

²⁰ S.C. 2001, c. 27, ss. 33, 77 to 85.

person will be sufficiently great that notice, full disclosure (at least to the individual's legal representative) and an opportunity to be heard will be constitutionally mandated". As noted by Professor Stribopoulos simply stating that "when the stakes are the great enough the demands of procedural fairness increase, tells us very little".²¹

The 2008 *Charkaoui* decision²² dealt more specifically with disclosure issues which are potentially broadly relevant to a number of administrative decision-makers. The issues include late disclosure of information, and the destruction of interview notes in accordance with CSIS policy.

The *CSIS Act* directs that CSIS "shall collect, by investigation or otherwise...and analyse and retain information and intelligence" respecting potential threats to the security of Canada.²³ CSIS, however, developed an internal policy requiring that operational notes must be destroyed after they have been transcribed into a report by the employee who took them. The Court canvassed the practical purposes of notes, as a better source of evidence and to refresh memory when testifying. The Court determined that as a result of the *Act* and "for practical reasons", CSIS officers must retain their operational notes when investigating targeted individuals or groups.²⁴ This finding is of broad application to all administrative bodies conducting investigations. The Court cautioned, however, that requiring CSIS officers to retain their notes will not always fully guarantee procedural fairness, since some notes must remain secret for national security or other reasons.

The Court also found a duty to disclose based on *Charter* section 7, relating to the severity of consequences (liberty, security, and potentially the right to life.) The Court determined that procedural fairness requires that CSIS retain all the information in its possession, and disclose it to the ministers and the designated judge. The designated judge will be responsible to filter the evidence for threats to national security and summarize the remaining evidence, checked for accuracy and reliability, to the person named in the security certificate.

²¹ Stribopoulos, J. "*Charkaoui*: Beyond Anti-Terrorism, Procedural Fairness, and Section 7 of the Charter". (November 2007) 16 Constitutional Forum, p. 16.

²² *Supra* note 7.

²³ *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, s. 12.

²⁴ *Charkaoui*, *supra* note 7 at para. 43

The Court also held that the remedy for late disclosure was an adjournment.

3. Third Party Privacy Interests and Disclosure

The Court dealt with the issue of third-party privacy interests and disclosure in the decision of *Deloitte & Touche v. Ontario Securities Commission*.²⁵ In the course of an investigation into Philip Services Corporation, the OSC compelled the provision of information from Deloitte & Touche, who acted as auditors for Philip Corporation. The OSC subsequently commenced a Commission proceeding against Philip Corporation and its officers, and determined that it was in the public interest to disclose all of the compelled information and material to Philip Corporation and its officers. The OSC used the *Stinchcombe* relevance standard, which Iacobucci, J. for the Court determined was reasonable in the circumstances.²⁶ The Supreme Court noted the statutory basis for the OSC's duty to protect third party privacy interests and confidences, and the appropriate balancing of interests to allow Philip Corporation and its officers to make "full answer and defence."²⁷

In holding that it was reasonable (from a standard of review perspective) for the OSC to apply the *Stinchcombe* relevance standard in assessing its disclosure obligations, the Court should not be taken as requiring the *Stinchcombe* standard. However, this is the kind of confusion that sometimes does arise as a result of misconstruing the standard of review analysis in the context of procedural fairness requirements.

4. Disclosure and Solicitor-Client Privilege: The Administrative Realm

One of the notable features of the McLachlin Court has been the expansion, constitutionalization, and protection of solicitor-client privilege in all its applications, in decisions such as *R. v. McClure*,²⁸ *R. v. Brown*,²⁹ *Lavallee*, *Rackel & Heintz v. Canada (Attorney*

²⁵ *Touche*, *supra* note 8.

²⁶ *Ibid.* at paras. 26-27.

²⁷ *Ibid.* at para. 1.

²⁸ [2001] 1 S.C.R. 445 [*McClure*]

²⁹ [2002] 2 S.C.R. 185, 2002 SCC 32 [*Brown*]

General),³⁰ *Blank v. Canada (Minister of Justice)*,³¹ and *Goodis v. Ontario (Ministry of Correctional Services)*.³² There have been two significant decisions in the administrative realm.

In *Pritchard v. Ontario (Human Rights Commission)*,³³ the Supreme Court held that solicitor-client privilege “appl[ies] with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law.”³⁴ As a shield against disclosure, it is “nearly absolute,” and “exceptions to it will be rare.”³⁵ The policy rationale supporting expansive protection of solicitor-client privilege generally applies equally in the administrative realm.

In *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*,³⁶ the Court held that the Privacy Commissioner’s statutory authority under PIPEDA to compel the production of records in the course of an investigation did not confer a right of access to solicitor-client privileged documents. Like many other administrative tribunals, the Privacy Commissioner has the statutory power to compel production of “any records and things that the Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record.”³⁷ She argued that since a superior court of record has the power to compel the production of privileged documents, interpreting this provision to give her the power to review privilege claims would be consistent with Parliament’s objective of creating an inexpensive and expeditious process, to “ensure the integrity and proper functioning of the legislative scheme protecting fundamental privacy rights.”³⁸ The Court held, following *Pritchard*, that a general production provision that does not specifically indicate that production must include records subject to solicitor-client privilege is not sufficient to compel production. The Court also held that:

³⁰ [2002] 3 S.C.R. 209, 2002 SCC 61 [*Lavallee*]

³¹ [2006] 2 S.C.R. 319, 2006 SCC 39 [*Blank*]

³² [2006] 2 S.C.R. 32, 2006 SCC 31 [*Goodis*]

³³ *Pritchard*, *supra* note 9.

³⁴ *Ibid.* at para 21.

³⁵ *Ibid.* at para 18.

³⁶ *Blood Tribe*, *supra* note 10.

³⁷ *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, s. 12.

³⁸ *Blood Tribe*, *supra* note 10 at para. 19

In any event, a court's power to review a privileged document in order to determine a disputed claim for privilege does not flow from its power to compel production. Rather, the court's power to review a document in such circumstances derives from its power to adjudicate disputed claims over legal rights. The Privacy Commissioner has no such power.³⁹

The use of the term "legal rights" is important in this passage, and has caused concern in the administrative tribunal community. Procedural fairness has been the common law's attempt to provide fairness to those whose privileges and interests are affected by administrative conduct, not just legal rights. All adjudicative tribunals are called upon to resolve privilege disputes and production issues. Counsel and parties cannot, except at great cost and with delay, proceed to a superior court for a ruling on privilege. Whether or not the *Blood Tribe* decision will undermine the power of adjudicative tribunals is an open question at the present time.

Peter Ruby and Lauren McLeod make a similar argument in their article, *Solicitor-Client Privilege and Administrative Agencies*⁴⁰ They note that as a result of the decision in *Blood Tribe* "reaffirming the importance and strength of solicitor-client privilege, the power of administrative tribunals was arguably weakened". They went to argue that a number of the advantages and purposes of administrative tribunals, in particular the efficiency of less formal rules of procedure, may have been undermined by the Supreme Court insofar as administrative bodies "will no longer be able to make informal decisions about evidence and whether it is protected from disclosure".⁴¹ To the extent that the decision in *Blood Tribe* undermines some of the very advantages administrative tribunals were designed to offer, the purpose of these bodies has also been undermined. One issue that remains unresolved as a result of this decision is whether it will be extended and applied to other forms of privilege.⁴² This will obviously have a bearing on the ultimate ramifications of the Court's findings on administrative tribunals.

5. Reasons and Procedural Fairness

³⁹ *Ibid.* at para. 22.

⁴⁰ Peter Ruby and Lauren MacLeod, "Solicitor-Client Privilege and Administrative Agencies". (February 2009) 22 Canadian Journal of Administrative Law & Practice 1

⁴¹ *Ibid.*, p. 103

⁴² *Ibid.*, p. 105

Baker established that in some circumstances, procedural fairness will require administrative decision-makers to provide reasons. While there has not been significant jurisprudential development regarding when procedural fairness will require reasons, since the Court's decision in *R. v. Sheppard*,⁴³ there has been a significant trend by administrative decision-makers to provide reasons.

The Chief Justice wrote the majority decision in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*⁴⁴ finding that the municipality, in refusing a number of rezoning applications to build a place of worship, breached its duty of procedural fairness in failing to give reasons for its denial. The conduct of the municipality was rather puzzling. In refusing the third rezoning application, the municipality staked out the position (essentially) that it had an untrammelled discretion, informing the Congregation that:⁴⁵

You have made a number of applications to amend the zoning by-law. The Legislature has given the municipal council the responsibility for exercising this power, which is discretionary. Upon careful consideration, the municipality of Lafontaine has decided not to take action in respect of your applications. The municipal council of Lafontaine is not required to provide you with a justification and we therefore have no intention of giving reasons for the council's decision.

The Chief Justice turned to policy justifications for the requirement for reasons in this case, stating:

Giving reasons for refusing to rezone in a case such as this serves the values of fair and transparent decision-making, reduces the chances of arbitrary or capricious decisions, and cultivates the confidence of citizens in public officials.

The Chief Justice commented that the municipality acted in an arbitrary manner and “straddled the boundary separating good from bad faith.”⁴⁶

C. The Right to An Unbiased and (Maybe) Independent Decision-Maker

⁴³ 2002 SCC 26.

⁴⁴ *Lafontaine*, *supra* note 4 at para. 11; , Major, Bastarache, LeBel and Deschamps JJ. dissenting

⁴⁵ *Ibid.* at para. 27

⁴⁶ *Ibid.* at para. 30

The second rule of procedural fairness is generally expressed as the right to an impartial and independent decision maker. In the last decade the Court has been significantly more active in the realm of administrative independence and impartiality than it has in relation to hearing-related procedural protections. It is notable, however, that the Court has not established a “bright line” test for the requisite level of administrative independence, even in adjudicative situations. Professor Sossin has noted that:

The Canadian case law on administrative independence is mostly unsatisfying. These cases do not explore the structural relationship between independent bodies and the government which matter most (e.g. budgetary and staffing autonomy, etc.), or the issue of politically motivated interference with the decision-making of administrative bodies. Much of the appellate case law has concerned the issue of government attempts to remove or not reappoint members or leaders of independent administrative bodies. As in the *Keen* case, these disputes reflect the tension between the legitimate government direction for administrative tribunals on the one hand and illegitimate political interference on the other. ...⁴⁷

Independence is a central focus of concern within the tribunal community. The removal of Linda Keen as President of the Canadian Nuclear Safety Commission on the day before she was scheduled to appear before a House of Commons Committee to testify on events leading to the shutdown of the medical-isotope producing Chalk River reactor, and the subsequent failure of her judicial review application in light of *Dunsmuir*,⁴⁸ have caused a chill in the regulatory community. Other issues include appointments, failures to appoint, the federal government’s new position on the role of Department of Justice counsel seconded to administrative agencies,⁴⁹ and judicial review applications by governments against their own boards and tribunals. Is this a direct result of *Ocean Port*? Or, perhaps, the result of *Ocean Port* combined with *Dunsmuir*? According to Professor Sossin, the Court’s “reluctance in *Keen* to explore the obligations of government to refrain from dismissing “at pleasure” appointments for improper reasons, or in an improper way, represents the fulfilment of an unsettling implication of the Supreme Court’s

⁴⁷ Lorne Sossin. “The Puzzle of Independence for Administrative Bodies”. (2009) 26 National Journal of Constitutional Law 1, at page 19.

⁴⁸ *Keen v. Canada (Attorney General)*, 2009 FC 353.

⁴⁹ See Lorne Sossin, “Administrative Law at Pleasure: *Keen v. Canada*”, May 31, 2009

landmark 2008 *Dunsmuir* decision”.⁵⁰ He goes on to note that the position of “members of adjudicative, oversight and accountability positions is even more precarious” in light of *Dunsmuir*.⁵¹ Institutional independence has been a central focus of the Court’s attention, with some development in adjudicative independence and impartiality.

1. The Significance of *Ocean Port*: 2001

In *Valente v. The Queen*,⁵² Le Dain, J. established the structural pre-conditions for judicial independence: security of tenure, financial security and institutional independence with respect to matters of administration bearing directly on the judicial function. In 2001, the Chief Justice wrote the seminal decision in the area of administrative independence in *Ocean Port*, which established that there is no constitutional right to institutional independence for administrative decision-makers in Canada.⁵³ In this case, the challenge was to the independence of the Liquor Control and Licensing Board. The respondent had been found liable for violation of liquor licence laws and received a penalty following a hearing. The respondent appealed to the Liquor Appeal Board by way of hearing *de novo*, where four of five allegations were upheld and the penalty was confirmed. The respondent challenged the independence of the Board. The members served “at the pleasure of the Lieutenant Governor in Council”, were appointed for one-year terms, served on a part-time basis, and all of whom except for the Chair were paid on a *per diem* basis. The Court of Appeal had held that the Board lacked the requisite guarantees of independence required of administrative decision makers with the power to impose penalties. The Supreme Court allowed the appeal.

McLachlin C.J. held that superior courts and provincial courts are constitutionally required to possess “objective guarantees” of both individual and institutional independence, to demarcate the “fundamental division between the judiciary and the executive,” thus protecting

⁵⁰ Lorne Sossin, “Puzzle of Independence for Administrative Bodies” p. 19

⁵¹ *Ibid.*, p. 20.

⁵² S.C.J. No. 77, [1985] 2 S.C.R. 673 at 685 [*Valente*]

⁵³ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] S.C.J. 17 at para. 31 [*Ocean Port*]

the impartiality of judges from external influence, particularly that of the executive.⁵⁴ McLachlin, C.J. went on to state:

Administrative tribunals, by contrast, lack this constitutional distinction from the Executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.⁵⁵

As importantly, the Chief Justice held that “like all principles of natural justice, the degree of independence may be ousted by express statutory language or necessary implication.”⁵⁶ Oddly, the decision in *Ocean Port* left open the possibility that a tribunal member, appointed at the pleasure of the Cabinet, faced with a *Charter* issue, could be terminated if the Government did not approve of the decision, while a judge deciding the same issue would be protected from interference.⁵⁷ At the outset of the decade, then, we were left in an awkward position. Independence was part of the common law of procedural fairness, as established in cases such as *Consolidated-Bathurst* and *Matsqui Indian Band*. Now it was clear that there was no constitutional protection, except that apparently sometimes the *Charter* might apply, and the issue would be to discern the will of Parliament in any given circumstance. As noted by Lorne Sossin, “[a]s a legal matter, independence remains, importantly, a right owed to those affected by administrative decision-makers, not a right enjoyed *by* those decision-makers.”⁵⁸ Ron Ellis has referred to this as the “hope and a prayer” theory of institutional independence, since there are no objective structural guarantees required.

⁵⁴ *Ibid.* at para. 23.

⁵⁵ *Ibid.* at para. 24.

⁵⁶ *Ibid.* at para. 22.

⁵⁷ G. Heckman and L. Sossin. “How do Canadian Administrative Law Protections Measure Up to International Human Rights Standards.” (2005) 50 McGill Law Journal at page 245.

⁵⁸ Lorne Sossin, “The Puzzle of Independence for Administrative Bodies” (2009) 26 National Journal of Constitutional Law 1, at p. 16.

2. *Bell Canada: 2003*

In 2003, the Court dealt with two significant issues relating to tribunal independence in *Bell Canada v. Canadian Telephone Employees Association*⁵⁹. In the course of a pay equity complaint heard by the Canadian Human Rights Tribunal, Bell Canada argued that guidelines applicable to the complaint that were issued by the Canadian Human Rights Commission and by statute were binding on the Tribunal, compromised the independence of the Tribunal by limiting its ability to interpret the Act. There was a further concern raised because the Commission appeared before the Tribunal as a party to pay equity complaints. Bell also argued that the Tribunal Chair's power to extend the terms of members for ongoing inquiries undermined the security of tenure of members and hence their independence. Impartiality arguments were raised as well.

The Chief Justice and Bastarache, J. emphasized the statutory scheme and the nature of the tribunal, holding that:

A tribunal may have a number of different functions, one of which is to conduct fair and impartial hearings in a manner similar to that of the courts, and yet another of which is to see that certain government policies are furthered. In ascertaining the content of the requirements of procedural fairness that bind a particular tribunal, consideration must be given to all of the functions of that tribunal. It is not adequate to characterize a tribunal as “quasi-judicial” on the basis of one of its functions, while treating another aspect of the legislative scheme creating this tribunal — such as the requirement that the tribunal follow interpretive guidelines that are laid down by a specialized body with expertise in that area of law — as though this second aspect of the legislative scheme were external to the true purpose of the tribunal. All aspects of the tribunal's structure, as laid out in its enabling statute, must be examined, and an attempt must be made to determine precisely what combination of functions the legislature intended that tribunal to serve, and what procedural protections are appropriate for a body that has these particular functions.⁶⁰

The court concluded that the Tribunal had a high degree of independence from the executive, which was appropriate both in light of the adjudicative nature of the decision-making process, and the nature of the interests affected by Tribunal proceedings which include “the

⁵⁹ [2003] SCC 36 [*Bell*]

⁶⁰ *Ibid.* at para. 22

dignity interests of the complainant, the interests of the public in eradicating discrimination, and the reputation of the party that is alleged to have engaged in discriminatory practices.”⁶¹

The Court held that even though the Tribunal was entitled to a high degree of independence, the power of the Commission to issue binding guidelines did not undermine the Tribunal’s independence or impartiality, but was instead “Parliament’s way of ensuring that the Act would be interpreted in a manner that was sensitive to the needs of the public and to developments across the country, and hence that it would be interpreted by the Tribunal in the manner that best furthered the aims of the Act as a whole.”⁶²

Clearly there are echoes of *Ocean Port* in this decision. The Court has continued the trend of not establishing a bright line test upon which a tribunal’s independence can be gauged. As in the *Ocean Port* decision, McLachlin C.J. and Bastarache J.’s emphasized the multiple roles played by an administrative tribunal as a justification for curtailing its independence. Of the multiple roles administrative tribunals are assigned, the Court has consistently pointed to the policy implementation role as being one that is particularly important. Unfortunately this role is one which does not sit comfortably alongside a robust level of independence.

C.U.P.E. (Retired Judges case): 2003

*C.U.P.E. v. Ontario (Minister of Labour)*⁶³ (the retired judges case) needs no introduction, given its prominence in the “patently unreasonable” debate. In any event, from an institutional independence perspective, the issue was whether the Minister compromised the independence of arbitration boards under the *Hospital Labour Disputes Arbitration Act* by appointing four retired judges to chair arbitration boards. The Minister had the power to appoint arbitrators, although historically the unions and the hospitals had mutually agreed on arbitrators, or approved an agreed list.

⁶¹ *Ibid.* at para. 24

⁶² *Ibid.* at para. 41

⁶³ [2003] SCC 29 [CUPE]

C.U.P.E. took the position that the indicia of independence (based on the *Valente* criteria) were absent, and hence the boards could not be independent. Binnie, J., writing for the majority, rejected this argument:

However, as explained above, the Court cannot substitute a different tribunal for the one designed by the legislature. An *ad hoc* tribunal is by definition constituted on a case-by-case basis. Security of tenure does not survive the termination of the arbitration, and financial security is similarly circumscribed. Administrative independence has little formal protection. Professional labour arbitrators (including those on the s. 49(10) list) function successfully in such a structure even though there may be no guarantee of continuing work from any particular employer or union.⁶⁴

The Court also considered impartiality concerns, that retired judges (as a class) might be seen as “inimical to labour”, at least in the eyes of the unions. Binnie, J. held, however, that the test for impartiality cannot be directed to the subjective perspective of a party, but to the reasonable, detached and informed observer. He held that allegations of individual bias must be dealt with on a case-by-case basis, but that the “fully informed, reasonable person” would not “tar the entire class of presently retired judges with the stigma of an anti-labour bias.”⁶⁵

As was the case in *Ocean Port* and *Bell Canada*, the Supreme Court in *C.U.P.E.* emphasized the importance of deference to the will of the legislature (as determined by the wording of the statute). And, as per the decisions cited above, they did so at the expense of institutional independence. This decision seems to exemplify Professor Sossin’s lament that the decisions of the Supreme have failed to “explore the structural relationship between independent bodies and the government which matter most (e.g. budgetary and staffing autonomy, etc.)”.

3. Discretion and Impartiality: *Imperial Oil*, 2003

Imperial Oil Ltd. v. Quebec (Minister of the Environment),⁶⁶ explored the issue of impartiality in relation to a Minister’s discretionary decision to direct Imperial Oil to prepare an environmental decontamination study for review by the Minister. Imperial Oil instead sought to

⁶⁴ *Ibid.* at para. 190.

⁶⁵ *Ibid.* at para. 202.

⁶⁶ [2003] 2 S.C.R. 624, 2003 SCC 58 [*Imperial Oil*]

quash the order, on the grounds that the Minister was not impartial or had a conflict of interest because the Minister had been involved in an earlier remediation project, was presently being sued as a result, and he thus had a personal interest.

The Supreme Court held that the Minister had to comply with precise procedural obligations. However, when exercising his discretion to make decisions implementing legislative policy in a mainly political role, the Minister is not expected to have the same degree of impartiality as a “judge or administrative decision-maker whose primary function is adjudication.”⁶⁷ He was acting in the public interest, which can legitimately include saving the public money. Thus, here too, deference was paid to implementing government policy, as expressed in the legislation, while issues of institutional independence are left essentially unanswered.

D. Adjudicative Independence

Adjudicative independence in Canada is established through the common law, including “the rule against dictation, the presumption against sub-delegation of quasi-judicial decision-making authority, and the rule that only those tribunal members who were actually present throughout the hearing may participate in the decision.”⁶⁸

An issue for Canadian administrative decision-makers is how to ensure consistency in decision-making, particularly where there are a number of part-time members or decision-makers are regionally dispersed. An important decision on the role of full board consultation is *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*,⁶⁹ which built on the seminal decision of Gonthier, J. in *Consolidated-Bathurst*.⁷⁰

In *Ellis-Don*, a panel of the Labour Relations Board prepared a draft decision following a hearing of a grievance for violation of a provincial collective agreement. The panel’s draft

⁶⁷ *Ibid.* at para. 34.

⁶⁸ Professor Philip Bryden, “A Canadian Perspective on Tribunal Independence” (Paper presented to the Conference of the Canadian Council of Administrative Tribunals, May 2007).

⁶⁹ [2001] 1 S.C.R. 221, 2001 SCC 4 [*Ellis Don*]

⁷⁰ *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282.

decision dismissed the grievance. Following a meeting of the full Board at which the decision was discussed, the panel's final decision upheld the grievance. The issue in the case involved the appropriateness of institutional consultations, and the tension between deliberative secrecy, the independence of adjudicators, and fair process. LeBel, J. for the majority⁷¹ held that institutional consultation ensures consistency in administrative decision-making, and will not constitute an apprehension of bias or lack of independence, so long as:

- (a) the consultation proceeding is not imposed by a superior level authority within the administrative hierarchy;
- (b) the consultation is limited to questions of policy and law, rather than findings of fact,
- (c) even on questions of law and policy, the decision-makers must remain free to make their own decision, and
- (d) if new issues arise in the full Board discussion, the parties should be notified and allowed an opportunity to respond.⁷²

LeBel, J. further held that:

Deliberative secrecy also favours administrative consistency by granting protection to a consultative process that involves interaction between the adjudicators who have heard the case and the members who have not, within the rules set down in *Consolidated-Bathurst, supra*. Without such protection, there could be a chilling effect on institutional consultations, thereby depriving administrative tribunals of a critically important means of achieving consistency.⁷³

This decision goes further than most in terms of establishing some concrete tests which can be used to determine if rules of procedural fairness have been violated with respect to consultation amongst administrative decision-makers. Unfortunately it is not entirely clear how these tests could be either enforced, and or monitored. Parties to hearings where such consultations take

⁷¹ Major and Binnie, JJ. dissenting

⁷² *Supra* note 58 at para. 29.

⁷³ *Ibid.* at para. 53.

place are essentially operating in the dark with respect to what is said during the consultation and the ultimate impact it has on the decision rendered. This is, in and of itself, sufficient to cast the independence and impartiality of the process into doubt. To the extent that the decision of the Court leaves the fairness of the decision-making process in doubt, it has failed to adequately address the issues which arise out of board-wide consultations.

E. Regulatory Negligence – The Next Frontier

Regulatory negligence is an aspect of tort law, not administrative law. However, the prospect of regulatory negligence has an effect on the environment and practices of administrative bodies. Further, there has been significant development in this area by the Supreme Court in the past decade. My starting point is 1940 and the decision in *East Suffolk Rivers Catchment Board v. Kent* where McKinnon, L.J. stated that: “The case law as to the duties and liabilities of a statutory body to members of the public is in a state of lamentable obscurity and confusion”.⁷⁴ The “lamentable obscurity and confusion” as to the duties and liabilities of a statutory body to members of the public is equally applicable in 2009.⁷⁵ Administrative decision-makers and persons harmed by substandard administrative action both deserve greater predictability as to the prospect of tort liability.

Most of the jurisprudence to date involves motions to strike rather than decisions on the merits, and a significant number of claims do not pass even this minimal threshold. Even where the courts find no liability, however, there are significant reputational risks for regulators. The commencement of a law suit may also significantly impact stakeholder relations. On the other hand, regulators and governments create and manage risks, citizens rely upon governments and regulators to protect us from harm, and understandably look for compensation when public authorities fail to deliver.

1. Cooper v. Hobart

⁷⁴ *East Suffolk Rivers Catchment Board v. Kent*, [1940] 1 KB 319 at 322

⁷⁵ This is an abbreviated discussion based on a paper I delivered, “Regulatory Liability of Public Authorities”, *The Six-Minute Administrative Lawyer* 2009, Law Society of Upper Canada, Toronto, February 24, 2009

The Chief Justice and Major J. wrote the Supreme Court of Canada's 2001 decision in *Cooper v. Hobart*.⁷⁶ *Cooper* determined that the factors giving rise to proximity for the purposes of the private law duty of care owed by a public body must be found in the governing statute. The case involved the Registrar of Mortgage Brokers, a statutory regulator which suspended a mortgage broker's licence and issued a freeze order over assets provided by investors which were allegedly used by the broker for unauthorized purposes. The plaintiff in the proposed class proceeding was an investor who had advanced money to the broker. The allegations against the Registrar were that the Registrar was aware and should have acted earlier to suspend the broker's licence and notify investors that the broker was under investigation, thereby avoiding or reducing the loss to investors. The Supreme Court held there was no duty of care owed by the Registrar to the investors.

The Court held specifically that when dealing with a public authority, in this case the Registrar of Mortgage Brokers:

*[t]he factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed. That statute is the only source of his duties, private or public. Apart from that statute, he is in no different position than the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute.*⁷⁷

The Court reviewed relevant statutory provisions, determining that the statute did not impose a duty of care on the Registrar to investors; rather, the Registrar's duty is to the public as a whole. Since a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public, the Court found that there was insufficient proximity between the investors and the Registrar to ground a prima facie duty of care.

The Court held that even if there had been sufficient proximity, the duty would have been negated at the second stage for overriding policy reasons. These included:

⁷⁶ [2001] 3 S.C.R. 537, 2001 SCC 79 [*Cooper*]

⁷⁷ *Ibid.* at para. 43 (emphasis added)

- The determination to suspend a mortgage broker involves both policy and quasi-judicial elements, which require balancing public and private interests;
- The Registrar is deciding, as an agent of the executive branch of government, what the policy should be;
- In the regulatory quasi-judicial role (decision to suspend or revoke a licence), the Registrar owes duties of fairness to the broker which are inconsistent with a duty of care to investors;
- The Registrar makes discretionary policy decisions;
- The spectre of indeterminate liability – there is no limit in the *Act*, and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system; and
- To impose a duty of care would be to effectively create an insurance scheme for investors at great cost to the taxpaying public.

2. *Edwards v. Law Society of Upper Canada*

*Edwards v. Law Society of Upper Canada*⁷⁸ was released as a companion case to *Cooper*, and was also written by the Chief Justice and Major, J. This case was a proposed class action by individual investors allegedly victimized by a gold delivery fraud in which the investors deposited money to a lawyer's trust account pursuant to a "Gold Delivery Contract." No gold was delivered, the investors were out \$9 million, and they claimed against the Law Society for damages. The solicitor had written to the Law Society with respect to the trust account improprieties, and the Law Society commenced an investigation. The investors claimed the Law Society had a duty to ensure the solicitor operated his trust account according to regulations once it became aware of the improprieties or, alternatively, to warn the investors that it had "chosen to

⁷⁸ [2001] 3 S.C.R. 562, 2001 SCC 80 [*Edwards*]

abandon its supervisory jurisdiction.”⁷⁹ Again, the Court found there was insufficient proximity, no *prima facie* duty of care, and even if there had been a *prima facie* duty it would have been negated by residual policy considerations.

Once again, the Court held that the *Law Society Act* did not reveal any “legislative intent to expressly or by implication impose a private law duty on the Law Society on the facts of this case.”⁸⁰ The Law Society’s investigative and disciplinary powers over its members is geared to the protection of clients and thereby the public as a whole: it does not owe a private law duty of care to members of the public who deposit funds into a solicitor’s trust account.

The Court noted that clients are protected and compensated through the Compensation Fund and LPIC insurance, which were means chosen to compensate for economic loss in lieu of the private tort duty.

The Court placed great weight on the statutory immunity clause, a typical clause providing that no action or other proceedings for damages shall be instituted “for any act done in good faith in the performance or intended performance of any duty or in the exercise or in the intended exercise of any power,” or “any neglect or default in the performance or exercise in good faith of any such duty or power.”⁸¹ The Court held that the good faith immunity clause “precludes any inference of an intention to provide compensation in circumstances that fall outside the lawyers’ professional indemnity insurance and the lawyers’ fund for client compensation.”⁸²

3. *Finney v. Barreau du Quebec*

The Supreme Court’s 2004 decision in *Finney v. Barreau du Quebec*⁸³ involved a different Law Society, and a very different result. Notwithstanding a good faith statutory immunity clause, the Barreau was found liable for what was essentially gross regulatory

⁷⁹ *Ibid.* at para. 3.

⁸⁰ *Ibid.* at para. 13.

⁸¹ Law Society Act, section 9; *Edwards*, *supra* note 67 at para. 16

⁸² *Edwards*, *supra* note 67 at para. 17

⁸³ 2004 SCC 36 [*Finney*]

negligence in failing to act with diligence to suspend a rogue lawyer from practice. The significant facts were the delay by the Barreau in responding to the lawyer's incompetence, egregious conduct issues brought to the Barreau's attention regarding his performance, and complaints made by the individual plaintiff to whom damages were awarded.

A brief chronology of the Law Society's relations with the lawyer and the plaintiff help illustrate the factors that led the Court to find the Barreau liable to pay damages in this case:

1978	B. Called to the bar of Quebec
1981-87	Barreau finds B. guilty on three occasions of disciplinary offences;
1985	Inspection Committee initiates investigation into B's competence (5 years to complete investigation);
1990	Inspection Committee report to the Executive Committee that B. is incompetent; recommends that B's right to practice be suspended, and he be required to redo his bar training;
1992	Executive Committee does not suspend B. After a hearing, it instead directs he take a refresher course and practice law under a tutor (supervising lawyer);
1991-1993	Finney and her lawyer file several complaints against B. with Barreau, and complain to oversight body re delay of Barreau;
1993	Due to B.'s flurry of unmeritorious litigation, Superior Court in Quebec summons all parties including a Barreau representative, and Court orders any proceeding brought by B. is to be subject to a special review;
1993	B's tutor (supervising lawyer) resigns;
1993	Oversight body asks Barreau re delay in dealing with complaints;
1994	Lawyer acting for Finney's son complains to Barreau about B.'s actions; the son is not interviewed until 1996;
1994	B. is provisionally struck off the rolls in relation to 23 counts;
1996	Finney commences action in damages against Barreau for breach of its obligation to protect the public in handling of complaints against B.
1998	B. is struck off the rolls for five years (retroactively to 1994) after being found guilty on 17 counts by Discipline Committee.

The Court of Appeal found that the lawyer, Belhassen, posed a "grave and imminent danger to the public" and the Barreau was aware of this danger. The Court found the delay between the complaints in early 1993 and striking him provisionally off the rolls in 1994 was "unacceptable and inexcusable."

The Barreau was protected by a good faith immunity clause. The Supreme Court of Canada held that “gross or serious carelessness is incompatible with good faith,”⁸⁴ and that an immunity provision is intended to give professional orders the scope, latitude and discretion they need in order to perform their duties. It is not meant to exclude liability for gross carelessness or serious negligence, the standard it found the Barreau to have met. The “virtually complete absence of the diligence” required in the situation meant the Barreau did not meet the standards of its fundamental mandate, which is to protect the public.

LeBel J. for the Court held that:

The attitude exhibited by the Barreau, in a clearly urgent situation in which a practising lawyer represented a real danger to the public, was one of such negligence and indifference that it cannot claim the immunity conferred by s. 193. The serious carelessness it displayed amounts to bad faith, and it is liable for the results.⁸⁵

The Supreme Court emphasized that the case was not restricted to the Quebec *Civil Code*, stating that the Barreau would have been liable under the analysis set out in *Cooper* and *Edwards*. The Court concluded by stating that:

The decisions made by the Barreau were operational decisions and were made in a relationship of proximity with a clearly identified complainant, where the harm was foreseeable. The common law would have been no less exacting than Quebec law on this point.⁸⁶

In the result, the Court awarded Ms. Finney damages for moral injury, assessed at \$25,000.00, together with costs on a solicitor client basis.

4. *Syl Apps Secure Treatment Centre v. B.D.*

⁸⁴ *Ibid.* at para. 40

⁸⁵ *Ibid.* at para. 43

⁸⁶ *Ibid.* at para. 46

In *Syl Apps Secure Treatment Centre v. B.D.*⁸⁷ Abella J. for the Court upheld the striking out of a negligence claim against a treatment centre and a social worker on the grounds of proximity, statutory immunity and residual policy considerations. A teenager was removed from the home and placed in a treatment centre because of alleged parental abuse. The family sued the Children’s Aid Society, the treatment centre and the social worker for wrongly depriving them of their relationship with their child, in part based on the relevant statute which recognized the importance of family relationships.

The Supreme Court found that there was insufficient proximity given the governing statute. The primary objective of the legislation is protection of the best interests of the child. Recognition of the private law duty of care to the parents raised a potential for conflicting duties, and the legislative intent embodied in the statutory scheme had primacy. The Court states:

The deciding factor for me, as in *Cooper* and *Edwards*, is the potential for conflicting duties: imposing a duty of care on the relationship between the family of a child in care and that child’s court-ordered service providers, creates a genuine potential for “serious and significant” conflict with the service providers’ transcendent statutory duty to promote the best interests, protection and well-being of the children in their care.⁸⁸

Other relevant factors negating a duty were administrative remedies available to the family and the statutory immunity provisions.

5. *Hill v. Hamilton-Wentworth Regional Police Services Board*

The Chief Justice’s majority decision in 2007 in *Hill v. Hamilton-Wentworth Regional Police Services Board*,⁸⁹ decision is significant in that the Court recognized a new category of relationship sufficiently proximate to give rise to a duty of care – police officer/suspect under investigation, and a new tort – the tort of negligent investigation.

⁸⁷ [2007] 3 S.C.R. 83, 2007 SCC 38 [*Syl Apps*]

⁸⁸ *Ibid.* at para. 41.

⁸⁹ [2007] 3 S.C.R. 129, 2007 SCC 41 [*Hill*]

In the proximity analysis, the Court identified a “personal, close and direct” relationship between an officer and a particularized suspect. Another important consideration was the interest of the suspect: there was no personal representation or reliance at issue. Rather, the Court emphasised that the targeted suspect’s interests at stake included “his freedom, his reputation and how he may spend a good portion of his life”, noting that these “high interests” support a finding of proximate relationship.⁹⁰

Other factors included: the lack of existing alternative remedies, the public interest in ensuring that appropriate investigations are undertaken given the serious problems of wrongful convictions and institutionalized racism, and that the duty would be consistent with the values underlying the *Charter of Rights and Freedoms*.

The Court carefully considered a number of arguments raised to negate the duty of care, including the argument that a duty of care to an individual suspect conflicted with the police’s overarching public duty to prevent crime. The Court limited the scope of the conflict argument as follows:

A prima facie duty of care will be negated only when the conflict, considered together with other relevant policy considerations, gives rise to a real potential for negative policy consequences. This reflects the view that a duty of care in tort law should not be denied on speculative grounds.⁹¹

The Court considered and rejected a number of policy arguments raised to negate the duty of care at Stage 2 of the Anns test:

- The “quasi-judicial’ nature of police duties;
- The potential for conflict with other police duties;
- The discretion inherent in police work;
- The potential for a chilling effect on the investigation of crime; and

⁹⁰ *Ibid.* at para. 34

⁹¹ *Ibid.* at para. 43

- Flood of litigation.

The standard of care was held to be that of a reasonable police officer in similar circumstances, applied in a manner that gives due recognition to the discretion inherent in police investigation. The Court found that the investigation met the standard in light of police practices at the time. This case is of obvious concern to all agencies which investigate.

6. *Holland v. Saskatchewan*

The Chief Justice's 2008 decision in *Holland v. Saskatchewan*⁹² is of particular interest to administrative law lawyers, illustrating the relationship between administrative law remedies and civil liability. A group of game farmers refused to register in a federal program aimed at preventing chronic wasting disease (CWD), because they objected to a broadly worded indemnification and release clause in the registration form. As a result of their refusal to sign the form, the game farmers lost the CWD-free herd certification level previously obtained by them under provincial rules, before the merging of the federal and provincial programs. As a result of the downgrading of certification, both their ability to market their game and the price of their product was reduced, causing a financial loss to the farmers.

The farmers initially commenced an application for judicial review, and established that the impugned indemnification and release clauses had been invalidly included on the registration form. The Queen's Bench judge on judicial review found that the Minister had no legislative authority to make acceptance of these clauses a condition to participate in the CWD program. The applications judge declared that if the applicants otherwise met the certification program conditions, the court's declarations would "serve to remove the earlier impediments," that is, the offending indemnification and release provisions. The government did not appeal from the judicial review decision.

⁹² 2008 SCC 42 [*Holland*]

However, even though the applications judge had declared that the government's reduction of the herd status was invalid, the government did not take steps to reconsider the farmers' certification or compensate the farmers for lost revenue. The farmers commenced a class action; at the Supreme Court of Canada the issue was whether the negligence claim could proceed.

To the extent that the claim alleged failure to comply with a statutory duty –that the government and its employees were under a duty of care to ensure the statute/regulations were administered in accordance with law and not to operate in breach of them – the Court held that there is no cause of action in tort, citing *Saskatchewan Wheat Pool*.⁹³ However, the Court upheld the claim to the extent that it was a claim for “negligent failure to implement an adjudicative decree.”⁹⁴ The Chief Justice held:

Policy decisions about what acts to perform under a statute do not give rise to liability in negligence. On the other hand, once a decision to act has been made, the government may be liable in negligence for the manner in which it *implements* that decision....Public authorities are expected to implement a judicial decision. Consequently, implementation of a judicial decision is an “operational” act. It is therefore not clear that an action in negligence cannot succeed on the breach of a duty to implement a judicial decree.⁹⁵

Whether the citizens of Canada would agree that it makes sense that there will be no tort liability where the government decides not to operate in accordance with laws, but there be will for failure to implement a Court order, I leave to another day.

A review of this jurisprudence highlights the state of “lamentable confusion” of this area of the law. While the Court appears to refer to a consistent set of principles in their analysis, the application of those principles to the facts has been inconsistent. The governing legislation will normally feature prominently in the analysis, as will any potential for conflicting duties. What remains unclear, and therefore leads to uncertainty, is the weight which will be accorded to these factors. The somewhat murky area of “residual policy considerations” further adds to the unpredictability of this area of the law. As was the case with respect to the Court's treatment of

⁹³ *Ibid.* at paras. 8-9.

⁹⁴ *Ibid.* at para. 12.

⁹⁵ *Ibid.* at para. 14

issues of procedural fairness, here too the Court has been reluctant to establish bright line tests which would give an element of stability and clarity to an area that is currently lacking in both.

F.The U.K.: Potential Legislative Solutions

It is interesting to note that in the U.K., the Law Commission is engaged in an extensive consultation process with respect to “Administrative Redress: Public Bodies and the Citizen.”⁹⁶ The Consultation Paper addresses the question: when and how should the individual be able to obtain redress from a public body that has acted in a substandard manner?

The consultation starts from the premise that “in principle, claimants should be entitled to obtain redress for loss caused by clearly substandard administrative action,” with special consideration given to the role played by public bodies in considering when and on what terms they should be liable. The consultation encompasses the “four pillars” of redress:

- Internal mechanisms of redress (complaint procedures);
- External non-court avenues of redress (public inquiries, tribunals);
- Public sector ombudsmen; and
- Remedies available in public and private law by way of court action.

What is particularly interesting is the Law Commission’s approach to negligence. They start from the premise that:

In private law, we consider that the current situation is unsustainable. The uncertain and unprincipled nature of negligence in relation to public bodies,

⁹⁶ The Law Commission, Consultation Paper No. 187, *Administrative Redress: Public Bodies and the Citizen*, June 17, 2008; the initial comment period expired in November, 2008, and further publications will be forthcoming.

coupled with the unpredictable expansion of liability over recent years, has led to a situation that serves neither claimants nor public bodies.⁹⁷

While the outcome of consultations is always uncertain, the U.K. has encountered problems similar to those now evident in Canada. The Law Commission suggests a specialised scheme for negligence in “truly public” activities that will require a showing of serious substandard administrative action, and will recognize the wide range of competing demands on public bodies. They also suggest a modification of joint and several liability in public law as it applies to public bodies. The failure in regulatory oversight is usually not the direct cause of the claimant’s loss (see Bernie Madoff, for example), but the public body may have to bear the loss in its entirety.

It may be that rather than the hit and miss of litigation, a more principled and comprehensive approach such as that presently under consideration in the U.K. would be beneficial, both for plaintiffs and for regulated bodies increasingly uncertain as to the potential for exposure to liability.

G. Conclusion

The Supreme Court has spent much of the last decade grappling with the standard of review, to the detriment of the development of procedural fairness jurisprudence. However, administrative tribunals and justice seekers will benefit from a return to procedural fairness and a focus on the foundation of the administrative justice system.

The Chief Justice has challenged administrative decision-makers to provide “fair procedures, equitable treatment, and responsiveness to the public.” Liability for regulatory negligence may well assist in achieving this goal. The present state of the law is confusing, however. I acknowledge that it is difficult to find the right balance in the modern regulatory state between protecting the rights of citizens and providing the necessary scope for government

⁹⁷ *Ibid.* at p. 3.

action. Predictability as to outcome will assist administrative bodies in establishing procedures to avoid liability (and benefit the regulated public.) Legislative reforms which more clearly set out the right of redress for substandard administrative action, such as the U.K. consultation, should be considered in Canada in the future if the courts are unable to establish a clear and predictable standard for regulatory negligence.

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