THE SIX-MINUTE Administrative Lawyer 2017

CHAIRS

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Counsel to the Executive Chair/Manager of Legal Services
Social Justice Tribunals of Ontario

March 1, 2017
Chairs: Jeff Cowan  
*WeirFoulds LLP*

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*Social Justice Tribunals Ontario*

March 1, 2017

9:00 a.m. to 12:00 p.m.  
Total CPD Hours = 2 h 30 m Substantive + 30 m Professionalism

The Law Society of Upper Canada  
130 Queen Street West  
Toronto, ON

SKU: CLE17-0020801

**Agenda**

9:00 a.m. – 9:05 a.m. Welcome and Opening Remarks  
Jeff Cowan, *WeirFoulds LLP*

Margaret Leighton, Counsel to the Executive  
Chair/Manager of Legal Services, *Social Justice Tribunals Ontario*
9:05 a.m. – 9:15 a.m. Practices, Procedures and Preliminary Objections in Judicial Review
The Honourable David Stratas, Federal Court of Appeal

9:15 a.m. – 9:40 a.m. Rebottling Old Wine: Modifications of Procedural Law in Response to Substantive Changes in Standard of Review
Dr. Paul Daly, Senior Lecturer in Public Law, University of Cambridge and Derek Bowett Fellow in Law, Queens’ College (Vidyo Presentation - UK)

9:40 a.m. – 9:48 a.m. Standards of Review of Administrative Decision-makers
Nicholas McHaffie, Stikeman Elliott LLP

9:48 a.m. – 10:03 a.m. Question and Answer Session

10:03 a.m. – 10:11 a.m. Fairness and Active Adjudication
Brian Gover, Stockwoods LLP

10:11 a.m. – 10:19 a.m. Investigation and Fact Finding in the Role of Integrity Commissioner
Janet Leiper, C.S., Barrister and Solicitor

10:19 a.m. – 10:27 a.m. First Nations and the Duty to Consult
Scott Robertson, Nahwegahbow Corbiere

10:27 a.m. – 10:37 a.m. Go Ahead and Ask Us (Question and Answer Session)

10:37 a.m. – 10:52 a.m. Coffee and Networking Break
10:52 a.m. – 11:25 a.m. Designing the Infrastructure of Tribunals (30 minutes)

Moderator:    Dean Lorne Sossin, Osgoode Hall Law School, York University

Professor Karim Benyehlf, Ad.E., Director of the Cyberjustice Lab, Université de Montréal, Faculty of Law

Rebecca Stulberg, Community Legal Education Ontario

E. Ann McRae, Rexdale Community Legal Clinic

11:25 a.m. – 11:33 a.m. Trinity Western and the Application of the Charter in Tribunal Decision Making

Linda Rothstein, Paliare Roland Rosenberg Rothstein LLP

11:33 a.m. – 11:41 a.m. Developments in Regulatory Negligence Law - the Liability of Public Authorities

Stephen Moreau, Cavalluzzo Shilton McIntyre Cornish LLP

11:41 a.m. – 11:49 a.m. Credibility Issues Refresher

Jill Dougherty, WeirFoulds LLP

11:49 a.m. – 12:00 p.m. Go Ahead and Ask Us (Question and Answer Session)

12:00 p.m. Program Ends
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Jill Dougherty, WeirFoulds LLP
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Rebottling Old Wine:
Updating the Adjectival Law of Judicial Review of Administrative Action

Dr. Paul Daly, Senior Lecturer in Public Law,
University of Cambridge
and Derek Bowett Fellow in Law, Queens’ College

March 1, 2017
Rebottling Old Wine: Updating the Adjectival Law of Judicial Review of Administrative Action

Paul Daly, Faculty of Law, University of Cambridge and Derek Bowett Fellow in Law, Queens’ College, Cambridge

Six-Minute Administrative Lawyer, March 1, 2017

The law of judicial review of administrative action has grown in leaps and bounds in recent decades. In particular, modern doctrines of reasonableness and procedural fairness have gradually encroached on what administrative lawyers once called ‘the merits’ of administrative decisions. Where previously errors ‘within jurisdiction’ were more or less immune from judicial oversight and correction, nothing is now off limits as far as reviewing courts are concerned: errors of law and fact alike can provide grounds for judicial intervention. While doctrines of deference ensure that judges exercise their judicial review function with due caution, such that administrative decisions generally tend to survive challenges to their substantive reasonableness, there can be no doubt that, in principle, the breadth and depth of judicial review of administrative action is much greater than it was several decades in the past. The Supreme Court of Canada’s formulation of reasonableness review – “justification, transparency and intelligibility” in the reasoning process and oversight to ensure that decisions fall within the range of possible, acceptable outcomes – would have been unthinkable a generation ago.

The increased breadth and depth of judicial review has, of course, given rise to predictable controversy. A less appreciated consequence, however, is that the “adjectival” law of judicial review may have fallen behind substantive administrative law. On issues such as the content of the record on judicial review applications, the extent to which administrative decision-makers can participate in judicial reviews of their decisions, superior court review of federal prison decisions and tribunals’ capacity to reconsider their decisions, the adjectival law has lagged the substantive law.

My goal in this paper is to set out an analytical framework for updating the adjectival law of judicial review of administrative action. I should note at the outset that the framework I propose does not envisage the adjectival and substantive law moving forward in lockstep. As I hope to demonstrate, the relationship between the adjectival and substantive in the common law tradition is dynamic and unpredictable.

I will lay out my proposed framework in Section I. Courts must exercise caution in updating the adjectival law, in order to avoid subsequent pressure to apply broadly or further reform the substantive law. Changes should only be made to the adjectival law of

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judicial review of administrative action in an incremental fashion where a development of the law is necessary to ensure that the courts can effectively carry out their reviewing function. These changes fall to be considered, moreover, in a particular setting, one shaped by understandings of the constitutional role of the courts vis-à-vis the administration, in particular that judges may not substitute their judgement for the judgement of the decision-maker designed by the legislature. Finally, changes to the adjectival law should, in the interests of coherence, be made by reference to the same principles or values that shape the substantive law.

In Section II I deploy the framework to analyze a series of recent Canadian cases that have addressed the adjectival law of judicial review of administrative action. I conclude that the Canadian courts have struggled with some issues – tribunal reconsideration and tribunal standing – but have done reasonably well on others – the content of the record and superior court jurisdiction over federal prisons.

I. A Framework for Analysis

A. Procedure and Substance in the Common Law Tradition

It is worth recalling the famous observations of prominent legal historians about the influence of procedure on the development of the common law. Maine’s remark about substantive law being “gradually secreted in the interstices of procedure”\(^5\) and Maitland’s quip about the buried forms of action that “still rule us from their graves”\(^6\) remind us that procedural changes can have important substantive consequences.

The cases to be analyzed in Section II have been provoked by changes in the substantive law of judicial review, which has increased in breadth and depth in recent decades, in breadth because it applies to a wider range of decisions and in depth because it is applied with increasing intensity. So lawyers argue that the adjectival law should change to keep in step with the substantive law: tribunals should have increased scope to defend their decisions; superior court jurisdiction over federal prisons should be extended; tribunals’ reconsideration powers should mirror the more extensive jurisdiction of reviewing courts; and parties should be permitted to present more extensive affidavit evidence on judicial review.

But these arguments overlook the relationship between procedure and substance in the common law. If the adjectival law changes, even simply to keep it in step with the breadth and depth of judicial review, the substantive law is likely to mutate further in the future.\(^7\) I say “likely” because cause and effect can never be traced with scientific precision; my point is that advocates of change should bear a heavy burden of persuasion.

\(^6\) The Forms of Action at Common Law (Cambridge, 1909), at p. 2.
\(^7\) See also Jack Beatson, “‘Public’ and ‘Private’ in English Administrative Law” (1987), 103 LQR 34, at p. 38, on the related subject of the relationship between remedial discretion and substantive law: “Consideration of what is a public law case at the remedial level could, in the long run, have effects at the level of substantive principle”.

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because of the history of how adjectival changes have influenced the substantive law. And administrative law aficionados certainly know that, historically, changes in the adjectival law of judicial review have been closely related to developments in the substantive law.

An appreciation of history no doubt accounted for the reluctance of the House of Lords in *Tweed v Parades Commission for Northern Ireland* to increase the scope of discovery of documents in judicial review applications involving fundamental rights claims. While their Lordships appreciated that the proper application of a proportionality test (a “new dimension” introduced in fundamental rights cases to supplant the deferential *Wednesbury* test) could require additional documentary evidence in some situations, leading to “a more flexible and less prescriptive principle” for disclosure, they nonetheless emphasized that disclosure would remain “exceptional”. “Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice”.

**B. Constitutional Considerations**

Any updating of the adjectival law should be effectuated in accordance with constitutional fundamentals: “the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution”. Two are relevant here.

First, judicial review forms part of the inherent jurisdiction of the superior courts. Devolved from the ancient prerogative writs, theirs is the general superintending jurisdiction over the administrative process. Judicial review cannot be ousted by legislative action; some meaningful judicial oversight must be exercisable by the ordinary courts. This is now bolstered by the recent recognition that access to judicial process is constitutionally guaranteed.

Secondly, and despite some of the sweeping statements of principle found in leading cases on inherent jurisdiction, the role of the superior courts is limited to ensuring the legality, reasonableness and procedural fairness of administrative decisions. There is a
vital distinction between appeals – which may only be created by the legislature – and the inherent power of judicial review. These ought not to be confounded. As Stratas J.A. observed in Bernard v. Canada (Attorney General): “Applications for judicial review are proceedings where a reviewing court is invited to overturn decisions Parliament has entrusted to an administrative decision-maker. In this context, the administrative decision-maker and the reviewing court have differing roles that must not be confused”. \(^{18}\) This echoes the wise advice of an English judge:

> The court does not ask itself the question, 'Is this decision right or wrong?' Far less does the judge ask himself whether he would himself have arrived at the decision in question…The only question for the judge is whether the decision taken by the body under review was one which it was legally permitted to take in the way that it did.\(^{19}\)

Scrutiny of the merits does not, in other words, justify substitution of judgement on the merits. The constitutional guarantee of access to judicial review and the fundamental distinction between the role of the courts and that of administrative decision-makers form part of the backdrop against which the adjectival law of judicial review falls to be updated.

**C. Change in the Common Law**

The Supreme Court of Canada “has signalled its willingness to adapt and develop common law rules to reflect changing circumstances in society at large”.\(^{20}\) Reflecting, however, Cardozo’s well-known observation that the common law judge “is not a knight-errant roaming at will in pursuit of his own ideal of beauty and goodness”,\(^{21}\) judicial power to change the law is subject to “significant constraints”:\(^{22}\)

> Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.\(^{23}\)

Considerations of institutional and constitutional competence might be raised in support of the position that the “judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society”:\(^{24}\)

\(^{18}\) 2015 FCA 263, at para. 17.

\(^{19}\) *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513, at p. 515, *per* Laws J.


\(^{21}\) The *Nature of the Judicial Process* (Yale University Press, New Haven, 1921), at p. 141.

\(^{22}\) *Salituro*, at p. 670, *per* Iacobucci J.


\(^{24}\) *Salituro*, at p. 670, *per* Iacobucci J.
The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.25

In the area of adjectival law, however, judges have the necessary institutional and constitutional competence. As Lord Donovan observed in Myers v. Director of Public Prosecutions: “The common law is moulded by the judges and it is still their province to adapt it from time to time so as to make it serve the interests of those it binds. Particularly is this so in the field of procedural law”.26 Yet caution is still advisable, given the symbiotic relationship between procedure and substance in the common law.

It is also worth noting Lord Reid’s observations from the same case: “there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles”.27 In this regard, it is worth noting that both the substantive and adjectival law of judicial review are tied into the larger tapestry of “administrative law values” present in the common law, “principles immanent in administrative law and repeatedly sounded in the case law especially when reviewing courts explain their exercises of discretions”.28 These values, which include “the rule of law, the principles of good administration (including proper, fair, pragmatic, efficient and effective administrative regulation and decision-making), the democratic principle (including Parliamentary supremacy), and the separation of powers”,29 “animate all of administrative law”30 and should in the interests of coherence be taken into account by judges in making the necessary incremental changes to the adjectival law of judicial review.31

### D. Avoiding Analytical Error

A final note of caution must be sounded. Courts should not automatically assume that the adjectival law of judicial review must move in lockstep with its substance; and they

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25 Watkins, at pp. 760-761, per McLachlin J.
27 Myers. at p. 1021. See also Bhasin v. Hrynew, [2014] 3 SCR 494, especially at paras. 67-71.
29 Wilson, at para. 30.
31 On the value of coherence and conceptual clarity in the common law, see Hall v. Hebert, [1993] 2 SCR 159.
should be particularly careful not to assume that changes in concepts drawn from the substantive law of judicial review require automatic changes in the adjectival law.

The point can be demonstrated by consideration of a specific example: tribunal reconsiderations of their decisions. Assume that tribunals may reopen a decision duly reached because of a “jurisdictional” defect, a sensible approach that allows tribunals to avoid the time and expense that would inevitably be involved in permitting only a reviewing court to quash a defective decision.

In earlier times, this rule was easy enough to apply. A tribunal without authority over one of the parties, or a remedy granted, for example, had fallen into jurisdictional error and could expect a stern reprimand and a writ of certiorari from a reviewing court. Breaches of natural justice were also considered jurisdictional in this sense: a failure to hear a party would obviously justify a reviewing court in quashing a decision and so was treated as a jurisdictional defect, with the effect that a tribunal reconsidering a procedurally flawed decision could annul it itself. In general, restricting tribunal reconsiderations to jurisdictional errors imposed significant limits on tribunals’ powers of reconsideration.

But the meaning of “jurisdiction” has changed. Today, Canadian administrative lawyers understand jurisdiction in two contrasting ways. One way is that it is merely a label to describe a decision that a reviewing court can quash: a tribunal did not have “jurisdiction” because it failed to consider a relevant factor, or was unreasonable, or failed to observe the duty of fairness. This is dangerously misleading, because the effect of applying this broad notion of “jurisdiction” would be to legitimate tribunal reconsideration of decisions on almost any ground. There would be no meaningful fetter on a tribunal’s power to reconsider its decisions.

The second way is that “jurisdictional” error is one type of error for which a decision can be quashed. In Canada, this is now a vanishingly small category of which the contours are unclear. Practically speaking, the Supreme Court’s guidance on “jurisdiction” is not clear enough to furnish a reliable benchmark for tribunals. Moreover, as a matter of principle, it is not designed to do so; the narrow conception of jurisdiction was adopted by courts to enhance the autonomy of administrative decision-makers by reducing the scope for aggressive judicial review, not to assist those same decision-makers in determining the limits of their reconsideration authority.

As a result, “jurisdiction” and other analytical concepts used in the substantive law of judicial review have to be understood in terms of the functions they serve. A better way to understand the meaning of “jurisdiction” in the particular context of tribunal reconsiderations is that it is designed to circumscribe the range of cases in which a tribunal can reconsider its decisions. But the scope of the reconsideration power cannot be dependent on the meaning that “jurisdiction” has in other contexts. To think otherwise

32 See e.g. Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 SCR 982, at para. 28.
is to make a category mistake. Similar observations could no doubt be made about other areas of adjectival law; the point is that analytical concepts should not be set to uses for which they were not designed.

II. Examples

A. Tribunal Standing

Ontario (Energy Board) v. Ontario Power Generation Inc.\(^{34}\) was a utilities regulation case concerning the Board’s decision to disallow salary costs even though a substantial portion was fixed in place by a binding collective agreement. The Court upheld the Board’s decision. Although Rothstein J.’s majority opinion contains a fascinating discussion of the principles of rate-setting, and Abella J.’s fiery dissent takes the Board to task for paying insufficient respect to the collective agreement, it is Rothstein J.’s analysis of tribunal standing that is of greatest significance.

The starting point was Northwestern Utilities Ltd. v. City of Edmonton, where, citing concerns about impartiality, Estey J. limited a tribunal’s participation in judicial review proceedings to “an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction”\(^{35}\). One immediately obvious problem is that what “jurisdiction” meant in 1979 is nothing like what it means today. Reasonableness has replaced it as the dominant organizing principle of Canadian administrative law.\(^{36}\) Indeed, in CAIMAW v. Paccar of Canada Ltd.,\(^{37}\) a minority of the Court would already have permitted tribunals to defend the reasonableness of their decisions, something the Court has subsequently, “without comment”, relatively regularly permitted.\(^{38}\)

How then should Northwestern Utilities be updated for the present day? One option would have been to follow the classically incremental approach of the common law. The procedural posture of this case invited such an approach: there was an appeal from the Board’s decision to the ordinary courts. In Canada, judicial review principles apply to appeals from specialized regulators. But surely a Board that is the sole respondent in an appeal cannot be equated to a decision-maker whose decision is attacked on judicial review. Rothstein J. relied in part on this sort of incremental approach, noting “the Board was the only respondent in the initial review of its decision”, which gave it “no alternative but to step in if the decision was to be defended on the merits”\(^{39}\).

Rather than leaving it at that, however, Rothstein J. adopted the principled approach that increasingly marks the Court’s public law jurisprudence. He noted the concerns for

\(^{34}\) [2015] 3 SCR 147 [OPG].
\(^{35}\) [1979] 1 SCR 684 [Northwestern Utilities], at p. 709.
\(^{38}\) OPG, at para. 45.
\(^{39}\) OPG at para. 60.
finality and impartiality underlying Northwestern Utilities. As Stratas J.A. explained in Canada (Attorney General) v. Quadrini, pursuant to the principle of finality, a decision-maker’s “job is done” once it reaches a final decision: “A judicial review is not an opportunity for the tribunal to amend, vary, qualify or supplement its reasons”. 40 Impartiality, meanwhile, counsels against “active and even aggressive participation [that] can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties”. 41

Having considered these principled concerns, Rothstein J. felt that a “categorical ban on tribunal participation on appeal” was not necessary to respond to them. 42 Rather, a “discretionary approach…provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis”. 43 Concretely, “tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court’s discretion”. 44 Rothstein J. identified three relevant principles: 45

(1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.

(2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.

(3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

This, like many of the Court’s public law pronouncements, 46 is plainly designed to give guidance to judges throughout the Canadian legal system, guidance that incrementalism may not be capable of providing.

40 2010 FCA 246, at para. 16.
41 Northwestern Utilities, at p. 709.
42 OPG, at para. 52.
43 OPG, at para. 52.
44 OPG, at para. 57.
45 OPG, at para. 59.
46 Though not all: see Paul Daly, “The Signal and the Noise in Administrative Law” University of Cambridge Faculty of Law Research Paper No. 3/2017.
Rothstein J.’s preference for a discretionary approach was supported by several principled considerations. First, “because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome”.47 Second, “[i]n a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute”.48 Third, the statutory mandates of different tribunals may require different conclusions. For instance, “[t]he mandate of the Board, and similarly situated regulatory tribunals, sets them apart from those tribunals whose function it is to adjudicate individual conflicts between two or more parties”.49 A blanket rule would achieve the goal of protecting the perceived impartiality of judicial tribunals but deprive reviewing courts of the potentially valuable perspectives of regulatory tribunals.

Rothstein J. then distinguished the issue of whether a tribunal can participate in judicial review proceedings from the content of its participation “The standing issue concerns what types of argument a tribunal may make, i.e. jurisdictional or merits arguments, while the bootstrapping issue concerns the content of those arguments”,50 in particular “where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal”.51 The same principles of finality and impartiality should guide courts in preventing bootstrapping.52 In general, “the proper balancing of these interests against the reviewing courts’ interests in hearing the strongest possible arguments in favour of each side of a dispute is struck when tribunals do retain the ability to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons”.53

There are two problems with Rothstein J.’s approach. First, Rothstein J.’s distinction between participation and the content of the participation may turn out to be chimerical. Even a tribunal that acts judicially can surely participate in some meaningful way before a reviewing court, for instance in addressing the standard of review54 or providing context for an alleged breach of procedural fairness. Most cases, perhaps even all cases, will turn on the content of the proposed participation, something to be determined in a discretionary fashion based on the principles set out by Rothstein J. This tilts the balance in favour of tribunal participation. It is a major shift from Northwestern Utilities, even allowing for the broader approaches advocated by some Courts of Appeal. If common law history is any guide, this strong statement by the Supreme Court of Canada in favour of tribunal standing will encourage and legitimate increasingly extensive tribunal participation in judicial review proceedings. The appropriate constitutional roles of administrative decision-makers and courts will be put under pressure. In this case, the

47 OPG, at para. 53.
48 OPG, at para. 54.
49 OPG, at para. 56.
50 OPG, at para. 63.
51 OPG, at para. 64.
52 OPG, at para. 69.
53 OPG, at para. 69.
54 Though see Newfoundland and Labrador Hydro c. Régie de l’énergie, 2013 QCCS 3848.
Board could participate without compromising the principles of finality and impartiality and, although Rothstein J. sounded a “note of caution” about the Board’s suggestion that even if it lost on judicial review it would reach the same result in fresh proceedings, he felt “the Board generally acted in such a way as to present helpful argument in an adversarial but respectful manner”. This relaxed attitude does not augur well for the future.

Secondly, permitting tribunals to offer additional arguments that were “implicit” in their decisions is misguided at best and dangerous at worst. Judicial laxity in permitting decision-makers to supplement their reasons _ex post_ is already causing enough difficulty. Once one appreciates the influence that adjectival law has had on substance throughout the history of the common law, it is plausible to fear that permitting tribunals “to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons” will expand the range of arguments that might be made in defence of administrative decisions on judicial review, making them harder to attack. At the very least Slatter J.A., in a passage cited by Rothstein J., phrased the appropriate test more effectively:

> While the tribunal, like any other party, can offer interpretations of its reasons or conclusion, it cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record. A tribunal can, within those limits, attempt to rebut arguments about how it reasoned and what it decided.

In conclusion, Rothstein J. would have been wiser to make an incremental change to account for the anomalous position of a decision-maker on appeal being unable to defend its decision than to initiate a sweeping change to settled practice. While the value of good administration is clearly served by permitting a decision-maker to explain its decision when no other party is able to do so, it is difficult to see why in other situations the virtues of finality and certainty, key aspects of good administration and the separation of powers should be compromised simply because the decision-maker did not explain its decision adequately at the first time of asking.

**B. Tribunal Reconsideration**

_Fraser Health Authority v. Workers’ Compensation Appeal Tribunal_, features three sets of reasons on tribunals’ authority to reopen closed decisions (though the concurring reasons of Goepel J.A. contain mostly a brief treatment of the merits of the case).

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55 _OPG_, at paras. 60-62.
56 _OPG_, at para. 72.
58 _OPG_, at para. 69.
60 2014 BCCA 499 [Fraser].
The contested decision here was the award of workers’ compensation benefits to a worker who had suffered breast cancer. Causation was at issue. After unfavourable decisions at lower levels of the workers’ compensation system, the workers won before the Tribunal. It found that there was a sufficient causal link. Subsequently, it also dismissed a request from the employer for a reconsideration of its decision. Ultimately the Supreme Court of Canada found in favour of the employees, but it did not undertake any analysis of the reconsideration question. I propose to focus therefore on the reasons of the Court of Appeal.

Two issues were addressed by the Court of Appeal about the scope of the Tribunal’s reconsideration power. The first is when a tribunal may reconsider a decision that has been duly reached. The second is how a reviewing court should perform its role where there has been an original decision and a reconsideration.

Traditionally, the functus officio rule applies to administrative tribunals. Quite properly: if an individual has been granted or denied a benefit, the decision should be final and binding; its substance should not be reopened, for otherwise uncertainty would arise. Nonetheless, the principle need not always be applied in the administrative field with the same rigour it attracts in judicial proceedings: as ever, administrative decision-makers are not bound to apply legal concepts in precisely the same way as courts do. All this was made clear by the Supreme Court of Canada in the leading case of Chandler v. Alberta Association of Architects.

At issue in Fraser was the wide scope the Tribunal has given to its power to reconsider its own decisions. Section 253.1 of its home statute provides for several unobjectionable grounds for reconsideration (inadvertent errors and typos, for example) but also – ominously – to “cure a jurisdictional defect.”

There was much discussion by the majority and minority of administrative-law metaphysics. Does “jurisdictional” here mean the same thing it means in judicial review cases? The majority, in reasons by Chiasson J.A. said it does; the minority, in reasons by Newbury J.A., seemed to treat it as co-extensive with a court’s authority to judicially review a decision. This is a category mistake, caused by the analytical error of confounding a change in the substantive law with an automatic change in the adjectival law. What matters here is the meaning of this power in the context of the Tribunal’s statutory scheme, not the meaning of “jurisdiction” (if any) in judicial review proceedings.

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61 British Columbia (Workers’ Compensation Appeal Tribunal) v. Fraser Health Authority, 2016 SCC 25.
62 See e.g. Chopra v. Canada (Attorney General), 2013 FC 644 at paras. 65-68.
63 See e.g. Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals, [2011] 3 SCR 616, at para. 45.
64 [1989] 2 SCR 848.
65 Workers Compensation Act, RSBC 1996, c 492.
66 Fraser, at paras. 150, 169.
67 Fraser, at para. 63.
The Tribunal had taken the view that it can, on reconsideration, correct a patently unreasonable decision (a standard of review that survives in British Columbia). To my mind, this is misguided. A power of reconsideration ought to be limited, for the good reasons given by the Supreme Court in *Chandler*, but review for patent unreasonableness in British Columbia is broader than the term itself suggests:

a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.  

This can amount to searching review of the correctness of the administrative decision-maker’s original interpretation of its empowering statute. Yet “as a general rule, a tribunal or other decision maker does not have power to reconsider simply because it later concludes that it reached a wrong decision”.  

On the second issue, the general rule is that only a decision-maker’s final decision can be assessed by a reviewing court. But there are some situations in which courts will look also to the original decision, for fear that otherwise they could not conduct a meaningful judicial review. Newbury J.A. was correct in dissent to note that this is typically a practical problem, best addressed by judicial discretion. But the Tribunal’s policy of – in essence – using its “jurisdictional defect” authority to perform a judicial review of its original decision cannot be minimized as a mere practical problem. Judicial review is a core function of s. 96 courts, not of administrative decision-makers.

Meanwhile, expansion of reconsideration authority raises a fundamental constitutional concern about the ability of statutory bodies to conduct judicial review proceedings. Constitutional fundamentals must be enforced “however worthy the policy objectives”. In general, it is doubtful that it would even be constitutionally permissible for a Canadian legislature to require an administrative body to conduct judicial reviews. The idea is not entirely far-fetched: the UK’s new tribunal system has just this feature, with the Upper Tribunal required on occasion to apply judicial review principles. But in Canada, s. 96 of the *Constitution Act, 1867*, puts a potential hurdle in the way of any such legislative effort. Judicial review is a core feature of the inherent jurisdiction of the superior courts

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68 *Administrative Tribunals Act*, SBC 2004, c 45, ss. 58(3) and 59(4).
69 *Fraser*, at para. 155, quoting legislative history.
70 See e.g. *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329, at paras. 44-45.
71 *Fraser*, at para. 64.
and cannot be exercised by an administrative body, as evidenced by the long line of cases condemning statutory tribunals that were given court-like functions.74

Although there are contradictory dicta in the decisions, in Crevier and Farrah the constitutional infirmity was due in essence to the purported exclusion of judicial review. When a statutory tribunal conducts judicial review, however, the jurisdiction of the superior court to conduct a subsequent judicial review is left intact. Moreover, in a subsequent case,75 the problem was said to lie in the transfer of a judicial function to an administrative body on an exclusive basis (here, the power to hold someone in contempt of court). A statutory judicial review jurisdiction would not amount to an exclusion of judicial review.

Nonetheless, assuming for the sake of argument that some sort of exclusion of judicial oversight is necessary to give rise to a s. 96 problem, vesting judicial review functions in statutory tribunals remains problematic. At the very least, it becomes practically impossible for the superior court to exercise its judicial review function when it finds itself reviewing a judicial review. Rather than asking whether the initial administrative decision-maker’s decision was clearly understandable and fell within a range of reasonable outcomes, it must ask if the appellate body’s review of the initial decision was clearly understandable and within the zone of reasonableness. This borders on the nonsensical and poses serious rule-of-law problems by potentially shielding egregious errors from challenge. As a practical matter, then, part of the superior court’s core function has been impeded by the exercise by a statutory body of judicial review powers.

Thus, performing an internal judicial review is not only constitutionally dubious per se but also makes it more difficult for reviewing courts to do their job. Newbury J.A.’s pragmatic response that a reviewing court could look at the original and final decisions is unconvincing, for it creates a needless duplication of effort and risks obfuscating important issues on judicial review (by suggesting that the reviewing court should review the ‘internal review’ conducted by the Tribunal on reconsideration, creating a “double deference” problem).76 I appreciate Newbury J.A.’s point that access to justice and efficiency are important concerns;77 if all this can be done ‘in-house’, isn’t that better for individuals? Perhaps, but judicial review is an ever-present feature on the Canadian administrative justice landscape. Duplicating it in an administrative forum will simply lead to complications.

74 Séminaire de Chicoutimi v. La Cité de Chicoutimi, [1973] SCR 681, Attorney General (Que.) et al. v. Farrah, [1978] 2 SCR 638 and Crevier v. A.G. (Québec) et al., [1981] 2 SCR 220. Whether these features can be vested in administrative bodies is judged by a three-part test which asks whether the functions formed part of the superior courts’ inherent jurisdiction in 1867; whether the functions are truly “judicial” in the administrative setting; and whether the functions are merely accessory to the administrative body’s mandate: Re Residential Tenancies.


77 Fraser, at para. 66.
To my mind, those administrative tribunals that have turned their appellate jurisdictions into judicial review functions have raised significant constitutional issues. That this may occasionally facilitate access to justice is beside the point: worthy policy objectives cannot override constitutional fundamentals. A better approach to the question of the legitimate scope of tribunal reconsideration authority would first, avoid the analytical error of moving the adjectival law in lockstep with the substantive law of judicial review of administrative action; secondly, keep in mind administrative law values, so as to respect the certainty and finality that are so important to good administration and the maintenance of distinct roles for courts and decision-makers counselled by separation of powers; and thirdly, focus on maintaining these distinct roles by restricting tribunal reconsideration to obvious errors that a court would unhesitatingly correct on judicial review.

C. The Record for Judicial Review

It is well settled that the record for judicial review is generally comprised of the information before the decision-maker at the time a decision was made. To permit supplemental information to be introduced by way of affidavit or exhibit would be to invite the reviewing court to re-try a question the legislature tasked an administrative decision-maker with answering. A more permissive approach to the content of the record on judicial review may change the nature of the reviewing court’s role. In *Dane Developments Ltd. v. British Columbia (Forests, Lands and Natural Resource Operations)*, Bracken J. refused to admit evidence that “could only be relevant if the Court were to embark upon a reweighing of the evidence, the exact exercise that the authorities prohibit on a judicial review”. But if such evidence could be tendered, courts would feel pressure to perform just such an exercise. This is a risk worth avoiding.

Not only would an expanded record unsettle the fundamental distinction between appeal and review, but, as Stratas J.A. explained in *Bernard*, the existing, restrictive approach coheres with administrative law values. Here, the respondent sought to strike out portions of the applicant’s affidavit and exhibits filed in support of her application for judicial review. In granting the motion, Stratas J.A. responded also to recent criticism that the exceptions to the rule are unprincipled, unclear and uncertain. Rather, in his view, the exceptions “are recognized because they are consistent with the rationale behind the general rule and administrative law values more generally”. This is true of the *background information* exception:

The background information exception respects the differing roles of the administrative decision-maker and the reviewing court, the roles of merits-decider and reviewer, respectively, and in so doing respects the separation of powers. The background information placed in the affidavit is not new information going to the merits. Rather, it is just a summary of the evidence relevant to the merits that was before the merits-decider, the administrative decision-maker. In no way is the reviewing court encouraged to invade the administrative decision-maker’s role as

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78 2015 BCSC 1663, at para. 58.
79 *Bernard*, at para. 19.
merits-decider, a role given to it by Parliament. Further, the background information exception assists this Court’s task of reviewing the administrative decision (i.e., this Court’s task of applying rule of law standards) by identifying, summarizing and highlighting the evidence most relevant to that task.\(^{80}\)

The same is true of the no evidence exception (“This can be useful where the party alleges that an administrative decision is unreasonable because it rests upon a key finding of fact unsupported by any evidence at all”\(^{81}\)) and the natural justice, procedural fairness, improper purpose or fraud exception, which relates to information “that could not have been placed before the administrative decision-maker and that does not interfere with the role of the administrative decision-maker as merits-decider”.\(^{82}\) Other exceptions are also possible, as long as they are consistent with the general principles. For instance, “reviewing courts have received affidavit evidence that facilitates their reviewing task and does not invade the administrative decision-maker’s role as fact-finder and merits-decider”.\(^{83}\)

Here, the information the applicant sought to introduce ran afoul of the general rule without falling into any of the recognized exceptions, because the evidence was “actually or reasonably available to her with some diligence at the time of the Board’s decision”.\(^{84}\)

However, the factual matrix of *Sobeys West Inc. v. College of Pharmacists of British Columbia*\(^{85}\) indicates that, in some situations, it might not be possible to effect a meaningful judicial review without placing fresh material before the reviewing court.

The basic issue here was whether the College, in outlawing pharmacy loyalty schemes, acted beyond its powers. Lurking in the background was the very real possibility that the College was discriminating against ‘big-box’ retailers and sacrificing the interests of consumers to the (vested) interests of its members. Relying heavily on affidavit evidence, Hinkson C.J. struck down the by-laws in question but the Court of Appeal, *per* Newbury J.A., reversed.

Counsel argued that the traditional rule limiting the content of the judicial review record to material that had been before the decision-maker “is clearly geared to tribunals that make adjudicative decisions at hearings, rather than legislative or policy-laden decisions at meetings that (as in the case at bar) may take place over an extended period while a matter is debated, refined and finally decided upon”.\(^{86}\) Newbury J.A. responded in forthright terms. Here, there was no suggestion that “the Council had attempted to ‘immunize its decisions from any scrutiny’ by limiting the material it considered. Had this been the case, a more flexible view of the admissibility of evidence might have been

\(^{80}\) *Bernard*, at para. 23.
\(^{81}\) *Bernard*, at para. 24.
\(^{82}\) *Bernard*, at para. 25.
\(^{83}\) *Bernard*, at para. 28.
\(^{84}\) *Bernard*, at para. 35.
\(^{85}\) 2016 BCCA 41 [*Sobeys*].
\(^{86}\) *Sobeys*, at para. 41.
The first-instance judge had been wrong to permit the introduction of additional material.

There are, however, strong rule-of-law considerations in favour of expanding the record in situations where by-laws are being reviewed for reasonableness. Often, the factual record will be patchy. In the absence of an adversarial procedure there is little to guarantee that the issues will have been thoroughly aired. This makes it difficult for a reviewing court to ensure that the by-laws are reasonable.

Moreover, there are considerations of good administration that might justify expanding the record in a case like this one. Where it is plausible to suggest that a regulatory body has been ‘captured’ by an influential interest group (though I appreciate that this may not always be easy to demonstrate), good administration would favour permitting the applicant to introduce evidence to this effect. A general presumption that by-laws were adopted in good faith should not function as an indestructible shield for regulatory capture and rent seeking. In a world in which judicial review of administrative action extends to the reasonableness of general regulatory measures, it might be necessary to expand the record in cases involving an non-adjudicative decision-maker beyond those situations in which bad faith or procedural unfairness have been alleged (as long as the applicant was not lax in providing the decision-maker with relevant information). This would represent an incremental shift in the procedural law that would not upset settled principles.

To the extent that a decision taken by a non-adjudicative decision-maker might not demonstrate the qualities of justification, transparency and intelligibility, Newbury J.A. stated that “the standard may be met by a non-adjudicative tribunal even where, to paraphrase the petitioners’ factum, there is no record of proceedings (other than minutes of meetings), no evidence is tendered, no findings of fact or law are made, and there are no reasons in the formal sense”. This is true, but it does not conclusively answer the argument that the record should be expanded in such cases, at least where rule-of-law and good-administration concerns are active.

D. Habeas Corpus

As a general rule, decisions of federal institutions may only be challenged in federal court, not the provincial superior courts. As the relevant statute makes clear:

…the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

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87 Sobeys, at para. 53.
88 Dunsmuir v New Brunswick [2008] 1 SCR 190, at para. 47.
89 Sobeys, at para. 69.
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.90

This represents an encroachment on the inherent jurisdiction of the provincial superior courts, which can be ousted only by clear language. No reference is made in the relevant provision to the writ of habeas corpus. As Laskin C.J. explained, in dissent but with characteristic clarity: “Nothing but express federal legislation directed to such an end would exclude a subject’s right to resort to habeas corpus” in superior court.91

Subsequently, in R. v. Miller, the Supreme Court held that habeas corpus proceedings, with *certiorari* in aid – designed to make habeas corpus “more effective by requiring production of the record of proceedings for that purpose”92 – can be brought in provincial superior court of various prison decisions impacting prisoners’ liberty.93 Relief could be granted against unlawful decisions. At that time, when the development of the pragmatic and functional analysis was in its infancy, unlawfulness could safely be equated with procedural unfairness, jurisdictional error and the various grounds of abuse of discretion.94

Fast forward to 2014 and *Mission Institution v. Khela*,95 which addressed a new question: Does the fact that a decision was unreasonable in the administrative law sense open it up to habeas corpus proceedings in provincial superior courts?96 The question arose because the grounds of judicial review have expanded since the 1980s: a decision that is unreasonable is as bad, legally speaking, as one that is jurisdictionally defective. But reviewing the decisions of federal institutions for unreasonableness is *classically* the role of Canada’s federal courts. On this occasion, the Court poured the old wine straight into the new bottle:

> Including a reasonableness assessment in the scope of the review is consistent with this Court’s case law. In particular, allowing provincial superior courts to assess reasonableness in the review follows logically from how this Court has framed the remedy and from the limits the courts have placed on the avenues through which the remedy can be obtained.97

Inmates can challenge detention decisions for unreasonableness in provincial superior courts. “Unlawfulness” now includes substantive unreasonableness: “a decision will be unreasonable, and therefore unlawful, if an inmate’s liberty interests are sacrificed absent

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90 See generally *Federal Courts Act*, RSC 1985, c F-7, s. 18(1).
93 [1985] 2 SCR 613 [*Miller*].
95 [2014] 1 SCR 502 [*Khela*].
96 *Khela*, at para. 51.
97 *Khela*, at para. 53.
any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion”.98

The difficulty here is that wider scope for habeas corpus review conducted by superior courts on the application of federal inmates risks expanding superior court jurisdiction over the internal management of federal prisons, a matter within the exclusive jurisdiction of the federal courts. On the one hand, the decision is not tainted by analytical error, as the Supreme Court in 1985 and 2014 was analyzing the same question: what sort of defects allow a prison decision to be quashed? The concepts at issue were developed for the same purposes: identifying the scope of judicial review. On the other hand, if the idea in 1985 was to develop a safety valve to allow prisoners to challenge obviously flawed decisions in the most convenient venue, it is by no means clear that its logic extends to virtually any arguably flawed decision impacting a prisoner’s liberty interests; there are a range of disciplinary measures that might be imposed as a matter of internal management of a prison, the legality of which would ordinarily be within the purview of the federal courts.

Tilting the balance in favour of the decision in Khela, however, are the important constitutional considerations that apply in the area of habeas corpus. The writ has great “importance as a safeguard of the liberty of the subject”.99 Liberty interests, so precious to the common law, are at stake, which militates in favour of providing as many points of access to judicial oversight as possible. Both administrative law values, in the form of the rule of law, and constitutional considerations point against a niggardly approach to superior court jurisdiction.

Conclusion

First, courts are often tempted to make the analytical error of keeping the adjectival law in lockstep with the substantive law. The Court of Appeal in Fraser found it difficult to resist the siren call of “jurisdiction”. Similarly, Rothstein J.’s approach in OPG favoured updating the adjectival law to take account of developments in the substantive law. While it was, in my view, inappropriate to do so in OPG in the context of tribunal standing, it was appropriate to do so in Khela – but only because administrative law values and constitutional considerations weighed heavily in favour.

Second, judges may often sweep too broadly in updating the adjectival law, emboldened perhaps by the sense that they are operating in a procedural area that is more or less the exclusive province of the judiciary, into which the political branches rarely intrude. This, however, can be dangerous, as evidenced by the sweeping approach adopted by Rothstein J. in OPG, an approach that is insufficiently sensitive to the lessons of history.

Third, judges should pay attention and give adequate weight to administrative law values and constitutional principles. The failures to do so in OPG and Fraser should function as cautionary tales. But judges who heed this admonition will not invariably refuse to update

98 Khela, at para. 73.
the adjectival law: sometimes, as in *Khela*, values and principles will support bringing the adjectival and substantive law into line.

Fourth, the case law on the content of the record for judicial review applications provides a useful template for judges who wish to appreciate how far they may legitimately go in updating the adjectival law. For in this area, judges have proceeded cautiously, in an incremental fashion that respects the constitutional roles of courts and administrative decision-makers whilst also taking account of the administrative law values that form the tapestry against which judicial review cases are decided.
Today is Not That Day:
Recent Cases on the Standard of Review

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March 1, 2017
Today is Not That Day:
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“The day may come when it is possible to write a judgment like this without a lengthy discussion of the standard of review. Today is not that day.”


“In this case, Slatter J.A. said: “The day may come when it is possible to write a judgment like this without a lengthy discussion of the standard of review” (para. 11). That day has not come, but it may be approaching.”


“TODAY”:

- *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47
- *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53
I. “Dunsmuir and its progeny”

_Dunsmuir v. New Brunswick, 2008 SCC 9:_

First, ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question.

Second, where the first inquiry proves unfruitful, proceed to an analysis of the factors making it possible to identify the proper standard:

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

“…many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.”

“Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity.”

“a question of law … may be compatible with a reasonableness standard where the two above factors [privative clause; expertise] so indicate”

_Smith v. Alliance Pipeline, 2011 SCC 7:_

“categories identified by _Dunsmuir_”:

- “home statute” interpretation
- fact, discretion, policy

- constitutional issue
- general question of law of central importance outside specialized expertise
- jurisdictional lines between tribunals
- true questions of jurisdiction

_Categorical Approach:_

Presumption of reasonableness for “home statute” interpretation regardless of tribunal’s expertise, privative clause or reasons.

- _Alberta Teachers’ Association, 2011 SCC 61_

Presumption may be rebutted based on a “contextual analysis”.
- _McLean, 2013 SCC 67_

_e.g._:  
- Concurrent originating jurisdiction
  - _Rogers, 2012 SCC 35; CBC v. SODRAC, 2015 SCC 57_
- Special appeal provisions
  - _Tervita, 2015 SCC 3_

- dismissal of non-unionized federal employee without cause
- can employer dismiss without cause justly (severance package)?

Determining the Standard

- Federal Court of Appeal, per Stratas JA, 2015 FCA 17
  - “persistent discord” on interpretations
  - Dunsmuir: rule of law vs. Parliamentary supremacy
  - Long-standing disagreement: rule of law predominates
  - Court must “act as a tie-breaker”
  - “question of law of central importance…”
  - If reasonableness, narrow “margin of appreciation”

- Abella J.:
  - Reasonableness standard for labour adjudicators
  - Even if “handful of adjudicators” reached different interpretation
  - Obiter: proposal – “to start a conversation”
  - Only one standard – always reasonableness
  - Even where range of reasonable outcomes limited to single conclusion
  - Dunsmuir:
    - Reasonableness applies when range of outcomes
    - Correctness applies when only single answer available
    - Dunsmuir applied this standard to:
      - constitutional questions regarding division of powers;
      - true questions of jurisdiction
      - central importance to legal system outside expertise
      - jurisdictional lines between tribunals
  - Maybe Dunsmuir didn’t go far enough
    - Move from two standards to one: all reasonableness
    - “Rare” occasions – only one defensible outcome, either with question of law,
      or four categories identified in Dunsmuir “based on rule of law principles”

- McLachlin CJ, Karakatsanis, Wagner, Gascon JJ.:
  - Agree on reasonableness and outcome
  - Unnecessary to address rest, not yet prepared to endorse any particular proposal.

- Cromwell J.:
  - Agree on reasonableness and outcome
  - Standard of review does not need an overhaul

- Côté and Brown JJ. (+ Moldaver J.):
  - Correctness should apply given conflict in law
  - “To conclude otherwise would abandon rule of law values in favour of indiscriminate deference to the administrative state.”
  - “One law for all”, even where “one conflicting but reasonable decision”
Applying Reasonableness

Stratas JA.:
- Even if reasonableness applies, interpretation of Canada Labour Code requires little specialized labour insight
- Narrow “margin of appreciation”

Abella J. (and Cromwell J.):
- “margin of appreciation” not helpful
- “to attempt to calibrate reasonableness by applying a potentially indeterminate number of varying degrees of deference within it, unduly complicates an area of law in need of greater simplicity”
- “range of reasonable outcomes” can be wider for those issues given deference, narrower range of only one outcome for those which formerly attracted correctness
- Code does not permit dismissal without cause
- “The alternative approach … falls outside the range of ‘possible, acceptable outcomes which are defensible in respect of the facts and law’ because it completely undermines this purpose [of the Code]”

Côté and Brown JJ.:
- Correctness
- Disagreed on meaning of Code – appears to think majority not just incorrect but unreasonable
III. *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47*

- Appeal from property assessment: can Assessment Review Board increase assessment? Implicit decision that it could
- Right of appeal to ABQB with leave

**Determining the Standard**

- Alberta Court of Appeal, *per* Slatter JA, 2015 ABCA 85:
  - several values in standard of review analysis: maintaining integrity of system of administrative justice, but also *rule of law* and legislative intent
  - statutory regime may provide “compelling signals”
  - sophisticated legislatures know what they are doing; removed administrative appeal to Municipal Government Board in favour of ABQB; leave process: correctness

- Karakatsanis J. (+Abella, Cromwell, Wagner, Gascon JJ):
  - *Dunsmuir* balance: legislative supremacy and *rule of law*
  - Presumption of reasonableness on home statute: respects legislative supremacy and choice to delegate to tribunal; also fosters access to justice
  - Not rebutted by one of *Dunsmuir* “categories”
    - Not “true question of jurisdiction”: narrow
    - “Statutory right of appeal” is not a new category

- Karakatsanis J.:
  - Contextual analysis can generate uncertainty and endless litigation
  - “Unfortunately, clear legislative guidance on the standard of review is not common.”

- Côté and Brown JJ. (+ McLachlin CJ, Moldaver J.):
  - Aim = discern legislative intent, keeping in mind constitutional role of courts in maintaining *rule of law*
  - Contextual analysis
    - Right of appeal not new category, but legislative indicator
    - Return to *Dunsmuir*: “Despite the ‘attractive simplicity’ of the category-based approach, eschewing context in favour of categories is “seriously overbroad”
    - Nature of appeal right/lack of expertise point to correctness
  - Correctness

**Applying Reasonableness**

- Karakatsanis J.:
  - Defer to reasons “which could be offered”
  - Statutory interpretation analysis/application of interpretive principles
  - Alternative would frustrate the purpose of the Act
  - Board decision reasonable

- Côté and Brown JJ.:
  - Correctness review - similar statutory analysis, different outcome
  - Opposite conclusion would undermine legislative policy choice; allow circumvention of Act
• **IV. Alberta (Information and Privacy Comm.) v. University of Calgary, 2016 SCC 53**
  
  - Commissioner ordered production of documents for review of privilege claim.
  - Must produce “despite any privilege of the law of evidence”

  - Alberta Court of Appeal, *per* Brown JA, 2015 ABCA 118:
    - Privilege important to legal system as a whole
    - Question of law with no special expertise: “Indeed, neither the Commissioner nor her delegate need have any legal training”
    - Correctness

  **Determining the Standard**
  
  - Côté J. (+ Moldaver, Karakatsanis, Wagner, Gascon JJ):
    - Central importance to the legal system as a whole and outside Commissioner’s specialized area of expertise
    - Privilege is fundamental to legal system; constitutional dimensions
    - Wide implications on other statutes
    - Privilege traditionally adjudicated by the courts
    - Correctness for both interpretation (authority to require production) and decision to issue notice

  - Cromwell J.:
    - Assume correctness without deciding

  - Abella J.:
    - Other important legal questions (limitation periods; estoppel) have been reasonableness
    - Commissioner interpreting home statute
    - Not deciding all of privilege, only application in context of one provision
    - Within statutory mandate; within expertise
V. Other Key SCC Cases

*Commission scolaire de Laval v. Syndicat de l’enseignement de la région de Laval, 2016 SCC 8*
- Evidentiary issue/deliberative secrecy in grievance
- Quebec CA: correctness, since “central importance”
- Gascon J.: “central importance category” limited to situations detrimental to fundamental order – reasonableness
- Côté J.: correctness

*Canada (Attorney General) v. Igloo Vikski Inc., 2016 SCC 38*
- Hockey gloves: “gloves, mittens or mitts” or “articles of plastics” for *Customs Tariff* purposes (CITT)
- Brown J.: reasonableness “does not require perfection”
- Côté J.: reasonableness, but not “blind reverence”

*British Columbia (Workers’ Compensation Appeal Tribunal) v. Fraser Health Authority, 2016 SCC 25*
- Breast cancer cluster: “occupational disease”? 
- Scientific evidence, theoretical causes
- Côté J.: No evidence, let alone positive evidence of causation

“[C]ollapsing the three standards of review into two has not proven to be the runway to simplicity the Court had hoped it would be in *Dunsmuir.*”

Sketching the Boundaries: Active Adjudication as a Means of Enhancing Fairness in Tribunal Proceedings

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Sketching the Boundaries:  
Active Adjudication As a Means of Enhancing Fairness in Tribunal Proceedings

Brian Gover¹ and Pam Hrick²

Administrative justice is meant to be accessible. Legislators have made conscious decisions to divert certain categories of disputes from formal courtroom settings to administrative tribunals to provide more efficient means of resolution by expert decision-makers. The comparatively relaxed rules of procedure of many tribunals, combined with increasing numbers of self-represented participants in proceedings before them, have made tribunals a ripe ground for the adoption of active adjudication – that is, methods of adjudication that see the decision-maker take on a more interventionist role in proceedings than the traditional model of a passive judge.

In this paper, we explore the genesis of active adjudication, particularly in the context of issues raised by self-represented litigants in tribunal proceedings. We explain the considerations at play – namely, respecting procedural rights and avoiding appearances of bias – in determining whether and to what extent it is appropriate to engage in active adjudication. Finally, we provide an overview of situations where tribunals have succeeded and failed to stay in bounds in their efforts to enhance fairness and avoid the appearance of bias, followed by advice to practitioners on the steps to take where an adjudicator appears to have crossed a line. It is important to note that tribunals and courts are continuing to develop guidelines and precedents to establish the proper

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boundaries of active adjudication. What will be appropriate in any given situation will be largely driven by context.\textsuperscript{3}

\textbf{Setting the Scene}

The traditional system of courtroom adjudication is built on the premise of litigants, armed with skilled lawyers, engaging in adversarial combat before an impartial and largely passive judge, bound by strict procedural and evidentiary rules. It is trite to say that this system was not built to be navigated by a lay person. Nor is the role of the adjudicator in this system meant to be an interventionist one.

However, courts have come to acknowledge there are circumstances in which it is appropriate for judges to take a more active role in the proceedings over which they preside. For example, appellate courts have recognized that, in exercising their inherent authority to control the court’s process, trial judges may properly ask questions of witnesses to clarify issues and provide directions to the parties on the conduct of the proceedings.\textsuperscript{4} In other words, courts have determined that there is a role for active adjudication within the boundaries of even the traditional courtroom proceeding.

The general nature and purposes of administrative tribunals make them particularly fertile ground for employing methods of active adjudication. Legislatures have signalled their intent to remove disputes from the strictures of traditional courtroom settings to facilitate more expedient and user-

\textsuperscript{3} In preparing this conference paper, the authors have had the benefit of reviewing comprehensive articles on active adjudication and, in particular, commend the following to those who desire a more in-depth discussion of the issues explored here: Freya Kristjanson and Sharon Naipaul, “Active Adjudication or Entering the Arena?: How Much is Too Much?” (2011) 24 Can. Journal of Admin. Law & Practice 201; Michelle Flaherty, “Best Practices in Active Adjudication” (2015) Working Paper Series WP 2015-23, University of Ottawa (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2631175).

\textsuperscript{4} See, e.g., Chippewas of Mnjikaning First Nation v. Ontario (Minister Responsible of Native Affairs), 2010 ONCA 47 at paras. 231-233 (“Chippewas”).
friendly resolution processes, often overseen by those with subject-matter expertise. This legislative intent is sometimes quite overt. For example, the Ontario legislature has expressly imbued the Human Rights Tribunal of Ontario with the power to make rules governing the practice and procedure before it, including “authoriz[ing] the Tribunal to conduct examinations in chief or cross-examinations of a witness” and to “define or narrow the issues required to dispose of an application and limit the evidence and submissions of the parties on such issues.”

Engaging in active adjudication is one means by which administrative tribunals can further the intent of the legislature in enhancing efficient, fair, and user-friendly dispute resolution.

The practical realities of present-day administrative tribunal proceedings provide further impetus for adjudicators to employ methods of active adjudication. Many litigants appearing before tribunals are unrepresented and unfamiliar with the applicable rules of procedure. The lack of familiarity with the rules and absence of formal legal training can put them at an inherent disadvantage in being able to obtain a fair hearing. These factors can also lead to unnecessary delays in hearings. As such, it has become desirable and even necessary for adjudicators to take a more proactive and interventionist approach to conducting proceedings in order to enhance procedural fairness, access to justice, and efficiency. Indeed, a 2012 Ontario Human Rights Review report actually called for the Human Rights Tribunal to “make greater efforts to promote active adjudication at its hearings.”

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5 Human Rights Code, R.S.O. 1990, c. H. 19, ss. 43(1), 43(3)(b)(i) and 43(3)(c). See also the Human Rights Tribunal of Ontario’s Rules of Procedure, Rule 1.7, which gives broad and interventionist powers to the Tribunal concerning the conduct of proceedings.

6 Human Rights Tribunal of Ontario/SJTO Vice-Chair Brian Cook notes that adjudicators are often faced with under-represented and, increasingly, self-represented parties. Adjudicators before the HRT are typically faced with an unrepresented applicant and a respondent represented by counsel: Brian Cook, “Active Adjudication: What Steve Jobs and Chivalrous Knights can tell us about Adjudication”, Presentation to SOAR Conference, 2015.

ensuring the outcome of a case turns on its merits, rather than the parties’ relative ability to navigate the tribunal system.  

In this broad context, many tribunals have made the conscious decision to engage in active adjudication. The appropriate extent and means of intervening in a given proceeding is subject to specific considerations.

**Enhancing Fairness While Avoiding the Appearance of Bias**

The general tenets of procedural fairness in administrative proceedings are well-established. Statutes (such as the *Human Rights Code*), rules of procedure, and common law (including the classic contextual factors set out in *Baker*[^10]) all come to bear in assessing the level of procedural protections owed to litigants in a given matter. Recently, the Supreme Court reaffirmed the principle of proportionality to which regard must also be had determining the appropriate procedures for adjudication. Though made in the context of civil summary judgment motions, the comments of the court remain apt in the administrative justice context:

> A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible – proportionate, timely and affordable … If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.^[12]

[^8]: Flaherty at 8.
[^9]: See, *e.g.* the Ontario Social Benefits Tribunal (*1505-04929 (Re)*, 2016 ONSBT 1043), the Human Rights Tribunal of Ontario (*Kassir v. Del Property Management Inc.*, 2017 HRTO 149) and the Ontario Landlord and Tenant Board (*TST-45943-13-RV (Re)*, 2015 CanLII 69353 (ONLTB)).
[^12]: *Hryniak* at paras. 28-29.
Taking all of these factors into consideration, there may be a broad scope for adjudicative intervention in a particular proceeding. When engaging in active adjudication in order to enhance the fairness of a proceeding for one litigant, adjudicators must, of course, ensure that they are appropriately respectful of the procedural rights of the adverse party. For example, an adjudicator may, at the outset of a human rights proceeding, properly provide an overview to a self-represented litigant of the process that will be followed during the hearing, as well as guidance on when and in what manner it is appropriate for the litigant to raise concerns during the process. The adjudicator might also intervene in or add to a litigant’s questioning of a witness, encouraging the questioner to focus on issues that are relevant to the hearing or even posing questions directly to the witness in order to elicit facts that are relevant to a legal determination the adjudicator must make.

In other settings, however, the levels of procedural protections and formalities required in a proceeding may call for the adjudicator to assume a more traditional, passive role. For example, in a professional discipline hearing, where an individual’s reputation and livelihood are at stake, standards of adjudicative conduct approximating those in criminal proceedings apply, rendering active adjudication less appropriate.\(^\text{13}\)

The methods and manner of active adjudication are limited by the requirement to avoid the appearance of bias – an essential component of procedural fairness. The Ontario Court of Appeal has adopted the well-known test for reasonable apprehension of bias in assessing the intervention of adjudicators in administrative proceedings:

\[
\text{[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the}
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required information … [T]hat test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

The test is a fact-specific, objective one and the threshold is high, as there is a strong presumption in favour of the impartiality of an adjudicative decision-maker. A real likelihood or probability of bias must be demonstrated. Addressing the specific issue of adjudicative interventions, the court stated:

… the trial record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated occurrences, from the perspective of a reasonable observer throughout the trial … Isolated expressions of impatience or annoyance by a judge as a result of frustrations … do not of themselves create unfairness … [T]here are many proper reasons why a trial judge may intervene by making comments, giving directions or asking questions during the course of a trial. A trial judge has an inherent authority to control the court’s process and, in exercising that authority, a trial judge will often be required to intervene in the proceedings.

The Court of Appeal further noted that these comments were apposite in the context of administrative proceedings.

In summary, while active adjudication has the potential to enhance the fairness and accessibility of administrative proceedings, one must consider the level of procedural fairness owed in a given proceeding, as well as the requirements of impartiality, in determining whether and to what extent it is appropriate to actively adjudicate a dispute. The application of these broader principles will

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15 CCBC at paras. 24, 25 and 27.

16 CCBC at paras. 25-26, citing Chippewas at paras. 230, 231 and 243.
vary depending on whether proceedings are adversarial and the extent to which they can be characterized as “quasi-judicial.”

Sketching the Boundaries

While courts and tribunals are continuing to work out the boundaries of appropriate adjudicative intervention, a number of decided case provide guidance on the methods of active adjudication that will and will not be acceptable in a particular context.

The Divisional Court decision in Children’s Aid Society of the United Counties of Stormont, Dundas and Glengarry v. S.V.D. (“CAS”) gives helpful guidance by demonstrating what is not acceptable. This case involved two competing adoption plans by two foster families, one of which was supported by the Children’s Aid Society (“Society”), while the other was not. The Child and Family Services Review Board (the “Board”) made two related decisions reviewing determinations made by the Society. The result of the Board’s decision favoured one family, the Ds. Before the Board, the Ds were self-represented; the other family, the Cs, had counsel. Both Board decisions were judicially reviewed – one by the Society, the other by Cs – based on submissions that the conduct of the hearing gave rise to a reasonable apprehension of bias. Interestingly, the Ds specifically submitted to the Divisional Court that they “were self-represented [before the Board] and … that their limited cross-examination skills meant that the Board had to participate to the extent it did, failing which the hearing would have taken longer and/or the Board would not have had all the pertinent information it required to reach its decision.”

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17 Kristjanson and Naipaul, supra, at 207.
19 CAS at para. 24.
The Divisional Court applied the test for reasonable apprehension of bias set out in *Committee for Justice & Liberty* and concluded that the applicants had demonstrated a reasonable apprehension of bias against them, in particular because of the uneven treatment of the foster families by the Board, but also because of the Chair’s treatment of certain witnesses. The Chair had engaged in particularly aggressive questioning of Mr. C that was “in the nature of cross-examination.” On a slim evidentiary record that suggested physical misconduct and abuse of alcohol had ceased two decades earlier, the Chair openly expressed her scepticism of Mr. C, asking questions like “So you’re saying you forgot that you have a separation with your spouse and your children” and “When did you stop drinking? Or did you ever actually completely stop?” Further, the Ds’ cross-examination of Mr. C occupied approximately one day and was lengthy, detailed and broad-ranging. The Court noted, “[a]t its conclusion the Chair asked Mr. C questions which occupy 42 pages in the transcript. These questions were not by way of clarification or to expand on his evidence already given…Unfortunately during the course of this questioning the Chair appears to have assumed the role of a litigant, adverse in interest to Mr. C.”

The Chair also “entered the fray” in questioning the Society’s social worker, “in effect cross-examining her” and “questioning the witness’s credibility and the reliability of her note-taking.” By way of example, the Chair engaged in the following line of questioning:

**THE CHAIR:** And this is the entirety of the notes you made during that meeting?
**THE WITNESS:** Yes.
**THE CHAIR:** And you remember telling me the other day when you were testifying that you wrote everything in your case note that was being said?
**THE WITNESS:** In the doctors appointments.
**THE CHAIR:** So this was everything that was said in that doctor appointment?
**THE WITNESS:** There’s a – that one has a – there is a typed case note of that.

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20 *CAS* at paras. 41-42.
21 *CAS* at para. 43.
22 *CAS* at paras. 84-85.
THE CHAIR: But that’s the one when you were at the appointment?

THE WITNESS: For the handwritten one and then there is a typed one that reflects all of the information.

THE CHAIR: So when you’re at the appointment, you just jot down notes. So the typed ones are not a transcript of your handwritten notes, it’s what you think you remember with the help of your handwritten notes?

THE WITNESS: Yes.

THE CHAIR: Okay. Thank you. Excuse us for a second. 23

At the same time, the Chair applied a clearly more generous attitude with its own witness, who was also a Society worker. Even with that witness, however, the Chair went beyond the boundaries of permissible questioning. She took the “unusual step” of conducting the witness’s examination in chief – during which she occasionally led the witness – for 33 pages in the transcript prior to turning her over to be questioned by the parties. 24

The Chair also attempted to force certain witnesses to answer compound questions that were with a “yes, no or I don’t know” response. The court specifically stated that “[a] witness should not be limited to answer this type of question” in such a manner. 25

While recognizing that “[w]hen one party is self-represented, balancing trial efficiency and effectiveness with an appearance of independence and impartiality can be truly challenging”, the Court stated that a neutral adjudicator – even one with a fact-finding obligation to a child – must fulfill her obligations “without losing [the] appearance of neutrality as between the parties.” 26

Further, “[i]f after attempting other measures the Board still required clarification on some issues, it ought to have confined itself to short, simple, open-ended questions.” 27

23 CAS at para. 84.

24 CAS at para. 108.

25 CAS at para. 88.


27 CAS at para. 95.
Ultimately, in this case, the Board’s conduct met the high threshold for establishing a reasonable apprehension of bias. The Court concluded:

The cumulative impact of the repeated forays by the Chair into the fray created the appearance that she had aligned herself with the [Ds] while the hearing was in process. No matter how well intentioned her interventions, this created the appearance that she was not impartial as between the parties. These were not isolated occurrences. Uneven treatment of witnesses, overlooking evidence favourable to the Society and the C.s, lengthy interventions in questioning, cross-examination of key witnesses, and challenging witnesses as to their testimony occurred throughout the hearing. In my view an informed person would more likely than not conclude that the decision maker would, and here the submission is unconsciously, not decide the case fairly. 28

The Board applied this decision in determining a subsequent recusal motion in a separate case, Appellant v. Respondent School Board (Education Act s. 311.7). 29 That case dealt with a hearing concerning a student’s expulsion from a school. Though the reason for potential expulsion is not expressly stated in the decision, one can infer it relates to allegations of non-consensual sale of intimate photos of a young female student. The respondent school board brought a motion seeking the recusal of the two-member panel of the Board on the basis of the panel’s questioning of certain witnesses – specifically the emotionally vulnerable victim.

The panel directed itself to the test in Committee for Justice & Liberty and ultimately dismissed the motion. The panel had taken time to explain to the victim-witness the steps that would occur so she understood the expectations of the hearing. Following examination in chief and cross-examination, the panel put to her eight short questions that were required to clarify some parts of her testimony and reconcile some contradictions with the testimony of previous witnesses:

1. Who did you send pictures to?
2. Were they different pictures to each boy at different times?

28 CAS at para. 128.
3. The pictures the pupil was selling, did he get them from these three boys?
4. Are the three boys in your school now?
5. When you shared the pictures with the three boys, did you have an agreement with them they would not share them?
6. Is there more than those three pictures of you circulating?
7. How come you are mad at [the pupil] but not upset or mad at the other three boys?
8. What was the bigger issue for you, that someone had pictures of you or that someone sold the pictures?

The panel noted that they had excused themselves to discuss the last two questions before posing them, in order to ensure their appropriateness and to consult with one another about wording.\textsuperscript{30} Further, these questions did not stray beyond the relevant issues in the proceeding.

In deciding the motion, the panel referred specifically to the Divisional Court’s guidance in \textit{CAS}, that “where a panel must question witnesses to obtain clarifications still required, it should confine ‘itself to short, simple, open-ended questions.’”\textsuperscript{31} The panel here “took care to confine its questions to very specific areas that were left vague from both examination in chief and cross examination by the parties and, when additional questions were required, they were brief, simple, open-ended and were asked in a calm and soothing tone.”\textsuperscript{32} In other words, they fell within the boundaries of appropriate methods of active adjudication.

A final example of guidance on the demarcations of these boundaries is the Divisional Court’s decision in \textit{Paul v. Wollen}, an appeal from the Landlord and Tenant Board.\textsuperscript{33} One of the landlord’s grounds of appeal was that the Board had breached its duty of procedural fairness to the landlord by intervening in the questioning of witnesses. The Court examined the transcript of the proceeding “as a whole” and held that it did not support a finding that the landlord was denied procedural fairness.

\textsuperscript{30} \textit{Appellant} at paras. 23-24.
\textsuperscript{31} \textit{Appellant} at para. 45, citing \textit{CAS} at para. 94.
\textsuperscript{32} \textit{Appellant} at para. 46.
\textsuperscript{33} \textit{Paul v. Wollen}, 2015 ONSC 1458.
fairness. This particular hearing involved self-represented parties and parties that were represented by non-lawyers. All tended to ask inappropriate questions, including leading questions during examination-in-chief. In dismissing the appeal, the Court stated:

… the presiding Member of the Board tried hard to guide the parties towards the relevant issues in dispute, to explain the law where necessary and to explain the hearing procedure, often by way of example. While the presiding Member was an active adjudicator asking questions of witnesses, in our opinion, the transcript reveals that the presiding Member gave due concern to the procedural rights of both parties and was careful to ensure that both sides had the opportunity to give evidence and test the evidence of the other party.  

From these and other cases, as well as commentary from academics and practitioners, the following general guidance can be drawn regarding appropriate methods of active adjudication:

- An adjudicator’s questioning of a witness should be open ended and avoid descending into cross-examination;  
- Wherever possible, intervention concerning the questioning of a witness should be reserved until the witness’s testimony is at an end;  
- It is appropriate for an adjudicator to intervene in questioning a witness for the purpose of clarifying evidence;  

34 Paul at para. 6.
35 CAS; Solicitor X.
36 Chanachowicz v. Winona Wood Limited, 2016 ONSC 160 at para. 64, citing Chippewas at para. 237; Appellant.
• An adjudicator must be careful to be even in his or her treatment and questioning of witnesses for all parties to the proceeding;\(^{38}\)

• Where possible, an adjudicator should seek to obtain consent to certain methods of active adjudication, as this can facilitate hearing management and allow the adjudicator to better develop strategies in line with the parties’ needs;\(^{39}\) and,

• Adjudicators should, as a best practice, ensure the parties understand the procedure to be followed in a hearing and have an opportunity to ask questions about it.\(^{40}\)

Of course, what will be appropriate in any given proceeding is context-specific. The adjudicator must maintain respect and civility throughout a proceeding, preserving his or her neutrality and acting with restraint.

In all cases, however, litigants are well-advised to object at the first possible instance to actions of an adjudicator that they feel infringe on their procedural rights, including by giving rise to a reasonable apprehension of bias. In many cases, and in accordance with well-established jurisprudence, a failure to object may be viewed as waiving one’s right to raise the issue at a later time. However, at least one court has recognized that the failure of a self-represented litigant to object immediately does not constitute a waiver where the litigant did not know he or she could raise the issue before the tribunal and did, in fact, raise it at the first opportunity in ensuing court proceedings.\(^{41}\) Nonetheless, counsel are almost invariably expected to know the lay of the land

\(^{38}\) CAS; Chippewas at para. 231: adjudicators and judges “may need to ask questions of witnesses, but if they do they have to use care not to create the impression of having adopted a position on the facts, issues or credibility.”

\(^{39}\) Flaherty at 20.


\(^{41}\) CCBC at paras. 51-56.
and risk being denied the opportunity to complain of unfair behaviour down the road if they fail to object to it at the time it occurs.

**Conclusion**

While the appropriate boundaries for methods of active adjudication continue to be fleshed out, consideration of procedural fairness owed to litigants and the necessity of avoiding appearances of bias will always come to bear in determining the conduct in which a tribunal should engage. Properly executed, active adjudication will continue to provide a significant means to enhance fairness, efficiency, and access to justice in tribunal decision-making.
The Nature of the Integrity Commissioner Investigative Function

Janet Leiper, C.S.
Barrister and Solicitor

March 1, 2017
The Nature of the Integrity Commissioner Investigative Function

Janet Leiper, C.S.

Six Minutes—Three Ideas

▸ Context

▸ Foundations: Legislation, Codes and Policies

▸ Process Powers and Responsibilities

Context

Nature of the Role

An Integrity Commissioner provides advice and education to Members of Council under Codes of Conduct and enforces Codes of Conduct at the municipal level.

The investigative function arises from the enforcement piece—involves inquiring into formal complaints and reporting to Council on recommended sanctions or remedial action.

The Foundations: Legislation, Codes and Policies

The Municipal Act and the Public Inquiries Act, 2009

Legislative Timeline

January 1, 2007: The Municipal Act, 2001 allows for the establishment of Integrity Commissioners by municipalities.


December 15, 2009: Municipal Act, 2001 amended to permit Integrity Commissioners to exercise the powers under sections 33 and 34 of the Public Inquiries Act, 2009.
Municipal Act: Independence

Integrity Commissioner
223.3 (1) Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an Integrity Commissioner who reports to council and who is responsible for performing in an independent manner the functions assigned by the municipality with respect to,

a) The application of the code of conduct for members of council and the code of conduct for members of local boards or of either of them;

b) The application of any procedures, rules and policies of the municipality and local boards governing the ethical behaviour of members of council and of local boards or of either of them; or

c) Both of clauses (a) or (b)
(Emphasis added)

City of Toronto: Foundation Pieces

- The Code of Conduct: Principles and Rules for Councillor Conduct—Sanctions and Remedial responses
- The Complaint Protocol: Jurisdiction, Timing, Reporting, Classification, Referral, Complaint Processing and Resolution
- Toronto Municipal Code: Chapter 3: selection, office staff, audit, appointment, removal, resignation, independence, accountability

Recent Judicial Consideration of the Role

- Integrity Commissioner given deference on review in his/her interpretation of Code of Conduct and Complaint Protocol (“home statutes”); judicial review applies the lens of the “statutory scheme”

- Clarification of jurisdiction over complaints that involve allegations of criminal conduct

- Disclosure of every aspect of the investigation to subject is not required, not required to disclose witnesses or provide documents obtained: Baker factors apply to question of meaningful right to respond to complaints;

- Expression of judicial reluctance to review a decision by an Integrity Commissioner to commence an investigation

Michael Di Biase v. City of Vaughan, Integrity Commissioner City of Vaughan 2016 ONSC 5620

“The detailed manner in which the Divisional Court effectively dispensed with each and every allegation of impropriety and error made against the Integrity Commissioner in Di Biase v. City
of Vaughan should send a strong signal that municipal codes of conduct, complaint protocols, Integrity Commissioners and their investigation processes will be given a status commensurate with their importance within the municipal ethical and accountability framework.”

“Municipal Codes of Conduct, Integrity Commissioners and the Investigative Process” 7
D.M.P.L. Mascarin & Dean

Process Powers and Responsibilities

- **Municipal Act**: Cooperation from the Municipality
- **Public Inquiries Act**: Summons Powers, Evidence Under Oath
- Code of Conduct: Anti-reprisal, obstruction
- Complaint Protocol: Opportunity to Comment
- Investigative Best Practices
  - Neutrality and Administrative Fairness
  - Clarity on jurisdiction, role, tools, framework, time constraints
  - Functional Investigative Attitude: “flexible, curious, courteous”
  - Use of Chronology and Case Management tools

Cooperation by the Municipality: 233.4(4) **Municipal Act, 2001**

“The Commissioner is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by the municipality or a local board that the Commissioner believes to be necessary for an inquiry”

Balancing Confidentiality with Transparency

- Commissioner required to “preserve secrecy’ with respect to matters under the provisions dealing with inquiries (223.5(1))
- Commissioner may disclose (in reports of contraventions of the Code) such “matters as in the Commissioner’s opinion are necessary for the purposes of the report (223.6(2))
- Integrity Commissioner reports must be made available to the public (223.6(3))
Further Details

Section 223.4 Municipal Act

Inquiry by Commissioner
223.4 (1) This section applies if the Commissioner conducts an inquiry under this Part,
(a) in respect of a request made by council, a member of council or a member of the public
about whether a member of council or of a local board has contravened the code of conduct
applicable to the member; or
(b) in respect of a request made by a local board or a member of a local board about whether
a member of the local board has contravened the code of conduct applicable to the member.
2006, c. 32, Sched. A, s. 98.

Powers on inquiry
(2) The Commissioner may elect to exercise the powers under sections 33 and 34 of the
Public Inquiries Act, 2009, in which case those sections apply to the inquiry. 2009, c. 33,
Sched. 6, s. 72 (1).

Municipal Act: 223.4(2) - Powers on Inquiry

(2) The Commissioner may elect to exercise the powers under sections 33 and 34 of the
Public Inquiries Act, 2009, in which case those sections apply to the inquiry.

What is an Inquiry?
- Inquiry means “a determination, examination, hearing, inquiry, investigation, review or
  other activity to which this section is applicable;” (Section 33, Public Inquiries Act, 2009)
- Inquiry includes an inquiry or other activity to which this section is applicable. (Section 34,
  Public Inquiries Act, 2009)

Legal Application: From Section 33 of the Public Inquiries Act, 2009
- Section 33 applies “where another Act or a regulation confers on a person or body the
  power to conduct an inquiry in accordance with this section or certain provisions of this
  section.”
- Section 34 applies to “an inquiry conducted under subsections 223.4 (2) and 223.12 (2) of
  the Municipal Act, 2001;”
The Powers on Inquiries: Sections 33 and 34, *PIA*

- **Section 33**
  - Summons witnesses
  - Summons documents
  - Evidence under oath
  - Witness protection (CEA)
  - Admissibility of unsworn evidence
  - Stated case for contempt
  - Objections
  - No employee discipline

*Conjunctive?*

- **Section 34**
  - Public inquiry section
  - Notice provisions
  - Ability to hold portions not in public
  - Direction over process
  - Ability to state a case

*Disjunctive?*
CASE LAW

Michael Di Biase v City of Vaughan; Integrity Commissioner of the City of Vaughan, 2016 ONSC 5620 (CanLII)

Date: 2016-09-19
Docket: 309/15 JR
Citation: Michael Di Biase v City of Vaughan; Integrity Commissioner of the City of Vaughan, 2016 ONSC 5620 (CanLII)

LINK: <http://canlii.ca/t/gtqtf>
MUNICIPAL CODES OF CONDUCT, INTEGRITY COMMISSIONERS AND THE INVESTIGATIVE PROCESS

by John Mascarin & Laura Dean

Introduction

The Ontario Divisional Court recently released a decision concerning the powers afforded to Integrity Commissioners under Part V.1 of the Municipal Act, 2001 which provides some much-needed clarification as to the roles of such accountability officers and, particularly, the scope of their investigative authority and discretion under the statute. Municipalities should be paying very close attention to this decision given indications from the province that mandatory codes of conduct and Integrity Commissioners may very well be forthcoming for all municipalities in Ontario.

In Di Biase v. Vaughan (City), the Divisional Court considered a judicial review application brought by Michael Di Biase, the Deputy Mayor and Regional Councillor (the “applicant”) for the City of Vaughan (the “City”), in which he sought to quash a final report submitted by the City’s duly-appointed Integrity Commissioner, Suzanne Craig, as well as the City council’s decision to accept the report and its recommendations (including the imposition of the harshest penalty permitted at law for breaching a municipal code of conduct).

The application, filed in January, 2016, alleged that the Integrity Commissioner and the City denied the applicant natural justice and breached procedural fairness by relying on a non-transparent investigation process. The Divisional Court ultimately determined that there was no merit in any of the applicant’s numerous submissions and accordingly dismissed

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2There have been rumblings that forthcoming legislative amendments to the Municipal Act, 2001 may include mandatory requirements that all municipalities establish codes of conduct and appoint Integrity Commissioners to enforce them. On June 14, 2016, days after announcing his resignation from Cabinet, former Minister of Municipal Affairs and Housing, Ted McMeekin, spoke at the AMCTO 2016 Annual Conference, expressing his expectation that codes of conduct would be required for all municipalities. On August 18, 2016, current Minister of Municipal Affairs and Housing, Bill Mauro, addressed the Annual AMO Conference in Windsor and echoed the need for a stronger accountability framework, although he stopped short of stating that there would be a mandated requirement that all municipalities have codes of conduct.

3Di Biase v. Vaughan (City); Integrity Commissioner of the City of Vaughan (2016), 2016 ONSC 5620, 2016 CarswellOnt 14568 (Ont. Div. Ct.).

the application against both the City and the Integrity Commissioner.\(^5\)

While there have been some recent cases\(^6\) (some more well-known than others) that have considered municipal codes of conduct and Integrity Commissioner reports, *Di Biase v. Vaughan (City)* is the first time a judicial review application has been decided concerning an Integrity Commissioner’s investigation and report.

**Background**

In December, 2014, the City’s Integrity Commissioner, Suzanne Craig, received a complaint filed pursuant to the City’s Complaint Protocol, alleging that the applicant had violated the municipality’s “Code of Ethical Conduct for Members of Council” (the “Code of Conduct”).\(^7\) The complaint alleged that the applicant had received a benefit from a named contractor, had assisted the contractor in various attempts to obtain City business and had voted improperly on matters before the City council.\(^8\)

After receiving the complaint, the Integrity Commissioner forwarded it to the applicant for a response. The applicant’s legal counsel responded with a number of assertions countering the allegations, including that the complainant was a disgruntled political rival who had been defeated by the applicant.

After considering this response, the Integrity Commissioner decided to investigate two allegations contained in the complaint, specifically, the applicant’s improper interference with the tendering process to assist the named contractor and the applicant’s various attempts to exercise influence to benefit the named contractor. The Integrity Commissioner found that the complaint alleging an improper relationship between the applicant and the named contractor was on its face an allegation of a criminal nature and, as a result, she referred the complainant to the appropriate police service pursuant to the Complaint Protocol.

Upon completing her initial investigation, the Integrity Commissioner made a number of preliminary findings with respect to the complaint including the preliminary finding that the applicant had interfered in the City’s procurement process in contravention of its procurement rules, had forwarded confidential procurement information to a private citizen after the prequalification process had ended and had applied inappropriate pressure on City staff with a view to exercising influence or assisting the named contractor with the business of the municipality.\(^9\) The Integrity Commissioner indicated that her preliminary finding was that the applicant had seriously undermined the Code of Conduct by his actions in both procurement matters and in his improper conduct with staff.

In addition to her findings with respect to the complaint, the Integrity Commissioner made a separate preliminary finding that the applicant violated a provision in the Code of Conduct which prohibited obstructing the Integrity Commissioner’s investigation and precluded threatening or undertaking reprisals against persons providing information during an investigation.\(^10\)

The Integrity Commissioner forwarded these preliminary findings to the applicant’s legal counsel for his comments and advised that her next step would be for her to report her findings to the City’s Committee of the Whole. The applicant’s legal counsel responded with a 7-page written response to the preliminary findings and advanced a number of accusations which are recited in the decision, including, among others, that the applicant was given insufficient time to respond and that the Integrity Commissioner had no juris-

\(^{5}\)The decision will not be appealed. “Di Biase said he was ‘quite disappointed not only in the result but also in the reasoning used by the court to reach their [sic] decision. I am disappointed that the court did not see the injustice in how my case was handled by the Integrity Commissioner,’ said Di Biase in a statement. ‘I did nothing wrong and had I been given a proper opportunity and all the necessary information to understand the full case against me, my innocence would have been demonstrated,’ he said, adding that he would not be appealing the decision.” Andrea Janus, *CBC News*, “Vaughan deputy mayor won’t appeal court decision upholding integrity commissioner’s sanctions” (September 22, 2016), online: http://www.cbc.ca/news/canada/toronto/michael-di-biase-judgment-1.3773541. See also Noor Javed, *The Toronto Star*, “Court sides with watchdog in battle against Vaughan deputy mayor” (September 21, 2016), online: https://www.thestar.com/news/gta/2016/09/21/court-sides-with-watchdog-in-battle-against-vaughan-deputy-mayor.html.


\(^{8}\)Earlier allegations regarding the applicant and the same contractor had been raised by the same complainant and led to a major story by CBC News respecting the construction of the applicant’s family cottage: see Zach Dubinsky, *CBC News*, “Vaughan Coun. Michael Di Biase’s cottage getting help from major city contractor, rival says” (October 24, 2014), online: http://www.cbc.ca/news/canada/toronto/vaughan-coun-michael-di-biase-s-cottage-getting-help-from-major-city-contractor-rival-says-1.2810808. In fact, quoted in the decision, the complainant requested that “the Integrity Commissioner use the CBC article as a basis for the investigation.”

\(^{9}\)Supra note 3 at paras. 52 and 54.

\(^{10}\)Ibid at para. 58.
diction to place a report before the Committee of the Whole because her mandate had expired.\footnote{Ibid at paras. 62-69. The applicant’s attempts to impeach the actions of the Integrity Commissioner are probably best demonstrated by the following passage in the Divisional Court’s ruling [at para. 75]: 

At the meeting of the Committee of the Whole, counsel for the applicant made an oral response to the Integrity Commissioner’s preliminary findings. Counsel spoke for the allotted five minutes, during which he said that the Integrity Commissioner: 

\begin{itemize}
  \item had conducted herself like a “Court of Star Chamber”;
  \item had been unfair from the outset of her investigation; and
  \item had made up her mind on the basis of allegations rather than evidence.
\end{itemize}

Finally, counsel asked the Committee of the Whole to reject the Integrity Commissioner’s Draft Report and give the entire matter to an independent person with an open mind.}{

The Integrity Commissioner submitted her draft report, without recommendations, before the Committee of the Whole approximately two weeks after sharing her preliminary findings with the applicant’s legal counsel. The Committee of the Whole moved to defer the entire matter to the next meeting of the City council.

The Integrity Commissioner’s final report\footnote{Suzanne Craig, Integrity Commissioner, “Code of Conduct Complaint #0114 Investigation Report in respect of Regional Councillor/Deputy Mayor Michael Di Biase” (April 17, 2015).} was ultimately unanimously accepted and endorsed by the City council which imposed the penalty she recommended - a suspension of pay for 90 days.\footnote{A suspension of pay for 90 days is the maximum penalty that may be recommended by an Integrity Commissioner and ultimately imposed pursuant to s. 223.4(5) of the \textit{Municipal Act, 2001}. There is precedent for such a severe penalty. In Toronto, former Integrity Commissioner Janet Leiper recommended a 90-day suspension of pay against Councillor Giorgio Mammoliti (Janet Leiper, “Integrity Commissioner Report on Violation of Code of Conduct: Councillor Mammoliti”, Report to Members of City of Toronto City Council, June 24, 2014) and, more recently, Sarnia Integrity Commissioner Robert Swayze recommended the same penalty be imposed upon Mayor Mike Bradley (Robert Swayze, “Code of Conduct Complaints Against Mayor Bradley from Nancy Wright-Laking, former City Clerk and Jane Cooper, former Planning Director”, Report to Mayor Bradley and Members of Sarnia City Council, June 28, 2016). This is reported to be the equivalent of approximately $20,000. See Andrea Jansus, \textit{CBC News}, “Vaughan deputy mayor won’t appeal court decision upholding integrity commissioner’s sanctions” (September 22, 2016), online: \url{http://www.cbc.ca/news/canada/toronto/michael-dibiase-judgment-1.3773541}.} Following City’s council’s decision, the applicant proceeded to bring an application for judicial review to quash both the Integrity Commissioner’s final report as well as the decision of the City council to accept the report and impose the recommended penalty. The three judge panel that heard the application was comprised of Justices Horkins, Varpio and Marrocco, the latter of whom delivered the decision on behalf of the Divisional Court.

It has been noted that, “[j]udicial review is the process by which the courts oversee administrative decision-makers to ensure that their decisions are legal and within their conferred powers.”\footnote{Tiffany Soucy, Ara Basmadjian, Paul Lomic, John O’Toole, \textit{Ontario Bar Association: Your First Judicial Review}, “Overview of the Judicial Review Process” (May 7, 2013).} Applications for judicial review may be brought, as in this case, when a party alleges that an administrative decision maker or public body has rendered a decision without observing the requisite standards of procedural fairness.

As will be discussed below, in addition to its consideration of the issues raised by the applicant on the judicial review application, the Divisional Court also reviewed and rejected the numerous objections made by the applicant’s legal counsel at each stage of the investigation process leading up to the council’s acceptance of the final report. The ruling is painstakingly thorough in dismissing each and every submission raised by the applicant (the decision is 235 paragraphs), and accordingly, this article will only refer to the Divisional Court’s consideration of those points which directly relate to the authority of the Integrity Commissioner.

\textbf{Statutory Scheme Governing the Integrity Commissioner}

One of the most important determinations made by the Divisional Court is articulated very early in the decision, that being the importance of reviewing the Integrity Commissioner’s investigation through the lens of the “statutory scheme.”

An Integrity Commissioner is a statutory officer created under the \textit{Municipal Act, 2001}.\footnote{\textit{Municipal Statute Law Amendment Act, 2006}, S.O. 2006, c. 32.} The statute was amended effective January 1, 2007, to add a new Part V.1, entitled “Accountability,”\footnote{\textit{City of Toronto Act, 2006}.} which imposed the penalty she recommended - a suspension of pay for 90 days.\footnote{\textit{The statute was amended effective January 1, 2007, to add a new Part V.1, entitled “Accountability and Transparency.” This Part was included in the \textit{Municipal Act, 2001} to mirror the accountability provisions that were placed into the \textit{City of Toronto Act, 2006}. These provisions were incorporated as a direct consequence of Justice Denise Bellamy’s report in the \textit{Commission of the Toronto Computer Leasing Inquiry, Toronto Computer Leasing Inquiry/Toronto External Contracts Inquiry} (the “Bel-}
The recommendations (contained in Volume 4 of the report) advocated for, among other things, an expanded code of conduct for municipal councillors and the hiring of a full-time integrity or ethics commissioner to report directly to the city council. The accountability and transparency provisions in the Municipal Act, 2001 are permissive (they are mandatory in the City of Toronto Act, 2006).

Part V.1 of the Municipal Act, 2001 authorizes municipal councils to establish codes of conduct for members of council and local boards and to appoint Integrity Commissioners. The statute does not prescribe the contents of a code of conduct, leaving it up to municipalities to determine the ethical standards that are to govern the actions and behaviour of councillors. Municipal codes of conduct generally govern a variety of matters, including gifts and benefits, confidential information, use of municipal property and resources, and improper use of influence.

An Integrity Commissioner is responsible for investigating and reporting on complaints regarding alleged breaches of the code of conduct by municipal councillors or local board members. An Integrity Commissioner reports to his or her appointing municipal council (or local board) and is responsible for “performing in an independent manner the functions assigned by the municipality” with respect to the application of a municipality’s code of conduct.

The Integrity Commissioner has significant powers to access information and documents in the course of an investigation. Subsection 223.4(3) of the Municipal Act, 2001 provides that “the municipality and its local boards shall give the Commissioner such information as the Commissioner believes to be necessary for an inquiry.” As part of this power, the Integrity Commissioner “is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by the municipality or a local board that the Commissioner believes to be necessary for an inquiry.”

Subsection 223.5(1) of the Municipal Act, 2001 imposes a statutory duty of confidentiality on the Integrity Commissioner and her staff requiring her to “preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties.”

If the Integrity Commissioner decides to report to the municipality (or to a local board) her opinion about whether a member of council or of the local board has contravened the applicable code of conduct, subsection 223.6(2) of the Municipal Act, 2001 permits the Integrity Commissioner to exercise her discretion to disclose in her report such matters she believes to be necessary.

If the Integrity Commissioner reports to the municipality that in her opinion the member has contravened the code of conduct, then the council of the municipality, if it accepts the report, may impose either a reprimand or a suspension of the remuneration paid to the member in respect of his or her services as a member of council for a period of up to 90 days.

Municipalities and local boards are required to make the Integrity Commissioner’s reports available to the public.

The Role of the Integrity Commissioner

The Municipal Act, 2001 does not explicitly describe the role of the Integrity Commissioner and prior to this decision, the Integrity Commissioner’s role had not been judicially considered. It is therefore noteworthy that the Divisional Court expressly adopted the following list from the Bellamy Report:

17Commission of the Toronto Computer Leasing Inquiry, Toronto Computer Leasing Inquiry/Toronto External Contracts Inquiry (Toronto: City of Toronto, 2005) (“Bellamy Report”). This commission was launched to investigate the circumstances surrounding the award and exercise of a $43-million contract for the leasing of IT equipment to the City of Toronto. The Bellamy Report contained a list of recommendations concerning the implementation of an accountability framework for the City of Toronto.

18Supra note 1, s. 223.2.

19Ibid, s. 223.3. A code of conduct cannot be enforced if an Integrity Commissioner has not been appointed with the authority to review and investigate complaints and make recommendations to the municipal council.

20Supra note 3 at para. 15.

21Supra note 1, s. 223.6.

22Ibid, s. 223.3. The independence of the office is of fundamental importance to the entire integrity of the ethical regime. Some municipalities have been very creative in at least partially subverting this independence by requiring that complaints be vetted and approved for investigation by the council or by the head of council. Some will contend that the Integrity Commissioner’s independence only commences once a proper complaint has been received by him or her.

23Ibid, s. 223.4(4). This is akin to the right of access an Auditor General and a municipal auditor have under sections 223.20(2) and 297, respectively, of the Municipal Act, 2001 to information held by a municipality.

24Ibid, s. 223.4(5). As noted by the Ontario Divisional Court in Magder v. Ford, supra note 6, a municipal council can only impose one of the two sanctions set out in s. 223.4(5) as a penalty for a council member’s contravention of a code of conduct. No other penalties or sanctions are permitted.

25Ibid, s. 223.6(3). The requirement for disclosure is express which appears to run counter to various decisions, orders and determinations of the Information and Privacy Commissioner regarding the protection of personal privacy arising from reports that disclose “wrongdoing” on the part of an individual, including an elected official: Order MO-1753 and Order PO-2225.
port, which articulates the purpose, role and function of an Integrity Commissioner:

- An integrity commissioner can help ensure consistency in applying the [municipality’s] code of conduct. Compliance with policy improves when everyone is seen to be held accountable under the same set of rules.
- Busy councillors and staff cannot be expected to track with precision the development of ethical norms. The Integrity Commissioner can therefore serve as an important source of ethical expertise.
- An Integrity Commissioner provides significant profile to ethical issues inside City government and sends an important message to constituents about the City’s commitment to ethical governance.
- No matter how comprehensive the rules, there will on occasion be situations where the ethical course of action is not clear and an individual will need authoritative advice and guidance.
- Without enforcement, the rules are only guidelines. Although research shows that a values-based approach to ethics policy, focusing on defining values and encouraging employee commitment, is preferable to a system of surveillance and punishment, where the public interest is involved, there should be a deterrent in the form of consequences for bad behavior. The rules must have teeth.26

As expressly enunciated in the Bellamy Report, and reiterated in the Divisional Court’s decision, an effective Integrity Commissioner system provides two basic services:

- An advisory service, to help councillors and staff who seek advice before they act.
- An investigative or enforcement service, to examine conduct alleged to be an ethical breach.27

The Divisional Court’s acceptance of the above principles will provide useful guidance for municipalities and Integrity Commissioners as they continue to navigate the still nascent landscape of municipal accountability regimes.

City of Vaughan’s Integrity Regime

The City’s council had established the Office of the Integrity Commissioner and the Code of Conduct, “to establish rules that guide Members of Council in performing their diverse roles in representing their constituents and recognize Members’ accountability for managing City resources allocated to them.”28

As is the case in a number of municipalities, the City had adopted, by by-law, a Complaint Protocol which set out the Integrity Commissioner’s process for receiving complaints, investigating and reporting her opinion to the City’s council. The Code of Conduct prohibited, among other things, the improper use of a member’s office to influence City affairs and City staff, the release of confidential information, and reprisals against staff - the grounds upon which the complaint was brought in this case.

Preliminary Issues

Before addressing the applicant’s submissions with respect to the Integrity Commissioner’s report and process, the Divisional Court dispensed with two important preliminary issues that arose during the course of the Integrity Commissioner’s investigation.

(i) Integrity Commissioner’s Decision to Investigate and Report

Following her investigation, the Integrity Commissioner forwarded her preliminary findings to the applicant’s counsel for comment. The applicant’s counsel responded by letter demanding, “copies of the submitted materials you reviewed at the beginning of your investigation that prompted you to interview 32 individuals and access the Regional Councillor’s server.”29

The Divisional Court held that the Integrity Commissioner properly refused this demand. Citing the City’s Complaint Protocol, it was found that the Integrity Commissioner was not compelled to release “every document, submitted by anyone, that causes the Integrity Commissioner to commence her investigation.”30 Further citing the Complaint Protocol, the Divisional Court found that the Integrity Commissioner was not required to identify witnesses nor provide documentation obtained from those individuals.31 This finding was made in light of the provisions of subsection 223.5 of the Municipal Act, 2001 which provides that the Integrity Commissioner “shall preserve secrecy with respect to all matters that come [within her] knowledge in the course of . . . her duties.” It was emphasized that the statutory scheme does not create any legitimate expectation that the person who is the subject of a code of conduct complaint will receive full dis-

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26 Supra note 17 at Volume 2, page 44.
27 Ibid at Volume 2, page 46.
28 Supra note 7.
29 Supra note 3 at para 27.
30 Ibid. at para. 29.
31 Ibid. at para. 128.
closure of all documentation obtained by an Integrity Commissioner.\textsuperscript{32}

The Divisional Court went on to confirm the broad power of the Integrity Commissioner to decide to commence an investigation, ultimately ruling that there was no basis for reviewing the Integrity Commissioner’s decision to investigate:

This Court will always be reluctant to permit judicial review of a decision by the Integrity Commissioner to commence an investigation. The decision to commence an investigation does not decide or prescribe the legal rights, powers, privileges, immunities, duties or liabilities of the Councillor who will be investigated. The decision to investigate does not decide whether the Councillor is eligible to receive or to continue to receive a benefit. Permitting judicial review of this class of decisions will inevitably result in two hearings instead of one.\textsuperscript{33}

\textbf{(ii) Reformulation of the Complaint}

When the Integrity Commissioner forwarded her preliminary findings to the applicant’s legal counsel for comment, her letter disclosed that she had reformulated the issues set out by the complainant into four allegations.

The Divisional Court confirmed that, in exercising the powers conferred upon her, the Integrity Commissioner was authorized to interpret and apply complaints submitted by members of the public, including reformulating the complaint.\textsuperscript{34} In this case it was held that, “by interpreting and applying the Code of Conduct and the Complaint Protocol when reformulating a complaint, the Integrity Commissioner essentially applies what can be considered her ‘home statute’.”\textsuperscript{35} Numerous decisions have held that determinations by a decision-maker concerning his or her home statute are to be reviewed on a standard of reasonableness. The Divisional Court found that the Integrity Commissioner’s decision to reformulate the complainant’s issue easily passed a reasonableness standard of review.\textsuperscript{36}

The Divisional Court’s recognition of the Code of Conduct and Complaint Protocol as the Integrity Commissioner’s “home statute” is significant from an administrative law perspective. This determination confirms that an Integrity Commissioner’s decisions made pursuant to this subordinate legislation are to be given deference and are therefore to be reviewed on the standard of reasonableness.

The Divisional Court’s ruling, that an Integrity Commissioner is empowered to reformulate complaints, will be of great assistance from an administrative point of view. Unlike the Municipal Conflict of Interest Act,\textsuperscript{37} which requires an elector to bring an application to a judge to determine whether a member of council or a local board has violated the statute, the code of conduct process under the Municipal Act, 2001, is initiated when a person submits a complaint to the Integrity Commissioner. Applications under the Municipal Conflict of Interest Act generally require an elector to hire legal counsel to articulate the elector’s allegations given that legal court proceedings must be undertaken to enforce the statute. However, because code of conduct complaints may be filed in a much less formal manner, they tend to be less exact, precise and coherent. The Divisional Court’s determination will ensure that a municipality’s code of conduct complaint process will remain accessible to all members of the public despite varied abilities to articulate complaints.

\textbf{Main Issues}

After considering the preliminary issues, the Divisional Court went on to consider the specific issues raised by the applicant.

\textbf{(i) Denial of Natural Justice / Procedural Fairness}

The applicant submitted that the Integrity Commissioner and the City denied him natural justice and breached procedural fairness by relying on a non-transparent investigation process.

The Divisional Court rejected this submission on the basis that the Integrity Commissioner’s report carefully set out the conduct she found to be of concern and described the various stages of her investigation as well as the documents she reviewed and considered.

The Divisional Court then canvassed the factors enumerated by the Supreme Court in \textit{Baker v. Canada (Minister of Citi-}

\textsuperscript{32}Ibid. at para 130. This is a fundamentally important determination because a contrary determination would have had a dire chilling effect on potential witnesses fully and frankly being willing to testify or even come forward to provide insight during an Integrity Commissioner’s investigation. Unlike a criminal proceeding which may carry significant penal consequences, including imprisonment, the range of penalties under the Municipal Act, 2001 are very scoped and limited.

\textsuperscript{33}Ibid. at para 37.

\textsuperscript{34}Ibid. at para 42.

\textsuperscript{35}Ibid. at para 43.

\textsuperscript{36}Ibid. at para 45. It is important to note that the Divisional Court fully considered the Integrity Commissioner’s detailed process and methodology in arriving at this determination. While a decision-maker may ultimately reach a decision that may be supported as being reasonable, the methodology employed in arriving at the decision is a vitally important element in considering the overall reasonableness of the decision.

\textsuperscript{37}Municipal Conflict of Interest Act, R.S.O. 1990, c. M.50.
zenship and Immigration)\(^{38}\) in considering the degree of participation to which the applicant should have been entitled during the investigation.\(^{39}\) In assessing these factors, the Divisional Court concluded that it was satisfied that the Integrity Commissioner exercised her discretion in a manner that properly balanced the applicant’s right to meaningfully respond to allegations in the complaint and the need to protect City staff who had cooperated in her investigation.

(ii) Lack of Jurisdiction Due to Expiry of Appointment

The applicant also argued a very technical point regarding the Integrity Commissioner’s appointment. He contended that because the Integrity Commissioner’s appointment expired during the course of her investigation, any actions taken after the expiry of her appointment were made without jurisdiction and as such, the City did not act lawfully in adopting and approving them.\(^{40}\) This argument was also rejected.

The Integrity Commissioner’s appointment expired on April 5, 2015. On April 13, 2015, the Committee of the Whole recommended that the Integrity Commissioner be re-appointed for a term coincident with the 2014-2018 term of the council and be retroactive to April 5, 2015. The City’s council subsequently approved this recommendation on April 21, 2015. The Divisional Court was satisfied that this retroactive appointment amounted to an approval of all work done by the Integrity Commissioner during the period when her appointment had expired.\(^{41}\)

(iii) Investigation Could Not Continue Until the Conclusion of the Police Investigation

As noted above, section 223.8 of the Municipal Act, 2001 requires the Integrity Commissioner to refer a matter to the appropriate authorities if there are reasonable grounds to believe that there has been a contravention of any other statute or of the Criminal Code\(^{42}\) and to suspend the inquiry until any resulting police investigation and charge have been finally disposed of. At the hearing of this matter, the applicant’s legal counsel argued that the Integrity Commissioner did not comply with section 223.8 because once she found something criminal, no part of her inquiry could continue until the conclusion of the police investigation. In rejecting this argument, the Divisional Court looked to the City’s Complaint Protocol which provided that:

6. (3)(a) If the complaint on its face is an allegation of a criminal nature consistent with the Criminal Code of Canada, the complainant shall be advised that if the complainant wishes to pursue any such allegation, the complainant must pursue it with the appropriate Police Service.

The Divisional Court also considered section 223.8 itself and found that neither provision states that once an Integrity Commissioner decides that an allegation in the Complaints Form is on its face criminal in nature, she must take no further action on any non-criminal complaints in the Complaints Form.

Accordingly, the Divisional Court determined that the Integrity Commissioner was authorized to continue to investigate redrafted allegations within the Complaint Form, which were not on their face “allegations of a criminal nature” unless or until her investigation revealed reasonable and probable grounds to believe that an offence had been committed.\(^{43}\)

It is not uncommon for code of conduct complaints to raise issues that may have Criminal Code implications and this decision clarifies the responsibility of the Integrity Commissioner in this regard.

(iv) Integrity Commissioner Should Have Referred Complainant to the Police

The complaint referenced some of the applicant’s private email communications. The applicant’s counsel argued that, having received copies of these emails, the Integrity Commissioner was, “on notice that she had an obligation in law to determine if the interception of private communications was lawful by determining whether there was consent or judicial authorization . . . [t]his knowledge, in turn required her to . . . report the matter to the police, and suspend any inquiry and notify Council of the suspension.”\(^{44}\)

The Divisional Court rejected the idea that the Integrity Commissioner had an “obligation in law” to determine if the interception of private communications was lawful and further stated:

If the Integrity Commissioner, upon receipt of the complaint, had immediately suspended any inquiry into the

\(^{38}\)Baker v. Canada (Minister of Citizenship and Immigration) (1999), 1999 CarswellNat 1124 (S.C.C.). The “Baker Factors” include: (i) The nature of the decision; (ii) The role of the decision within the statutory scheme; (iii) The importance of the decision to the individual affected; and (iv) The legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed.

\(^{39}\)For an excellent review of the “Baker Factors” and their application in the municipal context, reference should be had to George Tsakalis’ “When Municipal Council is an Administrative Tribunal” in 7 D.M.P.L. (2d) (January 2016), No. 13, 1-11.

\(^{40}\)Supra note 3 at para. 187.

\(^{41}\)Ibid. at para. 190.


\(^{43}\)Supra note 3 at para. 20.

\(^{44}\)Ibid. at para. 213.
complaint and called the police to investigate the complainant, her actions would have suggested that the City of Vaughan had no genuine interest in a robust complaints process.\(^{45}\)

**(v) Objection to the Seizure of Targeted Search of the Applicant’s City Email Account**

The applicant’s legal counsel further argued that neither the *Municipal Act, 2001* nor the Complaint Protocol permitted an examination of the applicant’s emails and that the targeted search conducted by the Integrity Commissioner was a breach of privacy.

In rejecting this argument, the Divisional Court cited the broad powers conferred on the Integrity Commissioner by section 223.4 of the *Municipal Act, 2001* to obtain information from the municipality in the course of her investigation, including the statutory right to free access to all documents and information within the municipality that the Integrity Commissioner believes necessary for an inquiry.

The Divisional Court also referred to the Complaint Protocol which provided:

10.(2) If necessary, after reviewing the submitted materials, the Integrity Commissioner may speak to anyone, access and examine any other documents or electronic materials and may enter any City work location relevant to the complaint for the purpose of investigation and potential resolution.\(^{46}\)

In consideration of the above, the Divisional Court found there was nothing procedurally unfair or illegal about the Integrity Commissioner’s targeted search of the applicant’s email address, hosted on the City’s computer systems.\(^{47}\)

Given that the applicant’s email address was hosted on the City’s computer systems and the emails copied were not “personal in nature,” the Divisional Court found there was no reason to view them as anything other than “property belonging to the Municipality.”\(^{48}\)

The Divisional Court further cited the Supreme Court of Canada’s decision in *R. v. Cole* where it recognized that although ownership of data is not determinative, an employee’s expectation of privacy in relation to information stored on employer’s equipment is diminished by the policies, practices, and customs of the workplace that relate to the use of computers by employees.\(^{49}\)

Given that, as a member of council, the applicant, agreed and consented to the procedures in the Complaint Protocol which confer broad investigative authority upon the Integrity Commissioner, the Divisional Court found that the applicant could not now complain about the targeted search of the email account provided to him for use as a councillor.\(^{50}\)

The Divisional Court’s finding that councillor emails may be accessed as part of an Integrity Commissioner’s investigation may be contrasted with the long-held position of the Information and Privacy Commissioner, that because councillors are not officers or employees of the municipality, their emails are not subject to disclosure under the *Municipal Freedom of Information and Protection of Privacy Act*.\(^{51}\) It is clear from this decision that the investigative powers granted to Integrity Commissioners for the purpose of code of conduct investigations are far greater than those afforded to municipal employees for the purpose of responding to requests under the statute.

**(vi) The City Erred in Law in Accepting the Final Report**

The Divisional Court’s ultimate ruling was that there was no merit in any of the applicant’s submissions. Accordingly, the applicant’s final contention that the City erred in law in accepting the Integrity Commissioner’s final report was easily dismissed.\(^{52}\)

**Conclusion**

The detailed manner in which the Divisional Court effectively dispensed with each and every allegation of impropriety and error made against the Integrity Commissioner in *Di Biase v. Vaughan (City)* should send a strong signal that municipal codes of conduct, complaint protocols, Integrity Commissioners and their investigation processes will be given a status commensurate with their importance within the municipal ethical and accountability framework.


\(^{46}\) *Ibid.* at para. 34.


\(^{48}\) *Ibid.* at para. 227. This is a very interesting determination by the Divisional Court which raises the whole issue of the supposed sanctity of “councillor records” as protected by the various rulings and orders of the Information and Privacy Commissioner of Ontario over the years (see John Mascarin, “Sheltering Councillor Records from Disclosure”, (2013) 6 D.M.P.L. (2d) (April 2013) No. 4, 1-7 and John Mascarin & Laura Dean, “Councillor Records and Disclosure - Same Old Analysis, Different Result”, (2016) 7 D.M.P.L. (2d) (June 2016), No. 18, 1-5).


\(^{50}\) *Supra* note 3 at para. 232.


\(^{52}\) *Supra* note 3 at para. 234.
At the time of this writing, approximately 80 municipalities in Ontario have appointed Integrity Commissioners (although the actual population of these municipalities covers a majority of the provincial population). For municipalities who have so far resisted the appointment of Integrity Commissioners due to uncertainties regarding the scope of their authority, this case confirms the broad powers they have to investigate and report on alleged violations of municipal codes of conduct.

The decision is of fundamental importance to the emerging law dealing with codes of conduct and Integrity Commissioner investigations and will provide important guidance going forward.

In particular, there are three determinations are of paramount significance:

- the enunciation of the “statutory scheme” that governs an Integrity Commissioner, which includes not only Part V.1 of the *Municipal Act, 2001* and the code of conduct established by the municipality, but also the complaint protocol or rules and any other guidelines or documents that set out the process for receiving, investigating and reporting the findings of a complaint to the municipal council (prior to this decision, it had been thought by many to comprise either only Part V.1 of the statute or Part V.1 and the code of conduct);
- the articulation of the criteria that comprises the role and function of the Integrity Commissioner and the two basic services that this accountability officer performs, both of which have been taken directly as set out in the Bellamy Report; and
- the fact that a code of conduct and accessory complaint protocol amount to an Integrity Commissioner’s “home statute,” thereby entitling the integrity officer’s decision to deference and a review of any determination made on a reasonableness standard (this serves to render attacks against an Integrity Commissioner’s investigitations and reports much less susceptible to a successful challenge).

As noted at the commencement of this article, the decision is timely as it is anticipated that forthcoming amendments to the *Municipal Act, 2001* will require all municipalities to adopt codes of conduct. Without an Integrity Commissioner to actually enforce such codes, however, the efficacy of these accountability mechanisms is severely limited. Should the amendments to the *Municipal Act, 2001* require all Ontario municipalities to adopt codes of conduct, as expected, municipalities would be well-advised to fully consider the scope, nature and contents of their codes of conduct and accompanying rules and to appoint qualified and experienced Integrity Commissioners to ensure that their elected representatives are actually held to the ethical standards they have set for themselves.

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Tribunals and the Duty to Consult and Accommodate “Fact or Fiction”

Scott Robertson  
Nahwegahbow, Corbiere

March 1, 2017
Tribunals and the Duty to Consult and Accommodate
“Fact or Fiction”

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Genoodmagejig Barristers and Solicitors

The Crowns’ Duty to Consult and Accommodate

- the protective purpose of the duty to consult and accommodate works to protect Aboriginal rights and preserve future use of resources claimed by Indigenous peoples.

- *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council* 2010 SCC 43, [2010] SCR 650 (SCC) at paras 33-34, 41, 50, 53 and 83

Application of the Duty to Consult to a Tribunal

Uncertainty as to:

- What powers does a tribunal possess?
- Legislative regimes (outdated)?
- Can the Crown rely on a tribunal to satisfy the duty to consult and accommodate?
- Is a quasi-judicial tribunal the Crown?
- The honour of the Crown?

In Practice...

Indigenous participants have little say in:

- Scoping of the project;
- Responding to timelines;
- Funding and capacity;
Chippewas of the Thames v Enbridge et al.

- the NEB Act does explicitly give the Board the authority to consult (no expertise);
- the Crown did not delegate the authority to the Board or to Enbridge;
- the NEB is not the Crown;

Who carried out the consultation????
Before the Supreme Court....

Enbridge reversed its FCA argument and stated the NEB has the authority to consult; (no legal precedent)

NEB requested direction from the Court as to its role with consultation;

The Crown admitted the NEB was not the Crown.
Designing the Infrastructure of Tribunals

PANEL

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March 1, 2017
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Material:


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About Steps to Justice

Rebecca Stulberg
Community Legal Education Ontario

March 1, 2017
About Steps to Justice

Steps to Justice is a first-of-its-kind initiative that empowers people in Ontario to understand and take action to deal with their legal problems. It gives comprehensive online information on common legal problems that people experience in family, housing, employment and other areas of law.

Steps to Justice:

- equips people to work through their legal problems through easy-to-understand steps
- includes practical tools, such as checklists, fillable forms, and self-help guides
- gives referral information for legal and social services across Ontario
- has live chat and email-based support for users with additional questions

Numerous justice sector partners are informing and reviewing the content to ensure that it is accurate and practical. And justice sector and community organizations will be able to embed Steps to Justice content on their own websites to share with their users. That means that Ontarians looking for practical legal information online will be able to access it easily and quickly – and know that it is reliable – no matter where their search begins.

A unique collaboration of justice sector organizations

Led by CLEO, Steps to Justice is a collaborative project of justice sector organizations. It is a signature initiative of The Action Group on Access to Justice, and benefitted from the early support of the Law Foundation of Ontario.
Partner organizations are sharing their vision, expertise, and resources to make this ground-breaking project possible. Steps to Justice partners include:

- the Ministry of the Attorney General
- the Superior Court of Justice
- the Ontario Court of Justice
- Social Justice Tribunals Ontario
- the Law Society of Upper Canada
- Legal Aid Ontario
- the Association of Community Legal Clinics of Ontario
- the Association des juristes d'expression française de l'Ontario
- the Ontario Justice Education Network

CLEO is working with the Association des juristes d'expression française de l'Ontario (AJEFO) to advance access to legal information for English- and French-speaking Ontarians. CLEO and AJEFO will build on Step to Justice and CliquezJustice.ca AJEFO’s legal information portal, as the foundation of this work. CliquezJustice.ca offers easy-to-understand legal information for Francophone communities across Canada. The two organizations are working together to secure the funding we need to start work on this important project.
Video Conferencing as an Option at the Social Benefits Tribunal

E. Ann McRae, Director of Legal Services
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March 1, 2017
Video Conferencing as an Option at the Social Benefits Tribunal: A completely unscientific analysis of the issues faced in the pilot project at the Rexdale Hub, 2015-2016

E. Ann McRae, Director of Legal Services, Rexdale Community Legal Clinic

This paper was prepared for the LSUC’s Six Minute Administrative Lawyer program, March 1, 2017.

Introduction

Remote video hearings of the Social Benefits Tribunal were first held between two tribunal locations in the same city or perhaps different cities. Appellants would attend at a hearing room in downtown Toronto, sit in front of a camera, and the hearing would be conducted by a tribunal member who might be a few blocks away or could be in the SBT’s facilities in another city. This was the tribunal’s way of optimizing its resources for available decision makers. This system saved travel time for the decision maker but not for the appellant.

From two tribunal locations, it was a short step to free both ends of the video conference from the confines of the tribunal’s offices. Decision makers are now able to log in from home computers, if they choose. Appellants are able, in theory, to log in from any computer, but at this point, the tribunal wants to have a trusted local agent act as “host”. The host, such as the Rexdale legal clinic in our pilot project, provides logistical support to set up the equipment, get the appellant into the “hearing room” website at the right time but not too early, and deal with other administrative matters such as delays, cancellations, interpreters failing to show up, equipment failure of one or more participants, waiting rooms, and so on.

There is no requirement for the participant to have any particular software or high-tech camera or any technical ability. Any web-browser will get the appellant into the hearing room. Any laptop camera is adequate. Any telephone, including a cell phone lying on the table, can become the audio feed. Each remote video hearing notice includes a url address for accessing the right hearing “room” at the appropriate time, a phone number to call and a web-conference ID code. It is thus no more complicated than logging into a webinar or a business teleconference. That said, any new and unfamiliar process comes with anxiety, a learning curve, mistakes and frustration. There will be many reasons for resisting or dismissing technological solutions, but there are also good reasons to persevere and get it right.
Initial Reactions, Concerns, Issues

1. **Why this, why now, why me?**

Legal representatives, and occasionally justice system administrators, have resisted the steady encroachment of technology into areas that traditionally have involved face-to-face transactions. Evaluations and responses should critique this resistance: the double-barrelled test should be, can we protect the integrity of the process, and advance access to justice at the same time? If these two tests can be met, then loyalty to tradition and our lack of comfort with technology are not sufficient reasons for resisting technological solutions.

2. **Is anything being sacrificed?**

Opponents will argue that the shift to video or telephone hearings, or other technologies, is being foisted on the public and the bar to save money for the tribunals. They will also argue that the individual approaching the seat of justice has a sacrosanct right to be in the presence of the person who is making a decision about his or her life, as opposed to speaking to a screen or to a Wizard of Oz behind a curtain. It is possible to hold this position but also take advantage of being able to Skype one’s grandchildren in Australia. True, you can’t hug the people on the screen, but you can see that they have jam on their faces and are really sleepy. So, I would argue that very little is sacrificed and a great deal is gained in using the technology that is widely available.

3. **Is cost-saving a sufficient reason?**

By careful scheduling and by having a rota of members who work from home, a tribunal can schedule many more hearings with fewer hearing rooms. Some members show up in a properly furnished hearing room, all alone, or with tech support nearly, and conduct the hearing. Some conduct the hearing from their offices or homes.

The Social Benefits Tribunal expected some cost savings, but has not yet published anything definitive. If there actually are cost savings for the tribunals and if the saved resources are applied to make the whole system more just and more effective, so much the better. However, our pilot project suggests that, even if budget concerns of the tribunal are the primary drivers, there are sufficient other benefits, and so few losses for the citizen that it is a win-win.

Secondary Benefits for Individuals and their Legal Representatives

1. **Saving of travel time for legal representatives:**

At my clinic, the primary benefit that we perceived when the project began, and still the biggest single reason for doing it, is the efficient use of time. Previously, a one hour tribunal hearing wiped out half a day of work due to travel across the City of Toronto at peak traffic times. Now, the entire transaction is now over in one hour, sometimes less. Outside of Toronto, my legal clinic colleagues laugh at my Toronto-centric pettiness, saying it can take them an entire work day to travel to a hearing site and back, frequently picking up and dropping off the client on the way. One way or another, a video hearing can double or triple
the daily productivity of an employee who does these hearings. This could easily be quantified in dollar savings or resources put to better activities than driving.

2. **Travel and stress avoided for appellant:**

   The appellants who appear in disability hearings for the SBT are often people of low income who seldom leave the twelve-block radius of their own neighbourhood or community. Being able to face their decision maker without a long bus and subway ride downtown, or a day-long excursion to the next major town, is a significant improvement in access to justice, for most. Only once in dozens of cases did a Rexdale client exercise the option to go downtown to be able to have his hearing in a Place Where Important Things Happen. We had to explain to this client that he might get downtown and still have to look at the tribunal member on a screen, if a member in Peterborough or Kingston or even in Scarborough, was selected to hear his case. The client still chose to make the trip. This option should remain available for those who wish to exercise it.

3. **Clients get what they need, and are not afraid of technology, as long as they are not prejudiced.**

   Our clients want a resolution, they want it to be as speedy as possible, and they want it to be fair. Modern media is no problem. The vast majority of our clients are very pleased to be on camera only a block or two from home. They do not seem to feel that video justice is second class justice.

4. **Opposing parties appreciate the convenience:**

   Well over half of all SBT disability hearings do not have a Case Presenting Officer from the provincial ministry, leaving the tribunal member to do any cross-examination, if they see fit. The logic behind when CPOs show up and when they do not is deliberately veiled from the view of the legal clinics, so we can only surmise. However, we can observe that, even in video hearings where the member has chosen to sit in a tribunal hearing room, the CPO frequently chooses to log in from his or her own desk.

**Assumptions:**

In thinking about the encroachment of technology and tools into a traditional sphere of work, I rely on underlying assumptions which may not be shared by all. Here are mine:

1. **Tools shouldn’t rule, but they are here to stay and should be used.**

   The use of technology is appropriate, helpful and not prejudicial, in legal proceedings, although perhaps not in all circumstances. Some parts of the justice system have been using technology for a long time. Legal Aid Ontario has conducted video-link interviews with accused persons in custody, to screen them for Legal Aid certificates. Surveillance video evidence is now routine in many courts, as is viva voce witness testimony via video link.

2. **Change is constant, so we should stay nimble**
The pace of change, with technological solutions, suggests that the field of video links is rapidly evolving. Anyone over fifty remembers carrying a credit card that had to be crunched through a carbon-copying machine. This remained the same year after year. Then, out of the blue, there was the debit card, then devices to swipe, then a cordless card reader, then you needed to learn a PIN, and now you can tap. To heavily invest in today’s technology or what seems modern today is to risk being locked into a three year Blackberry contract while everyone around you has switched to an iPhone. But have no fear: capital investment is not the pinch point of adopting technological solutions. All of the platforms and technologies for video hearings are readily available and cheaper than renting and furnishing office spaces. The point of risk and resistance in the workplace may be the necessity of retooling your training programs and instructions to staff at regular intervals, and the irritation of non-adopters who may fall farther and farther behind.

3. Connectivity is not a level playing field.

Connectivity is a term that covers the type of connection and the speed of the delivery of picture or data or sound. Dial-up internet, using Bell’s land lines, is the Model T Ford of the information highway, whereas fibre-optic or satellite connections are the fast lane. “Faster” is a term usually associated with a sales-pitch to try to get you to upgrade something, which you were not planning to pay for so soon. So, how will this affect legal clinics or other law offices, trying to keep up?

Smooth functioning of video platforms assumes high-quality, high speed connections. The harsh truth is that the worst connectivity is in those remote places that most need easier access to justice. My colleagues in clinics in those places are somewhat reluctant to celebrate any technological solution because of the possibility of a slippery slope to second-class service: first the wonderful breakthrough will be offered as an alternative to the all-day excursion, then slowly it will become the only method, and decision makers will never leave their orbit of Toronto or Hamilton. For advocates in remoter areas, preserving the right to face-to-face trumps taking a chance that the internet will be working, the phone connection will not get dropped, and that the face of the tribunal member will not freeze in place for five or ten of every ninety seconds. I admit that these things can happen, even in large centres. Voices on the phone can continue uninterrupted, but a visual signal that freezes one or all of the figures on the screen can certainly be a distraction and can diminish the sense of being in the same room as the decision maker.

Perhaps the ultimate comeuppance on this point was delivered by a person who was legally blind and who has sat as a tribunal member. Upon hearing the assertion that “Nothing can substitute for all participants being able to see the faces of the others during testimony”, he simply said “Why is that important?” and left the question hanging in the air.

Will the Technological Environment Affect the Outcome?

At a basic level, we all believe that face-to-face or ‘in person’ is best, but we cannot say why, or how much better it is than a video environment. In my experience, most participants of the
justice system do believe in the added value of a video hearing over a telephone hearing. Finders of fact and legal representatives alike will say that they want to be able to see and interpret gestures, body language, facial expression, wandering attention, inability to make eye contact and so on. Indeed, it is the duty of the finder of fact to observe and weigh these factors, in relation to a finding of credibility. However, we simply do not know whether a video hearing environment impedes the finder of fact, and if it does, we do not yet know if this tilts the playing field toward or away from the individual applicant.

I would be interested in a long term study of the comfort level of finders of fact in comparing witness testimony in a face-to-face environment against the video hearing environment. The Social Benefits Tribunal is examining differential grant rates in appeals heard by video, compared with those held in person. So far, there is nothing statistically significant to report. No doubt there will be more studies, which is why I subtitled this paper as entirely unscientific.

Challenges for All Participants

1. Security, Privacy, Encryption

Obviously, it is possible to use technology recklessly. The justice business does not want to be seen to play fast and loose with personal information, whether documents, data or oral conversations. The simple beauty of the video conference method used by the SBT is that the video signal is via internet and the audio signal is by phone. Yes, it would be possible to hack either one, I suppose. We have not worried about the level of encryption on the website, because the IT department of the Social Justice tribunals had satisfied itself. Separating the two signals means that hacking into the video signal does not achieve very much at all. The risk of an insecure phone line may be slightly higher, but still so minimal that I chose to accept the micro risk, if there actually is one.

2. Integrity of the process

Much more mundane than issues of cyber security is the issue of the integrity of the process when things become too informal. The tribunal member is entitled to assurance that no one is in the room just out of his or her view, that no one is gesturing or passing notes, or entering or leaving the room. Participants have to agree to rules on how these matters are to be handled, as well as the question of students or other observers, the exclusion of witnesses, the introduction of documents not previously disclosed, and so on. At the other end of the ether, there have been hearings interrupted by barking dogs and children coming in the door from school. Potentially, one could have a bizarre interruption from the member’s location, or the Case Presenting officer, or the interpreter, who could be at a fourth location.

3. Budget, training, communication

The budget has to be able to handle tech support and the inevitability of changes. Regular upgrading of hardware and software are necessary to keep up with the rest of the world. There
will be an added burden on the tech resources of the tribunal and on the legal clinic or other local agent, to keep things running smoothly. This means some staff person will have to devote a percentage of their time to overseeing a process which used to be someone else’s problem at a different location.

Also, there are industry standards for the upgrading of hardware and software, so in a government environment you can expect to be using tools that are about one generation behind your oldest child, just the reverse of real life. Upgrading and improving the tech tools for the tribunal, or the members at home, must not outpace the ability of the average citizen or the low income person to continue to participate.

Conversely, there is a risk of falling behind the average consumer, who according to media reports, is more likely to use a smart phone than a computer to access the internet and for many other activities that were once associated with personal computers. Will the cell phone’s smaller screen be a suitable medium of video-conferencing, in the near future? What are the additional risks associated? Video and audio will be on the same channel, and the signal will always be wireless. These factors introduce more vulnerability, more risk. Is the risk acceptable? Who bears the risk? Fortunately we need not answer these questions just yet, but soon.

4. Change, and Change-management:

There will be a learning curve for tribunal staff and decision-makers, who may want the option to participate or not. Tribunal members who want to work from a home office or a kitchen table will be able to do so, but some will not be comfortable being far from their IT department in case something goes wrong. Communication is always a huge factor in getting to “buy in”.

5. Adequate resources

There are human resourcing consequences for the tribunals that take on video technology. There must be continuous training, troubleshooting, and reassessment. Travel time is saved for the tribunal members working from home or not travelling to distant communities, but there is a need for staff to be involved in training, coaching, answering requests for tech support, making local arrangements for an appropriately connected and private computer at a clinic like mine, or at a library. Legal representatives and all users of the system will get very agitated if these functions suffer from understaffing or discontinuity. All of these demands may actually increase staffing needs, although the tribunal is making much more efficient use of members and using few hearing room hours.

6. The Self-represented Applicant and the Local Agent

Our pilot project found that the system works equally well (or equally poorly, if there is a delay or other problem) whether there is a legal representative or not. However, our pilot was carried out where legal clinic staff members were available to set up the equipment for the unrepresented clients. We were highly motivated to help the system to work. Our assessment is that a “local agent” must be present, and willing to be actively involved, not simply available somewhere in the same building in case something goes wrong. The function of the local agent is to assure all participants that the equipment is going to function well and on time, and that the tribunal’s rules such as the exclusion of witnesses are observed.
7. **No One Left Behind**

In all technical innovations, it is necessary to consider the effect on the lowest-resourced participant. At this time, individuals are not able to log into the hearing room from a home computer, as that is seen as giving up too much control over the process, over who is in the room, the quality of connections, and so on. So, for the time being, the lowest-resourced participant will be the local agent, such as a legal clinic or library or community agency. Will they be able to offer computers with webcams, with access to the right internet sites, in an environment that protect privacy both physical and electronic? Will they be free from hackers, viruses, and other things that erode the integrity of the administration of justice?

8. **When something goes wrong**

Something will go wrong. It will seldom be something that can be known in advance, for which preventative steps can be taken. One time there was an issue that the member was using his webcam at home for the first time, and angled the screen so that we only saw the top of his head. Nonetheless, the audio connection was clear, and the member could see the appellant quite well. The client was amused but satisfied with the process and the outcome.

9. **Trust takes time to develop**

We believe, based only on a quick and unscientific sample, that the Case Presenters from the Disability Adjudication Unit choose to attend more video hearings than in-person hearings. Possibly this indicates that they trust the process entirely and like to work from their own desks. Equally possible, they have so little confidence in the integrity of video hearings or the ability of members to conduct them properly, that they feel a need to monitor the video process more rigorously. On the side of legal clinics, as long as our “win” rate is unchanged, and we and the clients feel they have had a fair hearing, we do not care much what is motivating our opposing parties. However, if trust and integrity are still an issue, this should be communicated among the participants so that the choice of platform or medium is not perceived as a negative factor.

**Conclusion:**

Our legal clinic was very enthusiastic in promoting the benefits of video conferencing, and the Social Benefits Tribunal was equally positive, perhaps for different reasons. Other clinics clamoured to be allowed to participate, and there are now several clinics using video hearings as a preferred platform.

Our clinic has experienced a few bumps along the way, when not everything works out as planned, but we and our clients remain pleased with the outcomes. We think that video conferencing technology is a significant advance in access to justice and a model for the future.
Regulatory Negligence:
Recent Update on and Analysis
of "The Duty of Care"

Stephen Moreau
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March 1, 2017
REGULATORY NEGLIGENCE:
RECENT UPDATE ON AND ANALYSIS OF "THE DUTY OF CARE"

by: Stephen J. Moreau

PRESENTED AT: The Law Society of Upper Canada's "The Six-Minute Administrative Lawyer 2017"; March 1, 2017

In early 2012, I, along with Justice Freya Kristjanson, published an article entitled “Regulatory Negligence and Administrative Law”. That article contains a detailed survey at that point in time of the question of when it is a that a public body may or may not owe a duty of care in negligence. With kind permission, that article is reproduced as an Appendix to this paper.

For this paper, I consider a few trends I have observed in the jurisprudence since early 2012. I start however with an overview of key aspects of the law at that time.

The present paper can only but survey these latest developments in the search for clues as to when a duty of care in negligence might arise. As in 2012, the bulk of the case law over the last five years is the product of preliminary motions to strike claims or, in increasing cases, to certify claims as class actions, where the first certification step emulates a preliminary motion to strike. Thus, most of the case law provides tantalizing suggestions as to the scope of potential negligence liability when a public authority is involved, with few definitive determinations on the merits. It is within this modest jurisprudence that one can draw what few conclusions there are to draw.

The present paper assumes that the reader has a basic understanding of the two-step Anns framework still in use in Canada. The 2012 paper sets out that framework.

A. The Status of the Law in Early 2012

On the eve of the publication of our 2012 paper, the Supreme Court of Canada had just released Imperial Tobacco. In the decade prior, public negligence law took as its first cue the Supreme Court's rejection – on preliminary motions – of two potential

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1 I am indebted to Andrea Sobko, an articling student with Cavalluzzo Shilton McIntyre & Cornish LLP for her invaluable research assistance. This paper updates and follows-up on a paper I co-authored with (now Justice) Freya Kristjanson: Kristjanson, Freya; and Stephen Moreau: “Regulatory Negligence and Administrative Law”, (2012) 25 C.J.A.L.P. 103. [Reproduced by permission of the authors and Thomson Reuters Canada Limited. The journal is published under the auspices of the Council of Canadian Administrative Tribunals/Conseil des tribunaux administratifs canadiens.] It is an honour to step into Justice Kristjanson's shoes and "go it alone": thus, I take credit for all of the errors in the present update paper.

2 Knight v. Imperial Tobacco Canada Ltd. (sub nom. British Columbia v. Imperial Tobacco Canada Ltd.), 2011 SCC 42
negligence claims by victims of professionals' misconduct [Cooper and Edwards]. Cooper and Edwards represented a potential sea-change in how the highest Court saw the negligence test: suddenly, a great deal of "policy" analysis could be conducted at the first stage of the Anns duty of care analysis [proximity, or the question of whether the defendant and plaintiff were in a sufficiently direct relationship that the former had to look out for the latter's interests in a non-negligent fashion]. Whereas, before Cooper, most negligence cases were won or lost at the second stage of the Anns test [whether to negate a prima facie duty on the grounds that the impugned government activity amounted to protected government "policy" or actionable "operational" activity], Cooper signaled a move toward trying to see government liability differently, that is, to asking up front whether the regulator-to-plaintiff relationship was one that, as a matter of policy, ought to be regarded as close enough that a duty of care should arise.

More importantly, from this author's perspective, the Court's decisions in Cooper and Edwards seemed to command, or at least very strongly suggest, that the alpha and omega of the proximity analysis was the public authority's statute: did the language of the statute create that relationship of proximity? As Justice Kristjanson and I pointed out in 2012, because statutes mainly speak in the language of "power" and "discretion", as opposed to in the language of "duty", relying on statute to determine whether a duty of care might arise or not would in most cases leave the defendant free of any liability: how could a defendant, with broad discretionary powers and whose duty, apart from specific language to the contrary, be said to be owed to the public at large (or some large subset of the public), owe a duty to a very narrow set of persons applying a statutory source test? A great deal of confusion then arose because, despite the seemingly clear direction suggested by Cooper and Hobart, some subsequent Supreme Court decisions held that certain public authorities may owe a duty of care in negligence notwithstanding the fact that a discernible statutory source for that duty was decidedly missing. Whereas in Holland, for instance, one could explain the Court's reasoning in a way that was faithful to the notion of a statutory source (because the Court substituted for a statute as the source of the duty a judicial decree the Court said gave rise to some sort of duty to implement it non-negligently), other cases left one guessing as to the source of the duty.

Thus in Fullowka, where the Court upheld a finding at trial that the territorial government owed a duty of care to striking miners to protect them from violence, the Court's reasoning could superficially be explained in part from a detailed analysis of the government's statutory duties once a dangerous situation had arisen and into which it

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5 Holland v. Saskatchewan (Minister of Agriculture, Food & Rural Revitalization), 2008 SCC 42
had become inextricably involved. However, on further analysis, the Court's reasoning was somewhat amorphous. In a seminal passage, Justice Cromwell neatly slides from the use of the word "power" (the government had a power over mine inspections) to "duty" without apparently noticing the vast gulf that separates, or should, these distinct concepts:

To sum up, the mine inspectors had a statutory duty to inspect the mine and to order the cessation of work if they considered it unsafe. In exercising this statutory power...

Fullowka shows the Court trying to link all government duties to some statutory source, as Cooper and Edwards seemingly require, while deftly and quite correctly noting that, in reality, the statute itself could only be regarded as a source of a power. By definition, of course, a power is entirely distinct from duty: one must discharge one's duty whereas one can choose not to use one's power.

In our 2012 paper, we suggested that a close and careful reading reveals that, for all the Court's efforts to link a public law duty to a statutory source, the true work of determining if a duty of care exists, or not, occurs at a very base and fact-driven "implementation" stage, one that considers the government actor's actual words and actions. Thus, following the words "[i]n exercising this statutory power", Cromwell J. lists some steps the defendant took in exercising that power to convert the power to a duty, including physical presence at the mine, near daily inspections, a narrow group of plaintiffs, and coordination between officials and other actors.

In short, on the eve of the paper's publication, the potential post-Cooper/Hobart trend of potentially decreased liability (evidence especially in appellate decisions that followed) was beginning to make way for the conceivable blossoming of liability: clever pleaders could certainly survive a preliminary motion by pleading, to the extent possible, government-to-plaintiff interactions, and could see their claims survive, raising the spectre of increased liability.

B. Lessons from Imperial Tobacco Regarding the Concept of "Proximity"

Imperial Tobacco was inserted into our paper on the eve of publication with minimal analysis. However, if one must pick the biggest trend in public authority negligence liability law over the last five years, Imperial Tobacco and its effects would be it. In this case, tobacco companies defending provincial government-led lawsuits seeking the recovery of health care costs provinces spent on tobacco companies' alleged victims

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6 Fullowka v. Royal Oak Ventures Inc., 2010 SCC 5. Indeed, much of the decision regarding the territorial defendant is taken up with a discussion about what a statute required in the situation and how government lawyers had given erroneous advice that nothing was required. Although the advice was held to be erroneous, the act of acting upon such advice grounded a frankly laconic and highly questionable passage holding that the government could not therefore be found negligent.

7 Ibid. at para. 55.
sought, in turn, to sue Canada on a third party Action. Canada responded with motions to strike these claims.

What is interesting is that, while at bottom Canada succeeded in obtaining a finding that its interactions with the tobacco manufacturing industry (the result of which was the promotion of supposedly safer cigarettes) was the end-product of a broad policy choice that was not actionable because of the application of the second stage of the Anns duty of care analysis, on its way to making this finding, the Court offered a detailed analysis of how one establishes a duty of care at the foreseeability/policy stage one stage. Within this part of the reasons, what one sees is the Court truly grappling with the questions raised earlier about the sources of public negligence duties. The end result is, in my view, a departure from Cooper and Edwards but one that attempts to reconcile the various strands in the jurisprudence: the source of duties, within the proximity analysis, is not statute or something else like "interactions" or "conduct": it is one, the other, or both!

Before one wags the obvious finger with the observation that the Court's analysis of the proximity stage is obiter and perhaps something that can perhaps be overlooked in favour of isolating the comments within the confines of this very unique case, I observe that the presence of the obiter analysis strikes me not as something one should overlook en route to the more memorable and debated parts of the decision, the stage two parts. In fact, the way Imperial Tobacco was argued and decided, coupled with the Court's subsequent treatment of the law, leads me to conclude that the Court took the very real opportunity to try and reconcile some of its more inconsistent statements over the previous decade into a formula that is meant to more significantly affect the duty of care analysis.

In reading the factums filed in Imperial Tobacco, what strikes me as interesting is that a point blank tit-for-tat argument about the sources of a duty (statute? other?) is barely discernible. Canada, in its factum, does highlight the Cooper and Edwards framework before analyzing why the relevant statutes do not impose a duty on Canada to tobacco manufacturers to not negligently lead the latter into the promotion of the kinds of products that undergird the claims against the manufacturers. In response, only one of the many tobacco company respondents appears to deal with this issue, but not by quite taking it "head-on". At its highest, Imperial Tobacco responds by distinguishing Canada's cases and by observing that its claim against Canada falls squarely within a category of negligence (negligent misrepresentation) that depends for its existence on parties' representations and interactions, as opposed to any statutory source.

From this very modest attempt to "fit" the claim against Canada into the negligent misrepresentation pigeon-hole, the Court, instead, took the opportunity to lay out a complete stage one negligence framework. Had the Court merely stated, in brief reasons, that the proximity test was met based on Imperial Tobacco's argument that the Claim might fit within negligent misrepresentation, the impact of Imperial Tobacco might have been more minimal. What the Court did instead was conclude that, in all cases of alleged negligence, the government authority's actual actions, as opposed to its grant of authority, are critical to the duty of care analysis.
The Court first rejected, in a brief paragraph, Imperial Tobacco’s arguments that its claim fit within the negligent misrepresentation framework: it held that negligent misrepresentation to "an industry" could not ground such a claim. From there, the Court undertook a more detailed analysis of the negligence framework to see if some novel duty of care might arise. It is here that the Court essentially tells us that statutes may only be one source of a duty, that statutes in fact rarely create duties given the language used, that specific interactions may give rise to a duty, and that those interactions when viewed in light of the statutory framework may give rise to a duty too:

A complicating factor is the role that legislation should play when determining if a government actor owed a prima facie duty of care. Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.

The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a prima facie duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (Cooper), or removing children from harmful environments (Syl Apps). In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority’s duty to the public…

The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state’s general public duty established by the statute, the court may hold that no proximity arises: Syl Apps; see also Heaslip Estate v. Mansfield Ski Club Inc., 2009 ONCA 594, 96 O.R. (3d) 401. However, the factor that gives rise to a duty of care in these

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8 Knight v. Imperial Tobacco Canada Ltd. (sub nom. British Columbia v. Imperial Tobacco Canada Ltd.), supra at para. 38

9 As an interesting aside, the Court relies on one Ontario Court of Appeal decision over the previous decade here, Heaslip. Heaslip was authored by Sharpe J.A., who had been the author of a large body of decisions striking down negligence claims solely because the alleged duty of care could not be found in statute: see, for instance, Eliopoulos Estate v. Ontario (Minister of
types of cases is the specific interactions between the government actor and the claimant.

Finally, it is possible to envision a claim where proximity is based both on interactions between the parties and the government’s statutory duties.

Since this is a motion to strike, the question before us is simply whether, assuming the facts pleaded to be true, there is any reasonable prospect of successfully establishing proximity, on the basis of a statute or otherwise. On one hand, where the sole basis asserted for proximity is the statute, conflicting public duties may rule out any possibility of proximity being established as a matter of statutory interpretation: Syl Apps. On the other, where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the prima facie duty of care at the second stage of the analysis.\(^\text{10}\)

I believe that the Court may have deliberately gone out of its way to try and provide guidance here. It could have held that, for motion to strike purposes, the Claim might "fit" within a negligent misrepresentation framework or it could have avoided the policy analysis altogether in favour of its stage two finding that, for policy reasons, any duty that might exist was negated. The manner in which the appeal was argued and the presence at the time of genuine uncertainty over how to read Cooper and Edwards in light of subsequent case-law suggest as much.

Moreover, it is interesting and I suggest no accident that, since Imperial Tobacco, the Court has been playing a "wait and see" approach to see if its intervention is further warranted: it has not granted leave to appeal in a negligence case in over five years\(^\text{11}\) and, apart from some fleeting references to negligence principles in a recent Charter

\(^{10}\) Supra at paras. 43-47.

\(^{11}\) As of writing this paper, the Court is about to hear an appeal concerning a private auditor's potential duty to shareholders who own shares in the company being audited. The case turns on the application of a duty of care analysis to non-public authorities, however.
damages case, has safely stayed away from the topic altogether.\footnote{Ernst v. Alberta Energy Regulator, 2017 SCC 1} Compared with the Court working out the Cooper and Edwards analysis almost once a year in the ten year period between Cooper/Edwards and Imperial Tobacco, the absence of any negligence appeals in over five years might be telling. And, while it is hard to "read the tea leaves" when leaves to appeal are dismissed, the 2016 decision not to grant leave to appeal in Paradis Honey, a decision I review later, does seem to support my thesis.

C. So, What Has Happened Post-Imperial Tobacco?

Imperial Tobacco's two main takeaways (apart from this author's suggestion of a third, that the Court is "done", for now at least, with the question of duty of care and public authorities) seem to be: (1) a recasting of the proximity test; and, (2) an application of the stage two policy analysis to the very particular claim tobacco manufacturers levelled against Canada. A review of some key post-Imperial cases suggests that this first takeaway is making a real impact, while no discernible impact can be detected from the way in which the Court essentially applied pre-existing stage two policy principles to the particular facts in that case.

1. New Cases and the Recast Proximity Test

There have been many decisions in the last five years alone that rely on the Imperial Tobacco framework to establish that a potential duty of care in negligence might exist. The main effect of Imperial Tobacco appears to be that litigators and courts are paying particular attention in the pleadings and decisions to the most detailed of points concerning the alleged interactions of regulators with plaintiffs. Recent decisions safely ignore any potentially applicable statutory language or give it a cursory review, but prefer to focus on the "interactions" of government to claimant. I can only point to a few of the more significant or interesting cases to make this point.

What these cases suggest is that situations that hitherto have never or rarely attracted a duty of care (for example, a casino duty to a problem gambler's victims or police duty to victims of criminal activity) may attract a duty of care now under the Imperial Tobacco analysis. And, an interesting BC case (Leroux) holding that the CRA may owe a duty of care to a taxpayer in the way it audits the taxpayer has recently received approval in the Ontario Court of Appeal. Finally, there are two recent decisions, including one just decided in February [2017] that hold that a regulatory authority may be liable in negligence for the way in which it practically implements a legislative provision, all over defendant objections that this effectively imposes liability for breach of statute contrary to Saskatchewan Wheat Pool.

\textit{Paton Estate v. Ontario Lottery and Gaming Corp., 2016 ONCA 458; reversing Paton Estate v. Ontario Lottery and Gaming Commission 2015 ONSC 3130 (S.C.J.)} – The appellants were two estates defrauded by an addicted gambler. They sued the respondent, Ontario Lottery and Gaming Corporation ("OLGC"), hoping to recover some portion of their losses. Their statement of

\footnote{12 Ernst v. Alberta Energy Regulator, 2017 SCC 1}
claim was struck by the motion judge, who concluded that it was plain and obvious that the action could not succeed. They appealed from that dismissal, arguing that their claims for knowing receipt of trust funds, unjust enrichment, and negligence should be allowed to proceed to trial.

The specific circumstances arose from dealings with Shellee Spinks, a law clerk, who stole over $4,000,000 from the appellants and others by forging documents, selling estate assets, and taking the money for herself. She lost about $3,000,000 of that money in the respondent's casinos over a roughly 14-month period. The appellants alleged that they were defrauded of approximately $1,500,000 by Ms. Spinks, that she gave about $200,000 of that money to her mother, and that the two women gambled and lost about $950,000 of the estates' money in the respondent's casinos, where Ms. Spinks held herself out to be a lawyer. The gambling took place between late 2006 and Ms. Spinks' arrest on March 13, 2008.

The majority of the Court (Pardu and Roberts JJ.A.) reversed the decision of the motion judge regarding the negligence claim. Writing for the majority, Pardu J.A. analogized the situation of the respondent to that of the commercial host, as discussed by the Supreme Court of Canada in Childs v. Desmoreaux, 2006 SCC 18. According to Justice Pardu, the Court made it clear in Childs that where the defendant is a commercial enterprise that benefits from offering a service to the general public, it may have attendant responsibilities to act with special care to reduce risk, and a duty of care may arise. She noted that these comments apply with equal force to casino operators.

In her view, gambling, like serving alcohol, is a regulated activity. It is prohibited under the Criminal Code, unless a provincial government decides to adopt a law permitting the conduct and management of the activity by the province. The Alcohol and Gaming Commission of Ontario is the regulatory agency responsible for administering the statutes and regulations applicable to casinos. The Commission is mandated to "exercise its powers and duties in the public interest and in accordance with the principles of honesty and integrity, and social responsibility": Alcohol and Gaming Regulation and Public Protection Act, 1996, S.O. 1996, c. 26, Sched., s. 3(3). In light of this, Pardu J. concluded that it is not plain and obvious that the appellants' claim in negligence against OLGC is hopeless.

Hoy A.C.J.O. dissented on the grounds that the facts pleaded did not disclose any relationship or interaction between the OLGC and the appellants, and therefore did not disclose sufficient proximity. She further noted that the appellants' sought damages for pure economic loss, which Canadian courts have been extremely reluctant to impose a duty of care for. As such, in her view, there was no reasonable prospect that sufficient proximity between OLGC and the appellants would be found.
Canada (Attorney General) v. Walsh Estate, 2016 NSCA 60; affirming Walsh Estate v. Coady Estate, 2015 NSSC 175 – On August 18, 2010, a Silverado pickup truck driven by Ralph Michael Coady, Jr. collided with a Sterling tanker truck driven by Christopher Walsh. The accident occurred on Trans-Canada Highway #104 in Pictou County, Nova Scotia. Both Mr. Coady and Mr. Walsh were both killed in the collision. The tanker truck driven by Mr. Walsh was owned by Newalta Corporation, which operates an industrial waste management business. The tanker truck contained a cargo of waste oil. Following the collision, it left the road and exploded, causing substantial property and environmental damage. In December 2011, Newalta brought suit against Mr. Coady's estate and Coast Tire & Auto Services Ltd claiming that Mr. Coady's vehicle crossed the centre line, colliding with Newalta's tanker truck driven by Mr. Walsh. Newalta also sued Coast Tire claiming that it had failed to properly repair the Coady vehicle when Mr. Coady brought it to them to correct steering problems, rendering it unsafe to drive. A second action was brought by Mr. Walsh's widow, Tammy Walsh on behalf of his estate, their children and in her own right against Mr. Coady's estate and Coast Tire & Auto Services Ltd., essentially echoing Newalta's allegations against Mr. Coady.

In 2013, both actions were amended to add the Attorney General of Canada, RCMP Cst. Katie Green, and "unidentified RCMP members" as defendants. The plaintiffs in both actions asserted that the RCMP and Cst. Green knew or should have known that Mr. Coady was impaired and not fit to drive or that his vehicle was mechanically unsound and unsafe to drive. In particular, they alleged that on the day of the accident, Mr. Coady was observed to be impaired and driving dangerously and that it was reported to the police. They also alleged that members of the RCMP, including Cst. Green, approached Mr. Coady while in his vehicle in a parking lot, but allowed him to leave when they knew or should have known that it was unsafe for him to drive.

On the first stage of the Anns/Cooper analysis, the Court determined that the harm was reasonably foreseeable. With regard to proximity, the Court considered the analysis laid out in Imperial Tobacco and held that the locating of Mr. Coady and the interactions the RCMP officers had with him established potential proximity between them and the plaintiffs.

On the second stage, the Court considered residual policy issues, including that potential liability in tort could significantly change the behaviour of police as well the potential for directing scarce public resources to the resolution of private lawsuits.

Ultimately, the Court concluded that both the duty of care issue as well as residual policy considerations that would negate a prima facie duty of care would be better addressed at trial or on a motion that permitted evidence. As such, the appeal was dismissed.
Carhoun & Sons Enterprise Ltd. v. Canada (Attorney General), 2015 BCCA 163 – Between approximately 1987 and 2009, Carhoun purchased and consolidated six contiguous parcels of land encompassing about 33 acres located in the District of Mission, on which it planned to build a large commercial development on the assembled property. Two of the parcels of land were traversed by ravines considered to be a potential fish habitat. Filling the ravines could have resulted in harm to the fish habitat, and accordingly, Carhoun could then have been liable under s. 35(1) of the Fisheries Act, unless an exemption was provided pursuant to s. 35(2) before development commenced.

In 2009, Carhoun applied for such an authorization to fill the ravines, by submitting a request for review under the fish habitat protection provisions of the Fisheries Act. Before an exemption could be provided under s. 35(2), Fisheries and Oceans Canada ("DFO") would first need to trigger an environmental assessment and obtain a screening report pursuant to the Canadian Environmental Assessment Act, S.C. 1992, c. 37 ("CEAA"). On October 26, 2009, Canada, through the DFO, advised Carhoun that the authorization would not be issued because it would result in an unacceptable harmful alteration, disruption, or destruction of fish habitat. Despite Carhoun's requests, the DFO did not trigger an environmental assessment at that time. After two subsequent requests, the DFO reconsidered its decision and conducted an environmental screening, after which it issued the permit on certain conditions. Carhoun received the s. 35(2) authorization from the DFO on May 29, 2012. By then its financing had collapsed.

Carhoun brought an action in negligence and misfeasance against the Attorney General of Canada asserting that Canada was negligent and misfeasant in the manner in which it adjudicated Carhoun's applications under s. 35(2) of the Fisheries Act. Although the exemption sought was ultimately issued with conditions, Carhoun asserted that it was issued so late that Carhoun suffered foreseeable economic loss. Canada argued that it owed no duty of care in negligence to applicants pursuant to s. 35(2) of the Fisheries Act.

Canada conceded that the harm suffered by Carhoun was reasonably foreseeable and as such it was only necessary for the Court to determine whether a relationship of sufficient proximity existed in order to find a prima facie duty of care. Relying on Imperial Tobacco, Carhoun asserted its claim to proximity on the basis of specific conduct and interactions with the regulator. It argued that its commencement of the s. 35(2) application for an exemption placed it in a proximate, transactional-type relationship with the DFO.

In its proximity analysis, the Court stated:

Carhoun pleads that Canada was in a potentially "proximate" relationship with Carhoun through the direct interactions and communications between the parties. In such circumstances, the only potential barrier to a
The Court found that the legislative scheme in place suggests that Canada is to conduct environmental assessments having regard to multiple interests, including both the public interest in maintaining healthy fisheries and the private interest in efficiently processing an application. Accordingly, the legislation, in the Court's view, could not be interpreted as expressly prohibiting consideration of Carhoun's interests. In light of this, the Court concluded that it was not plain and obvious that Canada and Carhoun were not in a sufficiently proximate relationship.

The Court considered four residual policy issues but ultimately determined that they could not be answered solely on the basis of the pleadings, and would require a factual or evidentiary matrix to decide. Since a duty of care could not be ruled out at that stage of the proceedings, the Court concluded that it was not plain and obvious that Carhoun's claim would fail.

Ravikovich Estate v. Ontario (Minister of Education) 2015 ONSC 3321; additional reasons, Ravikovich Estate v. Ontario (Minister of Education) 2015 ONSC 5525 – In July, 2013, Eva Ravikovich, who was two years old, died while at an unlicensed private-home daycare in Vaughan. Her family members, including one who acted as the litigation administrator of Eva's estate, brought an action against the Ministry alleging that before Eva's death, the Ministry received a number of complaints about the daycare. The complaints were generally that more than five children were being cared for at the private-home daycare. The complainants observed 13 children, 15 children and 10 children at the unlicensed daycare on three different occasions between May 7, 2012 and November 16, 2012.

The Ministry staff attended and viewed the premises from the outside. Subsequently, the Ministry sent a letter to the daycare dated November 26, 2012 stating that it was operating in contravention of the Day Nurseries Act, R.S.O. 1990 c.D.2 because it was unlicensed and more than five children under 10 years of age were being cared for. The Ministry did not carry out any follow up with respect to its letter. On December 21, 2012, the Ministry received another complaint that 17 children were being cared for at the daycare. Approximately seven months later Eva, who was being cared for at this daycare, died.

Following Eva's death, the Ministry obtained a search warrant, attended at the daycare, and found 29 children and 14 dogs. The Ministry then made a court application and obtained an injunction to shut down the daycare.

The plaintiffs argued that the Ministry owed a duty of care to the plaintiffs. On its website, the Ministry stated that it would investigate and follow up on complaints about a person who may be providing care to more than five unrelated children under 10 years of age without a license. The website also stated that the Ministry may prosecute such providers. The plaintiffs argued that they relied on such representations, and that the Ministry knew or ought to have known that the daycare was operating in contravention of the law, and yet it took no steps to ensure Eva's safety.

The Ministry argued that it had no duty of care in the circumstances because there was no proximate relationship between the Ministry and Eva's parents. Her death could not have been foreseen from the fact that more children were at the daycare than permitted by law. According the Ministry, the Day Nurseries Act did not impose a private duty of care.

In her analysis, Vallee J. held that the Ministry clearly knew of the situation based on the number of complaints it received and the fact that its own staff members conducted a site visit. Furthermore, the fact that the Ministry obtained an injunction to shut down the daycare following Eva's death suggested that the Ministry was capable of taking action.

Relying on Jane Doe and Hill, Vallee J. held that the relationship is not required to be close and direct to support a finding of proximity; rather, the question is whether the actions of the wrongdoer have a close or direct effect on the victim, and whether the wrongdoer should have had the victim in mind as someone who might be harmed. Based on this, Vallee J. concluded that it was not plain, obvious and beyond a reasonable doubt that the plaintiff's claim could not succeed. The motion was dismissed.

_Brown v. Canada (Attorney General) 2014 ONSC 6967;_ affirming _Brown v. Canada (Attorney General) 2013 ONSC 5637 ["60s Scoop" case] –_ This action, which has an extensive procedural history, was an appeal from the decision of Belobaba J. certifying the proceeding as a class action. The circumstances of the claim relate to the period between 1965 and 1984 when welfare authorities in Ontario removed many Indian and aboriginal children from their families and communities and placed them with foster or adoptive parents that were non-aboriginals. The respondents, Marcia Brown and Robert Commanda, are aboriginal persons from Ontario who were two of these displaced children. The respondents alleged that many of these children lost their identity as aboriginal persons, and their connection to their aboriginal culture, that ultimately led to them suffering emotional, psychological and spiritual harm. More specifically, they allege that these children were deprived of their culture, customs, traditions, language and spirituality. This led them to experience loss of self-esteem, identity crisis and trauma in trying to re-claim their lost culture and traditions.
In essence, the respondents accused Canada of failing to ensure that the Ontario child welfare system, which Canada arranged to extend to aboriginal children in Ontario, would protect them generally, and in particular, would ensure the maintenance of their identities as aboriginal persons. The respondents brought the action on behalf of approximately 16,000 aboriginals who, they alleged, were the victims of this policy in Ontario between December 1, 1965 and December 31, 1984. The respondents alleged that they personally suffered from Ontario's child protection program in that they experienced psychological problems associated with a loss of culture, self-esteem, and identity. They sought a declaration that Canada breached its fiduciary obligation and duty of care to the class members and, as a consequence of those breaches, claimed general damages of $50,000 for each class member; special damages of $25,000 for each class member and punitive, exemplary and aggravated damages of $10,000 for each class member.

Central to this proceeding was whether the respondents advanced a proper claim for breach of fiduciary duty and/or for negligence arising out of the actions that were taken by Canada, both in entering into the 1965 Agreement and thereafter.

In respect of the negligence claim, Canada argued that the motion judge did not undertake a proper Anns/Cooper analysis. Writing for the Court, Nordheimer J. disagreed, holding that there was a sufficient relationship of proximity demonstrated between Canada and the respondents. He noted that Canada has acknowledged that there is a fiduciary relationship between Canada and Aboriginal peoples, and that Canada assumed an obligation towards aboriginal people regarding the provision of provincial welfare programs to them. In his view, by taking steps to fulfill that obligation by entering into the 1965 Agreement with Ontario, Canada arguably demonstrated a sufficient relationship of proximity to the members of the proposed class. It was equally arguably then, according to Nordheimer J., that in doing so, Canada ought to have recognized that the failure to take reasonable care to ensure that the welfare programs were administered properly might foreseeably cause harm to the members of the class.

On the second stage of the Anns/Cooper test – the residual policy concerns – Canada argued that to impose such a private law duty of care or fiduciary duty in this case would effectively penalize Canada for having used its spending power to ensure that Ontario had the capacity to provide Indian children in need of protection. Nordheimer J. rejected this proposition, holding that the fact that Canada was trying to do something positive for aboriginal children did not negate the need to ensure that such work was done free of negligence. No other policy reasons were advanced for why Canada should not be subject to a duty of care in the circumstances and Nordheimer J. added "certainly, it is difficult to see any
policy reason that would negate that duty in that the situation where children are directly affected.”

The Court dismissed the appeal with a final comment that "aboriginal claims are ones that are particularly underdeveloped and fluid and, consequently, greater latitude should be accorded to them in terms of the "plain and obvious" test."

Castle v. Ontario, 2014 ONSC 3610 – The family of Jesse-James Low brought an action under s. 61 of the Family Law Act alleging that the Ontario Provincial Police (the "OPP") breached its duty of care to protect Low when it released his killer from custody.

On September 2, 2011, Low was stabbed in the stomach and killed by his friend, Raymond Reid. Earlier that day, Reid, Low and another friend, David Ferguson, had attended a fair in Kinmount, Ontario. Reid was severely intoxicated. The three were separated. Reid had an altercation with a group of youths during which he assaulted them and tore down a tent pole. At the time, Reid was on probation, having been convicted of assault causing bodily harm on October 20, 2010. A condition of his probation was to keep the peace and be of good behaviour. In addition, Reid had been charged in August 2011 with failing to report an accident.

The OPP attended the scene and saw that Reid was severely intoxicated. The officers did not charge Reid. Instead, they transported him to the residence of Douglas Meecham, Reid's father, and released him into his custody. Low lived at Meecham's home, and was in a relationship with Meecham's daughter (Reid's sister). Shortly thereafter, Reid left the house and met up with Low and Ferguson at Ferguson's residence. There was subsequently a dispute between Reid and Low resulting in Low being stabbed in the stomach with a steak knife. Reid called Meecham, who attended at the Ferguson residence and transported Low back to his house rather than calling an ambulance. Although eventually an ambulance was called, Low died of his injuries.

The Plaintiffs alleged that the officers owed Low a private law duty of care because they knew that Reid had a violent history, had assaulted Low on two prior occasions, and was extremely intoxicated when they attended the fair. The Plaintiffs further alleged that the officers knew that Low and Reid both resided at Meecham's house, and that Reid was in violation of his probation terms. They argued that the police knew or ought to have known that Reid was dangerous to others at that time, and that they breached the duty of care by failing to keep Reid in their custody.

15 Ibid at para. 44. The day this paper was submitted, Belobaba J. held that the government breached its duty of care in negligence: Brown v. Canada (Attorney General), 2017 ONSC 251
Relying on Project 360 Investments Ltd. v. Toronto Police Services Board 2009 CarswellOnt 3418 (Ont. S.C.J.) and Patrong v. Banks, 2013 ONSC 5746 (Ont. S.C.J.), the defendant asserted that the OPP did not owe a private law duty of care to the plaintiffs or Low, but rather owed a public law duty to the general public. It submitted that courts have rejected the proposition that police owe a private law duty of care to individuals, and specifically to victims of crime. The defendant asserted that this case is not analogous to the exceptional cases where such a duty has been found to exist, and argued that the claim should be struck out on that basis.

On the first stage of the Anns/Cooper test, Lederman J. concluded that it was not plain and obvious that Low's harm was not foreseeable. With regard to the issue of proximity, Lederman J. reviewed a number of prior cases that dealt with whether police owe a duty of care to individuals. After considering the jurisprudence, he concluded that it was not plain and obvious that the facts alleged by the plaintiffs did not establish a special relationship of proximity between the OPP and Low. In particular, Lederman J. relied on the allegations that the OPP knew Reid personally and knew he was a dangerous individual, especially when intoxicated; they knew he had been convicted of assault causing bodily harm and was in breach of his probation; they knew Low was a resident of the home where Reid was dropped off; they knew Reid had assault Low on two prior occasions; they knew Meecham had failed to control Reid in the pass; and they knew that Reid and Low had been together earlier that day and ought to have known that Reid would likely rejoin Low. Lederman J. held that these factors arguably created a "close and direct" relationship between the OPP and Low, and if those facts were true, that the police would arguably have known that Low was in a narrow group of Reid's potential victims.

On the second stage of the test, Lederman J. held that there was no risk of indeterminate liability should a duty of care be found in these circumstances. He noted that "such a duty would only be owed to victims or their families who have a special relationship of proximity to police that is based on knowledge of the victim, of close and direct interaction with the victim."\(^\text{16}\) As such, the motion was dismissed.


\(^{16}\) Castle v. Ontario, 2014 ONSC 3610 at para. 51.
reasonable cause of action. The appellants sought on appeal to reinstate certain causes of action, including negligence.

The events leading up to the matter first arose in 1998 when the audit department of the respondent, Canada Revenue Agency ("CRA"), conducted an investigation into the use of research and development tax credits by several corporate taxpayers. The CRA's investigations extended to a team of tax advisors at the national accounting firm of BDO Dunwoody LLP, which included the two appellants. The CRA's concern was that, with the help of BDO, the corporate taxpayers were applying for fraudulent preferential research and development tax credits in the 1996, 1997, and 1998 tax years.

The respondent, Anne Kamp, was the lead CRA investigator. Between July 1998 and May 1999, she applied for and obtained three search warrants to search the homes and businesses of the corporate taxpayers, as well as those of their lawyers and accountants, including McCreight. Pursuant to these search warrants, approximately 60 boxes of materials and at least three hard drives were seized.

On November 3, 1999, Kamp sought formal approval from the Windsor CRA office and the Department of Justice (the "DOJ") to charge various taxpayers and tax advisors, including McCreight and Skinner, with fraud and conspiracy under the Income Tax Act and the Criminal Code. The DOJ provided its approval and on November 9, 1999, charges were laid. As a result, the CRA was entitled to retain all of the seized materials. Neither McCreight nor Skinner had had the opportunity to make any exculpatory submissions to the CRA.

The preliminary inquiry commenced in 2001 and ended in 2005. In 2006, Momotiuk J. discharged both McCreight and Skinner. Quinn J. subsequently stayed the charges against the corporate taxpayers on the basis of unreasonable delay pursuant to s. 11(b) of the Canadian Charter of Rights and Freedoms.

The appellants then commenced proceedings against the Attorney General of Canada, the CRA, and ten employees or agents of the DOJ or the CRA on that grounds that the CRA investigation had been mishandled and had resulted in the laying of false charges against McCreight and Skinner. They alleged that they were charged so that the CRA could keep the seized documents. McCreight and Skinner pleaded conspiracy, fraudulent and negligent misrepresentation, negligence, malicious prosecution, misfeasance in public office, breach of fiduciary duty and abuse of process, as well as breaches of the Charter.

With respect to the negligence claim, the motion judge found that the claims consisted of bald allegations and that no duty of care was owed by the CRA officers to subjects of an investigation. Furthermore, policy considerations would negate such a private law duty. On appeal, the appellants argued that the motion judge erred in striking the negligence claim. Relying on the Supreme Court of
Canada's analysis in *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, they argued that the relationship between a CRA investigator and his or her suspect is analogous to that between a police officer and the subject of his or her investigation. Further, the appellants argued that there was no distinction between the circumstances of their case and those in *Leroux v. Canada Revenue Agency*, 2012 BCCA 63, in which the British Columbia Court of Appeal refused to strike a negligence claim against the CRA, and recognized that it is at least arguable that the CRA owes a duty of care to individual taxpayers in the administration and enforcement of taxing statutes.

The Court of Appeal agreed with the appellants on both counts. Writing for the Court, Pepall J.A. held that the case at bar was analogous to that in *Hill* and also that there was no relevant distinction to be made between *Leroux* and this case. The Court was not persuaded that the claim of negligence should be struck and ordered that the action for negligence against the CRA investigators be permitted to proceed to trial.

**Ashak v. Ontario (Director, Family Responsibility Office)**, 2012 ONSC 1909; Leave to appeal refused, *Ashak v. Ontario (Director, Family Responsibility Office)* 2013 ONSC 39

Following the breakdown of the marriage between Haiata Ashak and Munir Toma, custody of the couple's three children was granted to Ms. Ashak. Mr. Toma was ordered to pay child and spousal support. Within days of the November 1996 order, Mr. Toma left the country and failed to meet any financial support obligations to his family.

The support order was filed with the Family Responsibility Office ("FRO") pursuant to the *Family Responsibility and Support Arrears Enforcement Act, 1996*. Collection efforts were undertaken; a writ of seizure and sale was issued and filed with the Sheriff's Office in Toronto; a Support Deduction Notice was sent to the federal government; and a negative credit report was filed. These steps proved ineffective. Without support from Mr. Toma, Ms. Ashak obtained social assistance, and she assigned the support order to the Minister of Community and Social Services.

Ms. Ashak periodically contacted the FRO with information concerning Mr. Toma's potential whereabouts and sources of income. Enforcement staff followed up, but without success. In October 2002, Mr. Toma resurfaced in Canada and attended at the FRO as a result of travel restrictions which had been placed on him. At FRO's request, the federal government had suspended Mr. Toma's passport under the *Family Orders and Agreements Enforcement Assistance Act* ("Act").

On March 17, 2003, Mr. Toma reappeared at the FRO counter and advised that his lawyer was seeking a variation order. That same day, the FRO authorized the
federal government to remove the suspension of Mr. Toma's passport, and Mr. Toma subsequently left the country forever. Following a hearing before Brownstone J. in the Ontario Court of Justice, the FRO took further steps to enforce the support order, including suspending Mr. Toma's passport again and serving a notice of garnishment on a financial institution. Further attempts were also made to locate Mr. Toma, with no success. Mr. Toma was killed in Iraq on September 14, 2004.

Ms. Ashak subsequently brought a claim for damages from Her Majesty the Queen in Right of Ontario as represented by the Director of FRO for breach of duty, negligence, gross negligence, breach of fiduciary duty, and/or vicarious liability.

With respect to the claim in negligence, Ms. Ashak argued that the FRO should not have requested that the federal government remove the suspension of Mr. Toma's passport, and that those involved in the decision to do so were grossly negligent.

After determining that this case did not fit within a recognized category of duty, Grace J. turned to the Anns/Cooper analysis. Referring to Imperial Tobacco, Grace J. held that a prima facie duty of care arose in this case from both the legislative scheme in place and the interactions between the FRO and Ms. Ashak. The case log report filed by Ontario evidenced frequent calls from Ms. Ashak and proactive attempts to provide the FRO with information intended to assist the FRO in locating Mr. Toma as well as his assets and sources of income. In light of this, Grace J. concluded:

A relationship between F.R.O. was established and was subsisting on March 19, 2003. F.R.O. was entrusted with the task of attempting to protect and advance the economic interest of the public — and Ms Ashak. It accepted that responsibility and took action. In my view, the relationship between Ms Ashak and F.R.O. is sufficiently close — or proximate — that a prima facie duty of care arose.¹⁷

With regard to the Act, Grace J. concluded that it provides a means of ensuring that the obligations imposed on a payor by the court are fulfilled, and that it creates a scheme which directly and profoundly affects those who have filed support orders with the FRO. Grace J. concluded that this case was the rare situation described by McLachlin C.J.C. in Imperial Tobacco whereby "some statutes may impose duties on state actors with respect to particular claimants."¹⁸

¹⁷ Ashak v. Ontario (Director, Family Responsibility Office), 2012 ONSC 1909 at para. 59.
¹⁸ Ibid at para. 70
The Court considered, and ultimately rejected, whether the action could be barred based on statutory immunity or policy concerns related to indeterminate liability. In light of the above conclusions, the motion for summary judgement was dismissed.\textsuperscript{19}

\textbf{Roe v. Leone, 2012 ONSC 6237} – Carl Leone, an HIV positive man, met the plaintiffs between 2002 and 2003. Without disclosing his diagnosis, Mr. Leone had unprotected sex with each of the plaintiffs, and subsequently infected all four women with HIV. The four plaintiffs sought damages not only from Leone and various members of his family, but also alleged that they are HIV positive and suffered damage as a result of negligence on the part of the Windsor Police Services Board and the Windsor Health Unit. In particular, the plaintiffs alleged that the Windsor Health Unit knew that Mr. Leone had committed aggravated sexual assaults, was sexually active, and would likely continue to commit aggravated sexual assault. With that knowledge, the Health Unit did nothing to advise the law enforcement authorities, to warn Mr. Leone's sex partners, or otherwise prevent him from endangering the health and lives of those and other victims.

With respect to the Windsor Police, the plaintiffs alleged that the Windsor Police received complaints that Mr. Leone was spreading AIDS/HIV, but conducted no meaningful investigation. One such complaint was received on September 24, 2000, prior to his infecting any of the four plaintiffs, but was duly recorded and negligently filed away without being brought to the attention of Mr. Leone's investigating officer.

Both defendants argued that there is no private law duty of care owed to any of the plaintiffs and moved for summary judgement dismissing the actions.

At stage one of the \textit{Anns/Cooper} test, the moving parties both conceded that it was foreseeable that Mr. Leone would have unprotected sex with unsuspecting women and infect them. With that, Grace J. turned to the proximity analysis. The parties agreed that neither the \textit{Health Protection and Promotion Act} in the case of the Windsor Health Unit nor the \textit{Police Services Act} in the case of the Windsor Police created nor foreclosed a private law duty of care.

Referring to \textit{Imperial Tobacco}, Grace J. held that a private law duty of care can arise from a series of specific interactions between the government and the claimant. The moving parties pointed to the absence of a direct of a direct

\textsuperscript{19} Note: See also Ashak v Ontario (Director, Family Responsibility Office) 2013 ONCA 375, in which Ontario appealed the decision of Grace J. on the grounds that it amounted to a binding final order. The appeal was dismissed, with the Court noting that "to the extent that a motion judge may purport to make findings of fact in reasons for judgement dismissing a Rule 20 motion, such findings do not have a binding effect".
relationship between the plaintiffs and the public authorities, and noted that none of the plaintiffs had any contact with the Windsor Police before May 2004, and that Jane Roe did not mention Mr. Leone's name in her dealings with the Windsor Health Unit. They argued that that dealt a fatal blow to the plaintiffs' attempt to establish proximity.

Grace J. disagreed, noting the moving parties had read the prior case law too narrowly, and that "the law does not require direct communication or interaction between the government authority and the plaintiff." He considered the importance of the plaintiff being within the reasonable contemplation of the alleged wrongdoer, and noted that both defendants, long before any of the plaintiffs met Mr. Leone, knew that Mr. Leone was having unprotected sex with his partners without disclosing his HIV status.

Grace J. concluded that, in light of *Imperial Tobacco*, as long as there was a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, a trial was essential to respond to the duty of care issue.

*McCrea v. Canada (Attorney General)*, [2015] F.C.J. No. 1225, var'd 2016 FCA 285 AND *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121 – I have included reference to these two cases, one just decided this week, because they are examples of cases that hold that, arguably, a simple breach of statute as between a body that awards benefits and recipients, can be actionable as a negligence claim. What leads both courts here to hold that a duty may be owed is that active steps were taken by the regulatory bodies in question (in the first case, Service Canada, in the second, the WSIB in Ontario) to "implement" legislative provisions. These implementations took on the form of active steps in a context where the claimant would expect that a certain degree of care would be taken in adjudicating his or her particular claim (a claim for EI benefits or a claim for WSIB benefits). But *query*, isn't the implementation of a statutory benefit in a supposedly negligent way a "breach of statute" claim *per se* that *Saskatchewan Wheat Pool* provides should not be actionable? These cases show how far active steps by regulators (and there are often such steps) can fit within the broad compass of "implementation", the buzz-word of *Imperial Tobacco*, so as to ground potential negligence implications.

### 2. New Cases and the Stage Two Policy Analysis

The *ratio* of *Imperial Tobacco* was that the manufacturers could not establish a duty of care in negligence because of broad, public policy considerations that animate stage two of the foreseeability/proximity/policy analysis. While McLachlin C.J.C., in her policy analysis, tells us that she is revisiting the policy/operational distinction and test previously accepted by the Court [by now excluding from liability only "core" or "true"

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20 Roe v. Leone, 2012 ONSC 6237 at para. 117
policy decisions], to be frank, I can find no discernible difference between the test used there and in previous cases. This point is made in a detailed case comment by Prof. Klar that is well worth reading,\textsuperscript{21} and I won't repeat the analysis here.\textsuperscript{22}

Suffice it to say that, in my opinion, whereas a previous decade of claims had foundered at the stage one policy stage of the "duty of care" test, the reformulated proximity test, one I feel expands the potential scope for liability, will likely lead regulators to focus more heavily on stage two, and to try and use \textit{Imperial Tobacco} in support. Indeed, Prof. Klar regards \textit{Imperial Tobacco} as a "big win for public authorities" because "[i]t extends significantly the policy aspects of governmental conduct, making it even more difficult for plaintiffs to succeed in these cases."\textsuperscript{23} I would not go so far – if Prof. Klar is right (and I agree) that the stage two reasons in \textit{Imperial Tobacco} are just another way of saying much the same thing about the policy/operational distinction (a distinction that is inherently complex, however it is cast by the courts), I am not sure that one can draw any conclusions that this stage two analysis will mean fewer negligence claims will actually proceed or succeed.

A review of recent case law does not support Prof. Klar's "big win" conclusion. Indeed no discernible pattern can be found.\textsuperscript{24} One of the main reasons for this, I suggest, is that the bulk of the recent case law are a series of preliminary motion decisions where courts typically decline – absent a record – to decide on whether the alleged negligence is the product of a "policy" or "operational" decision. This is interesting because, in \textit{Imperial Tobacco} itself, the tobacco companies argued vociferously that the Supreme Court cannot and should not engage in the stage two analysis on a preliminary motion. This was rejected by the Supreme Court, opening up the possibility that, after 2011, other claims might founder at stage two even on a preliminary motion. That has rarely been the case, and the few cases that follow are among the few where this has taken place.

\begin{itemize}
\item \textsuperscript{21} L.N. Klar, "\textit{R. v. Imperial Tobacco Ltd.}: More Restrictions on Public Authority Tort Liability" (2012), 50 Alta. L.Rev. 157
\item \textsuperscript{22} Prof. Daly has likewise observed that, so long as the Court continues to use a dichotomy (policy vs. operational or, to borrow from \textit{Imperial Tobacco}, true or core policy decisions vs. other types of decisions), consistent difficulties will arise for the simple reason that the public authority is inevitably, in all decision making, engaged partly in policy making and partly in implementing policy, often if not always at the same time: P. Daly, "The Policy/Operational Distinction: A View from Administrative Law" (2015), 69 S.C.L.R. (2d) 17. In other words, so long as such a dichotomy itself is used, the application of different labels on either side of the dividing line amount to very little by way of a change.
\item \textsuperscript{23} \textit{Ibid.} at para. 47
\item \textsuperscript{24} A new article by Lorian Hardcastle, which reviewed a large volume of lower court public authority negligence decisions from 2002 to 2013, found no discernible pattern during that time period in the number of claims that succeed or might succeed vs. those that failed: see L. Hardcastle, "Recovering Damages Against Government Defendants: Trends in Canadian Jurisprudence" (2016), 69 S.C.L.R. (2d) 77. The article is a helpful reminder that efforts at discerning a "pattern" ("\textit{Cooper} means less liability", \textit{Imperial Tobacco} is a "big win") in this area are notoriously difficult. Government regulatory negligence liability is not one that lends itself to certainty.
\end{itemize}
Cropvise Inc. v. Canadian Food Inspection Agency, 2016 NBQB 186 – This is a decision in the matter of an action in which Cropvise Inc. ("Cropvise") and Wolf & Wolf Seeds Inc. ("Wolf", and collectively with Cropvise, the "Plaintiffs") claimed damages against the Canadian Food Inspection Agency ("CFIA") for negligent performance of the CFIA's responsibilities in relation to the export of seed potatoes by the plaintiffs to Venezuela during the period from December 2009 to March 2010. The CFIA is a statutory entity formed under the Canadian Food Inspection Agency Act (Canada) (the "CFIA Act"), and is a Crown agent with a mission "dedicated to safeguarding food, animals and plants, which enhance the health and well-being of Canada's people, environment and economy."

The summarize the detailed facts involved in this matter, the plaintiffs contended that the CFIA did not take reasonable steps to secure the entry of rejected potatoes into Venezuela. Specifically, they maintained that the CFIA negligently performed its responsibility under ss. 7.1.1 of the CFIA Policy to "negotiate the release of shipments that are detained, as a result of alleged phytosanitary reasons." In this case, there were no phytosanitary issues and the CFIA was aware of that based on the due diligence carried out by their own inspectors. The plaintiffs alleged that the CFIA declined to act forcefully to bring about the entry of the rejected potatoes into Venezuela because it was more focussed on maintaining diplomatic relations with the Venezuelan government than pursuing its duties under the policy.

On the first stage of the Anns/Cooper test, Stephenson J. held that based on both the interactions between the parties as well as the government's statutory duties the CFIA owed the plaintiffs a prima facie duty of care in the performance of its roles and responsibilities under the CFIA Policy and Protocol.

In turning to the second stage of the test, Stephenson J. assessed the issues of statutory immunity, indeterminate liability, and whether the action of the CFIA in this instance should be properly regarded as matters for the Government and not for the Court.

He concluded that the first two issues did not operate to extinguish the prima facie duty of care owed by the CFIA to the plaintiffs. On the third issue, Stephenson J. turned to the analysis of "core policy" issues outlined in Imperial Tobacco for guidance. He noted that some of the decisions by specific government actors in this case were motivated by political considerations about what was an appropriate procedure for a meeting between CFIA operations staff and senior members in the Venezuelan Plant Health Organization. They were also concerned about potential impacts in other areas of interest to Canada. Stephenson J. found that the CFIA concluded that engaging the Venezuelan stakeholders diplomatically rather than forcefully would be beneficial to overall Canadian interests, and could potentially keep the potato market open. In his view, these were precisely the types of "core policy" decisions driven by
economic and political considerations that McLachlin C.J.C. was referring to in *Imperial Tobacco*. In light of this, Stephenson J. concluded that such residual policy considerations would negate any duty of care owed by CFIA. The action was dismissed.

**Adam v. Ledesma-Cadhit, 2014 ONSC 5726** – Aminatawalla Napoga Chidinma Abudu ("Aminatawalla"), the daughter of the plaintiffs, Abudu Ibn Adam and May Hyacenth Abudu died on November 28, 2009 at the age of 5 years old. The plaintiffs alleged that her death was the result of an H1N1 influenza vaccination that was administered by her family physician five days earlier, on November 23, 2009. The plaintiffs commenced two actions in negligence, naming as defendants the doctor who administered the vaccination, Dr. Christine J. Ledesma-Cadhit, the manufacturer of the vaccination, GlaxoSmithKline Inc., the Attorney General of Canada/Her Majesty the Queen in Right of Canada ("federal Crown") and the Attorney General of Ontario/Her Majesty the Queen in Right of Ontario ("provincial Crown") (collectively "the Crowns").

The plaintiffs alleged negligence on the grounds that the Crowns invited the public, Aminatawalla and her family to take the H1N1 virus vaccination without advising of the risks of adverse effects of taking the said vaccination; that they failed to caution the medical profession or the public that there were additional higher risks of death or injury when the H1N1 vaccine is used on specific populations such as the age group of Aminatawalla; and that they failed to call an inquiry to investigate the circumstances of Aminatawalla’s death even after several requests were made to all appropriate governmental departments by the plaintiffs.

In June and October 2012, the federal Crown and the provincial Crown brought motions seeking to strike the Statement of Claim and dismissing the actions as disclosing no reasonable cause of action against them.

Chiappetta J. concluded that a private law duty of care had not been established. In her view, the relevant statutes did not demonstrate a legislative intent to provide a private remedy to individuals. Rather, the purpose of the relevant legislative schemes was to facilitate the public authority to act in its discretion in the interest of public health.

With respect to proximity, Chiappetta J. concluded that the factual allegations did not distinguish the relationship that existed between the public health regulators and the members of the public sufficiently to create a relationship of proximity between the plaintiffs and the public health regulator. She noted that the facts were analogous to those in *Imperial Tobacco* in that public representations by a regulator as to its public duties and obligations do not establish a relationship of proximity between the regulator and an individual plaintiff.
Furthermore, in her view, even if a *prima facie* duty of care could be established at stage one, it would be negated based on residual policy considerations at stage two. At the relevant time in 2009, a pandemic health risk was facing the entire country. The Crowns developed a course of action in anticipation of the pandemic situation, designed to address the health and safety of the Canadian population. Chiappetta J. concluded that the decisions made necessarily involved the consideration and balancing of a myriad of competing interests blanketed by the ultimate goal of public health protection. The Crowns decisions were identifiable policy decisions and could therefore not ground an action in tort.

Chiappetta J. concluded that it was plain and obvious that the plaintiffs' claim in negligence would fail and as such, the motion was allowed.

*Los Angeles Salad Co. v. Canadian Food Inspection Agency, 2013 BCCA 34*; affirming *Los Angeles Salad Co. v. Canadian Food Inspection Agency, 2011 BCSC 779* – The appellants, United States corporations that distribute carrots for retail sale by Costco in Canada and the United States, sued the respondents for damages for negligence in their inspection of carrots that the appellants imported into Canada. At the material times, the respondent, Canadian Food Inspection Agency (the "CFIA"), was exercising its inspection powers under the *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6, and the *Canada Agricultural Products Act*, R.S.C. 1985, c. 20 (4th Supp.). The respondent Attorney General of Canada represented the Public Health Agency of Canada, established pursuant to the *Public Health Agency of Canada Act*, S.C. 2006, c. 5, and Health Canada (presided over by the Minister of Health), which agencies assisted the CFIA in the investigation.

The appellants argued that in the process of an inspection, the CFIA incorrectly declared the plaintiff's carrots to possibly be contaminated. The carrots were recalled in both Canada and the United States, and the inventory was destroyed. The plaintiffs suffered economic losses because of the incorrect and allegedly negligent inspection.

Smith J., writing for the Court, rejected the claim that the agency's conduct was sufficient to establish proximity, noting that the clear purpose of the relevant legislative scheme was to protect the health of Canadians by preventing the sale of contaminated food in Canada. To recognize a private law duty of care to food sellers "would put food inspectors in the untenable position of having to balance the paramount interests of the public with private interests of food sellers and would thereby have a chilling effect on the proper performance of their duties."25

As such, the statutory scheme was held to exclude the possibility of sufficient factual proximity to make it just and reasonable to impose a *prima facie* duty of care.

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In considering residual policy concerns, Smith J. affirmed the position of the chambers judge that the issue of indeterminate liability would negate any duty of care. Relying on *Imperial Tobacco*, the chambers judge had held that a duty of care to protect the economic interests of food suppliers could lead to a multitude of claims from parties such as retailers, wholesalers, suppliers, food processors, distributors, farmers, and employees of each.

Accordingly, the decision of the chambers judge was upheld and the appeal dismissed.

D. **A Voice Cries Out in the Wilderness – Paradis Honey**

I introduce this section on the Federal Court of Appeal's interesting judgment in *Paradis Honey* with a tongue-in-cheek title, not so as to cast aspersions on the reasons but so as to make the observation that the initial reaction to the decision, while respectful, has been for the most part playful, as if the analysts somehow "know" that one can muse a bit on *Paradis Honey* because its effects are likely to be minimal at best, as if that in and of itself suffices to confine the majority reasons to some bookshelf reserved for judicial apocrypha.

Even the case's name, "Paradis Honey", has provided CanLII commentators and bloggers with fodder from which to make Biblical references or puns about the sticky situation that would lead a group of two appellate judges to offer a poignant appraisal of the state of negligence law in Canada.

While it is true that *Paradis Honey* has had little effect and, I would argue, cannot possibly change the law of negligence in Canada in the foreseeable future given the current state of the law, and while that must be said in any paper that is honestly appraising the current state of things, *Paradis Honey* reflects a very real and understandable frustration with the development of negligence principles, particularly in a country which maintains a very rich and nuanced administrative law history and jurisprudence applicable to the exercise of public power, and particularly where a primary source of that rich history (England) has: (a) itself long abandoned the foundational *Anns* negligence test in favour of a new approach to public authority negligence law; 26 and, (b) been seriously studying the question of whether to legislate in this area. 27

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27 The 2012 Paper at Appendix A closes with a review of legislative developments in the UK.
1. What Paradis Honey Held

*Paradis Honey*\(^\text{28}\) involves a proposed class action launched by Canadian beekeepers that alleges that a government directive, practice, or policy prohibiting the import from the US of bee colonies amounts to negligence. Before 2006, such importation was governed by a series of discrete regulations. After 2006, the contention in the Claim is that the regulations ceased, leaving in place a generic statutory framework that, alongside a regulatory authority's significant involvement in the well-being and functioning of the industry, gave rise to certain duties to non-negligently assess the plaintiffs' requests that they be permitted to import honey bee colonies. The *Paradis Honey* decisions in the Federal Court and Federal Court of Appeal followed from the federal government and federal authority's motions to strike the Claim.

Interestingly, both the Federal Court and Federal Court of Appeal agreed that the Claim did not disclose a negligence cause of action on the basis of any statutory language alone. Echoing what I say in the 2012 paper and my comments about *Cooper* and *Edwards*, both decisions succinctly indicate that a duty cannot be readily found in statutory language that, like much statutory language, conferred on the key decision-makers wide discretionary powers.\(^\text{29}\)

However, whereas the Federal Court judge and the dissenting judge in the Federal Court of Appeal held, following *Imperial Tobacco*, that the course of conduct between the plaintiffs and defendants was not sufficiently close to create a relationship of proximity, the majority in the Court of Appeal held that enough facts were pled that the Claim should survive a preliminary motion to strike. Before coming to that conclusion, thought, the majority decision, written by Stratas J.A., begins by suggesting that the plaintiffs likely had open to them four distinct arguments recognized by traditional administrative law principles, arguments that might have resulted in the Court granting administrative law remedies.\(^\text{30}\)

Having begun his reasons by indicating that administrative law offers tools for persons in the plaintiffs' position, the majority then in effect applies *Imperial Tobacco* to the pleading in reasons that are, at once, an attempt to apply the decision and, on the other hand, a sharp critique of what the majority believe is a complete lack of guidance.

What emerges are a series of statements that one could apply to a large number of regulatory negligence decisions and that would, if applied literally, widen the number of situations where liability might be possible. Those statements include:

- a finding that "Canada assured [the Plaintiffs] that imports affecting their economic interests would be banned only as long as there was scientific

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\(^{28}\) *Paradis Honey Ltd. v. Canada*, 2015 FCA 89

\(^{29}\) This finding was made even though the underlying statute governing the importation of animal products states that the authority "shall" permit importation once certain objective conditions are met.

evidence of risk”, with a holding that this assurance alone may constitute the type of "interactions" required by Imperial Tobacco to ground a duty of care [para. 90]

- the presence of legislative criteria the regulator will normally factor into any decision concerning the importation of animals [para. 90]
- a conclusion that these interactions within these legislative criteria give rise to sufficient proximity to overcome a motion to strike [para. 91]
- a statement that the fact a duty of care "could have" a chilling effect on government is no policy reason to negate a prima facie duty of care [para. 98]

In my experience, most regulators at least offer some sort of assurance of a certain quality of service or policy or goal or aspiration. These are found on myriad websites and reports. That, coupled with ongoing consultation with industry strikes me as a relatively low bar from which to find a potential duty of care in negligence, yet the majority in Paradis Honey suggests that this may be enough.

In fairness to the majority, the decision followed a preliminary motion to strike where even the Plaintiffs recognized that their pleading might have to be amended to particularize the kinds of "interactions" Imperial Tobacco requires. Moreover, unlike many statutory regimes, the underlying legislation involved here indicated that the regulator had to ("shall") authorize certain imports on the meeting of certain safety criteria. [Query then why all four judges at both levels felt that the statute itself was insufficient to impose a duty of care with the use of such mandatory language and related criteria?] The majority reasons can thus be explained as following from a plea of some interactions within a regime where the plaintiffs might have expected, and even demanded, that specific statutory criteria be considered and, if met, would lead to a right of importation.

What gives Paradis Honey its recent reputation as a case of note is that, in the course of applying Imperial Tobacco, the majority is heavily critical of its prescriptions as being vague, incoherent, and, frankly, relatively useless. Responding to Canada's argument that its directive on non-importation was immune from review, being a core policy decision that Canada said cannot be reviewed, the majority unsparingly tells us that Imperial Tobacco may or may not say that core policy decisions cannot be reviewed, that the whole policy/operational dichotomy is flawed, that the idea that policy decisions are immune from review is contrary to basic principles of accountability, and that, what is or is not a policy decision is impossible to glean from the Supreme Court itself:

In Imperial Tobacco, the Supreme Court states that if a duty of care “would conflict with the state’s general public duty established by the statute,” the court “may” not find one: at paragraph 45. That sentence appears in a section that suggests broadly that “expressions of government policy” are exempted from liability for damages: at paragraph 62. The Supreme Court also speaks of matters of “core policy” that are protected from suit: at paragraph 90. The Federal Court regard some or all of these statements as clear propositions preventing recognition of a duty of care upon Canada to the beekeepers.
I disagree. I do not accept that Imperial Tobacco establishes any hard-and-fast rule that decisions made under a general public duty, government policy or core policy are protected from a negligence claim.

The statement in paragraph 45 of Imperial Tobacco about a “general public duty” contains the word “may,” a qualifier. Unfortunately, the Supreme Court is silent about when that qualifier applies. Further, the Supreme Court does not define what qualifies as a “general public duty.” Nor does it define the meaning of “expressions of government policy” in paragraph 62. We are left to fend for ourselves.

As for “core policy” matters that are protected from suit, the Supreme Court offers this definition (at paragraph 90):

“[C]ore policy” government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. [This]…does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of “policy” involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

In the first sentence of this paragraph, we are told that “decisions…based on public policy considerations” are immune. But most decisions are based on public policy considerations; indeed, all considerations to be taken into account by decision-makers under legislation are public policy considerations.

Also in the first sentence, we are told that examples – not exhaustive – of public policy considerations are “economic, social and political factors.” But that covers just about everything on the legislative books in the area of regulation. Read literally, the first sentence immunizes a broad zone of bureaucratic activity quite contrary to fundamental principles of accountability in public law, and many decided cases too, including many from the Supreme Court …

But the first sentence does not stand alone. Four follow. They whittle the definition down essentially to nothing, telling us immunity may or may not apply, and any certainty is “likely chimerical.” What should be immunized from liability is said to be
“readily identifiable,” but no criteria for identification are supplied. Again, we are left to fend for ourselves.

I conclude that Imperial Tobacco does not stand for any clear proposition that dooms the beekeepers’ claim to failure. If anything, Imperial Tobacco leaves us more uncertain than ever as to when the policy bar will apply.

This is fairly pointed criticism. Having thus excoriated Imperial Tobacco’s stage two guidance, Stratas J.A. returns, in his reasons, to his earlier comments that the plaintiffs' complaints could have fit most neatly into a number of administrative law categories. He then proceeds to state, from paragraphs 112-153 in his reasons, that "[f]or the benefit of future cases", it is worthwhile to consider, as an alternative to the Imperial Tobacco negligence analysis, whether a novel "public law claim" might be recognized. After all, as Stratas J.A. correctly reasoned, on a motion to strike, even a "novel" claim should be permitted to proceed. According to Stratas J.A., if, as all in the Federal Court of Appeal agreed, a traditional administrative law analysis might lend itself to a remedy, is it not high time that long-standing administrative law principles be put to use to found a damages claim? 31

For the purposes of this brief summary paper, I cannot possibly begin to tackle the "public law claim" aspects of the majority reasons. The decision deserves a thorough vetting and analysis, and this is not the place for that. The public law claim suggested is certainly novel and, *grosso modo*, what it amounts to is a well-argued suggestion that public regulatory liability be subsumed within administrative law principles, with one obvious change in the law: that "damages" potentially, and I stress "potentially", might flow from directly breaches of administrative law standards when, hitherto, courts have assiduously held that damages are virtually never awarded on judicial review. At its core, Stratas J.A. would substitute for negligence law administrative law principles of reasonableness, transparency, and accountability, and would, as a matter of the exercise of the court's discretion to grant relief, grant damages in appropriate cases. In doing so, Stratas J.A. writes that some of the confusing, if not indefensible, distinctions the Supreme Court draws in articulating the negligence test (ex. is it "policy" or "operational") could be neatly subsumed within administrative law: administrative law already deals with these policy issues by showing more or less deference to the administrative actor within the reasonableness standard of review.

To translate that into negligence principles, Stratas J.A.'s formulation would essentially involve a more dynamic analysis of the virtually neglected "standard of care" stage of the negligence test: the standard a government might have to meet could be lower or higher depending on how much deference a court is to show a public authority given the court's proper role viz. the executive in our Parliamentary democracy. 32 In this respect,
Stratas J.A.’s suggestion that the standard of care stage of negligence law be brought to bear within a more supple administrative law test mirrors his many decisions where he observes that, in administrative law itself, the degree of deference to be shown depends on a number of factors: the "margin of appreciation" in which the government operates is said to expand or contract accordingly, per Stratas J.A..

Any serious study of Paradis Honey would, I think, have to start from Stratas J.A.’s assumption that administrative law in fact provides the kind of organizing, uniform, and nuanced principles capable of replacing negligence law. The actual truth is that administrative law continues to suffer from similarly incoherent dichotomies as those advanced in Imperial Tobacco. Thus, in administrative law, "legislative" and "policy" decisions are not subject to judicial review, while "administrative" ones can be. And, what constitutes a policy or administrative decision, that is, where the dividing line is to be found, is not exactly any more coherent than the Imperial Tobacco dividing lines: "[d]ecisions of a legislative nature …create norms or policy, whereas those of an administrative nature merely apply such norms to particular situations". Further, the idea that the standard of review in administrative law is supple and varies on a case by case and issue by issue basis (the "margin of appreciation"), may have been rejected in the divided decisions of the Supreme Court in Wilson. [Certainly one panel of the Federal Court of Appeal has already treated Wilson as saying so].

In any event, I turn to the effect of Paradis Honey.

2. The SCC Reaction to Paradis Honey

What I can best offer in terms of keeping the reader up-to-date is a survey as to where Paradis Honey has taken the legal system, or not, in admittedly only a very short period of time. It is at this point of the analysis that bloggers and other disjecta membra – apparently aghast at what Paradis Honey might do to the law if it were ever to gain support – find comfort in the probably correct conclusion that Paradis Honey is not destined to have much, if any, impact. It would be correct to say that Paradis Honey

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33 For examples of Stratas J.A.’s discussion of the "margin of appreciation" in administrative law, see for instance, Canada (Attorney General) v. Abraham, 2012 FCA 266 and Attaran v. Canada (Attorney General), 2015 FCA 37. The FCA has in some cases indicated that the "margin of appreciation" may reduce the number of acceptable outcomes on reasonableness review to one.


35 Brown and Evans, Judicial Review of Administrative Action in Canada (Carswell, Toronto; 2014), at ss. 7:2330 and 7:2340


37 Zulkoskey v. Canada (Employment and Social Development), 2016 FCA 268 at para. 15
has had almost no impact so far. I would go a step further and suggest that it is highly unlikely that it can have an impact, at least not in the foreseeable future.

First, the government in *Paradis Honey* sought leave to appeal the decision, and the Supreme Court, in late 2015, rejected the application.\(^{38}\) It is admittedly difficult to read too much into a leave to appeal decision dismissing an application. However, it is interesting to observe that, following *Cooper* and *Edwards*, the Supreme Court was eager to hear more negligence cases and work out the implications of *Cooper/Edwards*, which they did in *Finney, Hill, Syl Apps, Broome, Fillowka, Elder Advocates, Holland, Telezone*, and of course, *Imperial Tobacco*, and others. However, following *Imperial Tobacco*, no further negligence cases have been heard in nearly six years, with one coming to the Court this term on auditors’ liability (which is not a claim against a public authority, of course).

Secondly, in rejecting the leave application, the Court would have had in mind the fact that it had just released *Imperial Tobacco*. But, perhaps more importantly, if one accepts that what *Paradis Honey* represents is an attempt to merge the public and private spheres together, other recent developments in the Supreme Court around the time of *Imperial Tobacco* tell me that the Court’s current philosophy is very much rooted in the idea that the two spheres are ones that do not, and should not, somehow meet. In our 2012 paper, we review that case law as the "to judicially review or sue" cases, fronted by *TeleZone*.\(^{39}\) Our paper concluded then that, if anything, the *TeleZone* cases spelled the death knell for any cross-fertilization between the spheres. What *TeleZone* instructs is that, notwithstanding the fact that an underlying administrative decision may stand undisturbed from a "public law" perspective, as opposed to quashed on an application for *certiorari*, an Action in negligence stemming from the decision is permissible. The Court’s language in *TeleZone* is actually quite strong in favour of such a conclusion. Of some interest is the fact that the idea that one should judicially review first, obtain a favourable ruling, then sue, was a favourite finding of the Federal Court and Federal Court of Appeal.\(^{40}\)

In short, the Supreme Court’s decision not to grant leave in *Paradis Honey*, the maintenance of the *Imperial Tobacco* framework, and the *TeleZone* line of cases, all signal that the Court is not likely to revisit negligence law any time soon along the lines proposed by *Paradis Honey*. Until the Supreme Court does, judges will be bound to follow the Supreme Court’s prescriptions.

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\(^{38}\) *Her Majesty the Queen, et al. v. Paradis Honey Ltd., et al.*, 2015 CanLII 69423 (SCC)

\(^{39}\) *Canada (Attorney General) v. TeleZone Inc.*, 2009 CarswellOnt 3493, 2009 CarswellOnt 3492 (S.C.C.)

\(^{40}\) The idea finds its clearest expression in *Canada v. Grenier*, 2005 FCA 348, the decision most clearly overruled in *TeleZone*. 
3. The Lower and Appellate Court Reaction

Only two cases since Paradis Honey has taken note of the "public law claim" aspects of the majority reasons. These cases indicate that counsel have argued that such a claim should be recognized or at least not struck out at an early stage. To date, though, the public law reasoning in Paradis Honey has had little impact. For instance, several Federal Court cases post-Paradis Honey have opted to decide similar negligence duty of care issues by referencing the Imperial Tobacco formulation while ignoring Paradis Honey altogether. And, in a number of the more recent negligence cases summarized earlier, Paradis Honey makes no appearance.

The case law referring to Paradis Honey includes:

- cases that hold that Paradis Honey has no application in cases where the claim, even one against government, is one that falls within a traditional negligence category.42
- cases that rely on Paradis Honey for previously-accepted propositions that damages do not, in ordinary administrative law proceedings, normally flow from invalid government action.43
- one Federal Court decision that observes that government arguments that a Claim attacks "policy" decisions should not be given effect to on a preliminary motion to strike given the difficulties identified in Paradis Honey in articulating what is a "true" policy decision protected from suit.44
- a brief reference in one BC Court of Appeal decision to Paradis Honey as a case analogous to the plaintiff’s claim in its case that the alleged negligent delay by fisheries’ officials in conducting an assessment caused damages.45

There is one notable exception that bears a brief mention. As of now, negligence claims by victims of crime against police have rarely gotten off the ground. While a suspect who is the victim of an alleged negligent investigation can sue, as was decided in Hill, cases where victims can sue are rare and the leading case saying that this could happen, Jane Doe, has often been distinguished as unique. Yet, recently, in Patron, the family of a gunshot victim was permitted to continue a negligence claim against police actors in part because the motion's judge felt that the Claim might fit within Jane Doe...
Doe but also because the "public law claim" reasoning in Paradis Honey might give rise to a cause of action:

Stratas J.A. suggests that rather than suing a public authority for negligence, the appropriate analytical tool is an application for judicial review involving remedial discretion and a remedial monetary mandate. Just as surgeons can be expected to first recommend surgery rather than medical treatment, perhaps the most likely approach of a statutory court is a statutory remedy. However, in my view, Stratas J.A. is absolutely correct in pointing out, with much authoritative support, the inaptness of making decisions in these cases based solely on narrow private law factors. The fact that government is involved necessarily broadens the scope of the inquiry.

The common law is flexible enough to develop principles that fit cases brought against government actors before the Her Majesty's courts of inherent jurisdiction. I accept that under a private law analysis on the amended pleading liability should be available. First, Mr. Patrong pleads that he was known to the police and used as bait to fit Jane Doe if read as a statutory prescription. Second, in my view, the harm pleaded was reasonably foreseeable and the parties were sufficiently close so that police ought to have been considering the Patrogs as being within the recognizable class of people who should be entitled to claim compensation. They are among a very limited class of people in a very defined and limited area where the defendants' alleged neglect would most foreseeably cause injury -- just like Jane Doe and just like a negligent airplane engine manufacturer. But, the third and best approach, in my view, is balancing the justice and fairness of liability in light of the nature and quality of the wrong, the interests of the victims that were affected, the causal link between the negligent act and the injuries alleged, the public nature of the defendants, whether their wrongful acts were policy based or operational, whether the decisions that they took were mandatory or discretionary, whether there is a statutory prohibition against a damages award, whether harm was imminent, whether the harm was located in a defined area or at large, whether harm was likely to a limited number of individuals as opposed to society at large, whether a finding of liability might be inconsistent with the defendants' public duties, and any other factor that is properly germane to the common law's ultimate question of whether it is fair and reasonable that the police ought to compensate the plaintiffs for the losses alleged.46

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46 Patrong v. Banks, 2015 ONSC 3078 at paras. 77-78
4. Giving *Paradis Honey* Its Due

Only time will tell whether other courts are prepared to hold that other public authorities could or should be liable on "public law" claim grounds or not, either on their own, or as an alternative to an *Imperial Tobacco* private law claim.

If anything, I can see a way in which *Paradis Honey* comes to play a greater role in Canada. If I am correct that the Supreme Court has decided to take a hands-off approach to this area of law for the foreseeable future, the presence of ongoing litigation against government, and heavily fought class action litigation, could yield further decisions that rely on *Paradis Honey*. In fact, because the Supreme Court has never ruled on whether to reject or accept *Paradis Honey*, it may be incumbent on future courts, courts which might be minded to reject a claim on *Imperial Tobacco* principles, to at least consider whether the claim can be advanced on alternative *Paradis Honey* grounds. If enough such cases begin to "crop up", such as *Patrong* cases where hitherto accepted catechisms (victims cannot sue the police) come under scrutiny, the Supreme Court may be compelled to address the point head-on.

Having argued in the 2012 paper that many of the cases in this area are “contradictory” and that the law is “in a state of lamentable confusion”, and having pointed out how the UK was considering reform, I believe that it is too easy to push the decision into a corner and pretend it does not exist when private negligence law principles continue to sow confusion and where these principles as they apply to government actors are open to real criticism. Moreover, there are so many clever litigators out there, and too much ongoing litigation and potential litigation, that counsel and courts are bound to be forced to consider whether a different kind of non-private negligence claim might adequately address the plaintiff's concerns in a way that is more acceptable to them not just as a seeker of "money" but as a person who wishes to hold government actors to account under the very rules, public law ones, against which they may believe government actors ought to be measured.

E. Conclusions

Judging by the number and variety of class actions and other claims currently against government and regulators, the hundreds of pages of commentary written since *Imperial Tobacco*, and the presence of real strains as evidenced by *Paradis Honey* and academic criticisms of *Imperial Tobacco*, this area of the law is not likely to settle down any time soon.

I would argue that this may be inevitable.

That is, the one feature that all negligence cases in Canada since *Saskatchewan Wheat Pool* and *Kamloops* share is a desire for coherence and consistency. We are told in *Imperial Tobacco* that the newly formulated stage two test, for example, is being outlined to secure clarity. We are told in *Paradis Honey* that one of the main points of contention with *Imperial Tobacco* is that it does not in fact promote clarity. There are many examples of this "search for coherence" in this area of the law.
While no doubt such a search is laudable, as coherence and clarity regarding the rules would serve the ends of justice and promote accountability, as accountability starts from engaging in actions that are intelligible and coherent in and of themselves, it may be that whatever tests the courts settle on, if ever, it might be time to concede that the tests are hard to apply and the questions difficult to answer: in short, it may be time to ask ourselves whether the right questions are being asked for the right reasons, rather than the easiest ones.

While this may sound obvious, the case law indicates that courts try their utmost to pretend that it is not. *Paradis Honey* is open to criticism on this ground too, for instance, by assuming altogether that it offers neat prescriptions for the ills of alleged ill action by officials by simply importing the whole of administrative law [see my observations earlier that administrative law suffers from the same difficult categories and dichotomies negligence law clings too]. If we are to import administrative law, it should be because administrative law best explains the exercise of public authority, not because it explains it more clearly than negligence law.

I am certain that more developments in this area are forthcoming, and soon.

*Stephen J. Moreau*
APPENDIX – 2012 PAPER


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Regulatory Negligence and Administrative Law*

Freya Kristjanson and Stephen Moreau†

The law of negligence has been a growth industry for lawyers since the Donoghue v. Stevenson decision. While defining its contours has always been a difficult task, the application of negligence principles to public authorities has been especially hard. In Canada, public authorities must not only be aware of their obligations to the public as these are defined in legislation and other public instruments, but must temper their behaviour and use of public power in order to — in some cases — look after the interests of a particular person or segment of the population. This paper explores the reach of negligence principles to public authorities in Canada, with emphasis on when it is that such authorities owe individuals a duty of care and suggests that liability in negligence remains very uncertain to predict, suggesting that authorities must be proactive in attempting to reduce the scope of potential liability.

1. INTRODUCTION

Why should regulators, administrative lawyers, and tribunal members care

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about tort law? Administrative law is concerned with the exercise of public powers, and tort law provides private law remedies. However, when administrative bodies harm members of the public due to the negligent discharge of statutory powers, individuals increasingly turn to the courts seeking damages. Liability in negligence is an important aspect of accountability for public authorities. Further, lawsuits have a significant reputational effect, even where the courts find no liability. The commencement of a lawsuit may undermine public confidence in the functioning of an administrative body, affect stakeholder relations, and draw unwanted media attention. Regulators and governments create and manage risks. Citizens rely upon governments and regulators to protect them from harm, and understandably look for compensation when public authorities fail to deliver. The courts face a delicate task — balancing the discharge of public obligations with the rights and interests of individual members of the public. Tort liability is uncertain, and the law is evolving. It is important for those who work with administrative bodies to understand the types of actions that may lead to liability, and design governance tools, policies, and procedures to reduce the zone of tort liability.

Unfortunately, courts do not make it easy for administrative actors, tribunals, and public authorities to understand the scope of their potential liability. In the decade following the famous Donoghue v. Stevenson decision, the House of Lords bemoaned that “[t]he 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”. To some extent, this state of confusion exists to this day. For some commentators, the trend in Canada has been described as one towards severely limiting the type of situations where public authorities can be liable in negligence. This paper argues that, more recently, that trend may have been attenuated somewhat, although, overall, the law remains mired in a “lamentable state of obscurity and confusion”. At a minimum, liability in negligence continues to be a real possibility, the result of which ought to be increased vigilance and oversight on the part of public authorities in how they discharge their duties.

The scope for liability for substandard administrative action may have increased in light of the Supreme Court of Canada’s 2010 decision in Fullowka, in which the Court held that the government owed a duty to mine workers to protect them from a bomb explosion during a bitter labour relations dispute. In the last decade, the Court has released a number of significant decisions relating to tort liability of public authorities. These and other decisions provide important lessons for administrative bodies interested in reducing tort liability. The Court in McCullock Finney c. Barreau (Québec) appeared to expand the scope for regulatory negligence even in the face of a good faith immunity clause. In Hill v.

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Hamilton-Wentworth (Regional Municipality) Police Services Board, the Supreme Court recognized the tort of negligent investigation, a significant concern for administrative bodies. In Holland v. Saskatchewan (Minister of Agriculture, Food & Rural Revitalization) the Court confirmed that there is no tort of breach of statutory duty, but recognized “negligent implementation of a judicial decree”, an obscure issue, as a potential head of liability for public authorities. At the same time, courts have dismissed claims against public authorities in relation to areas as diverse as SARS, West Nile, special education, tobacco regulations and medical devices.

In this paper we discuss the potential scope of regulatory negligence for Canadian public authorities, reviewing recent Canadian case law. Our overall conclusion is that the Supreme Court Fallowka decision does have the potential of casting the negligence liability net wider, although this is somewhat tempered by the Court’s subsequent decision in Elder Advocates of Alberta Society v. Alberta. With the notable exceptions of the Sauer and Adams appeal judgments discussed below, appellate courts had been shutting down negligence cases against regulators fairly routinely in the five years prior to Fallowka. Fallowka appears to adopt a strand of reasoning more consistent with Sauer and Adams. It is this strand of reasoning that has recently found favour in the Ontario Court of Appeal in Taylor v. Canada (Attorney General), a decision in which the court holds that Health Canada might owe patients who suffered damage due to the implantation of joint implants comes negligence duties of care. Taylor at minimum strikes a different tone from, and certainly carries a different result than, the more conservative decisions of the Court of Appeal pre-Fallowka denying the existence of any such duty. At best, courts continue to experience enormous difficulty reconciling the various strands of jurisprudence and in saying when it is that a regulator does or does not owe a negligence duty to particular individuals.

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8 2012 ONCA 479.
9 The best example of this is Taylor, which the Court of Appeal last year described as having “a tortured procedural history” [Taylor v. Canada (Attorney General), 2011 ONCA 181, 2011 CarswellOnt 1255 (Ont. C.A. [In Chambers]). Taylor — a class action involving negligence by Health Canada over their approvals of a defective jaw implant — was: (1) certified in 2007 [Taylor v. Canada (Minister of Health), 285 D.L.R. (4th) 296, 2007 CarswellOnt 5541 (Ont. S.C.J.); leave to appeal refused 2007 CarswellOnt 8122 (Ont. Div. Ct.) in reasons that applied Sauer; (2) revisited and struck out in early 2010 (before Fallowka was decided) [2010 ONSC 4799]; (3) certified a second time after the plaintiff amended the claim to incorporate the wording accepted in Sauer (particulars of representations) [Taylor v. Canada (Attorney General), 2010 ONSC 4799, 2010 CarswellOnt 10538 (Ont. S.C.J.)]. This "tortured procedural history" has now hopefully drawn to a close with the court’s decision, supra fn 8, that Health Canada may owe duties of care in negligence.
We also address practical issues for regulators and tribunals, including proactive responses to limit the scope for regulatory negligence lawsuits. Given the fractured and uncertain state of the negligence jurisprudence, the best approach is the proactive one, to avoid liability and prevent a situation whereby a duty of care will be owed to particular members of the public.

2. THE NEGLIGENCE FRAMEWORK

Since the enactment of Crown liability statutes across Canada, it has been clear that almost all statutory decision-makers and public authorities in Canada are subject to the general principles of negligence law. Pursuant to Saskatchewan Wheat Pool, there is no tort of breach of statutory duty, although proof of the statutory breach causing damage may be evidence of negligence, and the statutory duty may provide evidence of the relevant standard of care. Although Crown liability statutes have opened the door for lawsuits against public authorities, some, though few, public authorities continue to enjoy judge-made absolute or near absolute immunity from lawsuits in certain cases.

A plaintiff pursuing a regulatory negligence claim against a public body must establish the common law requirements for a private law action in negligence:

- A duty of care;
- Standard of care;
- Breach of the standard of care;
- Causation; and,
- Damage or loss that is not too remote or unforeseeable.

While the last four common law requirements are important, a decision in favour of the plaintiff or regulator on these issues is heavily dependent on the facts. Whether a regulator can potentially be liable or not in negligence today is the province of the “duty of care” analysis which this paper breaks down and analyzes in

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the following sections.

(a) Policy vs. Operational Decisions

For decades, Canadian negligence law around the existence (or not) of a duty of care focussed on whether a regulatory action or decision was “operational” or “policy” in nature: an “operational” decision was more likely to attract a negligence duty of care while activities at the level of “policy” generally would not. Today, the debate focuses to a much greater extent on “proximity” and the existence of a duty of care.\(^\text{12}\)

Since the House of Lords case of *Anns v. Merton London Borough Council*,\(^\text{13}\) adopted in Canada in *Nielsen v. Kamloops (City)*,\(^\text{14}\) the prevailing wisdom was that public bodies should not be liable for “policy” decisions, but merely for the implementation of such decisions as an operational matter. The Supreme Court in *Brown v. B.C.*\(^\text{15}\) identified the factors that led to the categorization of a decision as “policy” or “operational”:

True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.

The operational area is concerned with the practical implementation of the formulated policies. It mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.\(^\text{16}\)

It is important to remember, however, that bad faith or irrational regulatory policy decisions (including failures to act) are actionable in negligence. As stated by Cory J. in *Brown*:

> It will always be open to a plaintiff to attempt to establish, on a balance of probabilities, that the policy decision was not bona fide or was so irrational or unreasonable as to constitute an improper exercise of governmental discretion. This is not a new concept. It has long been recognized that government decisions may be attacked in those relatively rare instances where the policy decision is shown to have been made in bad faith or in circumstances where it is so patently unreasonable that it exceeds governmental discretion. The test to be applied when a policy decision is questioned is set out in *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, at p. 24, by Wilson J. in these


\(^\text{13}\) [1977] 2 All E.R. 492 (U.K. H.L.) [*Anns*].


words:

In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the bona fide exercise of discretion. Where the question whether the requisite action should be taken has not even been considered by the public authority, or at least has not been considered in good faith, it seems clear that for that very reason the authority has not acted with reasonable care.17

Notwithstanding the Supreme Court’s decision in Just18 labelling the policy/operational distinction as the “bright line” in the area of regulatory negligence, the distinction has proven very difficult to maintain in practice. All decisions of public bodies are constrained, to some extent, by the very real problems of limited resources and social/political factors. Most decisions will have both policy and operational aspects, and the courts have been unable to establish any approach that would bring predictability to the policy/operational categorization.

(b) A Prima Facie Duty of Care?

As a result of the difficulty distinguishing between policy and operational decisions, much of the contemporary battle takes place in the discussion of “proximity” and whether there should be a prima facie duty of care in light of the nature of the relationship between the regulator and the plaintiff, in contrast to general duties owed to the public at large which will not form the basis for a duty of care.

There are two steps in the duty of care analysis. As stated by McLachlin C.J. for the majority in Hill, and confirmed later in Fullowka:

The test for determining whether a person owes a duty of care involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a prima facie duty of care; and (2) If so, are there any residual policy concerns which ought to negate or limit that duty of care?19

The first aspect of the test involves a determination of whether the case falls in a category of cases in which a duty has previously been recognized. If not, the issue is whether a new duty of care should be recognized. This requires consideration, first, whether it was reasonably foreseeable that the actions of the defendant public authority would cause harm to the plaintiff, and secondly, whether there is a “close and direct relationship of proximity or neighbourhood” sufficient to give rise to a legal duty of care. In terms of proximity, the issue is whether the actions of the defendant have a close and direct effect on the alleged victim (plaintiff), such that the defendant ought to have had the plaintiff in mind as a person who would be potentially harmed by the defendant’s actions.

17 Ibid. at pp. 15-16.
19 Hill, supra note 5 at para. 20.
In *Cooper*, the Court held that proximity is a question of policy and the balancing of interests; the proximity analysis involves examining the relationship at issue considering factors such as:

- Expectations;
- Representations;
- Reliance; and
- Property and other interests involved.

If the relationship is sufficiently proximate to found a *prima facie* duty of care, then the analysis shifts to residual policy concerns that may negate the duty.

Now, we would like to examine the application of this general framework to specific cases, to illustrate issues in tort law of concern to administrative lawyers.

3. CASE REVIEW

(a) *Cooper v. Hobart*

The Supreme Court of Canada’s 2001 decision in the *Cooper* case is critical, largely because *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 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 that 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.

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

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would have been negatived at the second stage for overriding policy reasons. These included:

- 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. 22

(b) Edwards v. Law Society of Upper Canada 23

Edwards v. Law Society of Upper Canada was released as a companion case to Cooper. 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 abandon its supervisory jurisdiction”. 24 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”. 25 The Law Society’s investigatory 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

23 2001 SCC 80, 2001 CarswellOnt 3962, 2001 CarswellOnt 3963 (S.C.C.) [Edwards].
24 Ibid. at para. 3.
25 Ibid. at para. 13.
public who deposit funds into a solicitor’s trust account.

The Court noted that clients are protected and compensated through the Compensation Fund and Lawyers’ Professional Indemnity Company 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 Ontario 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”. \(^\text{26}\) 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”. \(^\text{27}\)

Overall, the Court’s two major decisions on negligence law at the start of the 21st Century signalled a significant tightening of the duty of care analysis by: (1) focussing the analysis almost exclusively on whether or not the legislation imposed a duty; and, (2) as part of that analysis, giving strong effect to statutory immunity clauses. While prior case law had rightly recognized that statutes, by their very nature, are not written in the language of duty and obligation (they are written with the language of discretion and power), and while prior case law had found duties of care in the face of such language, the Cooper/Edwards cases signalled a retraction by basing duties of care on what was contained in statutory language when such language is not written to create such duties.

\(\text{(c) Finney v. Barreau du Quebec}^\text{28}\)

The Supreme Court’s 2004 decision in Finney v. Barreau du Quebec 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 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 Belhassen 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 (five years to complete investigation);

\(^{26}\) \textit{Ibid.} at para 16, relying on the \textit{Law Society Act}, s. 9.

\(^{27}\) \textit{Ibid.} at para. 17.

\(^{28}\) Finney, supra note 4.
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;

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);

Finney and her lawyer file several complaints against B. with Barreau, and complain to oversight body re delay of Barreau;

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;

B’s tutor (supervising lawyer) resigns;

Oversight body asks Barreau re delay in dealing with complaints;

Lawyer acting for Finney’s son complains to Barreau about B.’s actions; the son is not interviewed until 1996;

B. is provisionally struck off the rolls in relation to 23 counts;

Finney commences action in damages against Barreau for breach of its obligation to protect the public in handling of complaints against B;

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 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”,29 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.

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.30

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29 Ibid. at para. 40.
30 Ibid. at para. 43.
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.31

In the result, the Court awarded Ms. Finney damages for moral injury, assessed at $25,000, together with costs on a solicitor-client basis.

(d) *Syl Apps Secure Treatment Centre v. B.D.*32

In *D. (B.) v. Children's Aid Society of Halton (Region)* the Supreme 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. Here, 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 due to 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.33

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

(e) *Hill v. Hamilton Wentworth Regional Police Services*34

This 2007 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.

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

31 Ibid. at para. 46.
33 Ibid. at para. 41.
34 *Hill*, supra note 5.
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.35

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.36

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.37

The Court considered and rejected a number of policy arguments raised to negate the duty of care at Stage 2 of the Anns/Kamloops 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
• 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.

The Ontario Court of Appeal has recently held, however, that family members of victims of alleged police misconduct do not have a right to sue the Special Investigations Unit for negligent investigation when the SIU chose not to lay charges against the officer in question.38 Sharpe J.A. for the Court relied on a Cooper analysis of the duty of care, and distinguished Fullowka as follows:39

This case is distinguishable from Fullowka v. Pinkerton’s of Canada Ltd., 2010 SCC 5 (CanLII), [2010] 1 S.C.R. 132, where the court found, at paras. 42–45, that the government regulator owed a duty of care flowing from its statutory duties to inspect a mining operation in favour of fatally injured

35 Ibid. at para. 34.
37 Hill, supra note 5 at para. 43.
39 Ibid. at para. 49.
The miners were held to be a narrow and clearly-defined group relating directly to the statutory duties of the mining inspectors. This was held, at paras. 46-47, to be analogous to the duties of building inspectors towards property owners and purchasers recognized in Kamloops. The duties of the SIU in investigating crimes committed by police officers stand in sharp contrast. Those duties are not focused on the protection or promotion of victims’ interests but instead relate to protecting the public at large.

Other courts, following Hill or Finney, have concluded that particular plaintiffs who were the subject of administrative investigations were owed a duty of care. In Alevizos, the Manitoba Court of Queen’s Bench confirmed that a chiropractor who had been subject to a preliminary investigation into his conduct by his college could sue the investigator in negligence. In Quebec, lawyers have been successful in suing their law society in negligence over the handling of disciplinary proceedings against them.

In River Valley Poultry Farm Ltd. v. Canada (Attorney General), the court held that neither Health Canada nor the Canadian Food Inspection Agency owed a duty of care to the plaintiff to conduct a timely and competent investigation of whether a farm’s flock of hens and chicks were infected with salmonella. Canada won similar motions in 2008 over alleged negligent failures to properly regulate breast and other surgical implants.

On the other hand (and confusingly), Canada was successfully sued in 2008 over allegations it negligently responded to a potato virus in the Maritimes. In Adams, the New Brunswick Court of Appeal held that Canada owed duties to conduct a timely investigation to identify a virus in the plaintiffs’ potatoes. Having chosen to investigate in the first place, the duty to conduct a timely investigation was imposed. These cases illustrate the difficulty in predicting whether liability will be found, but they are important illustrations of the types of issues to which administrative bodies must pay heed.


42 2009 ONCA 326, 2009 CarswellOnt 2053 (Ont. C.A.); leave to appeal refused 2009 CarswellOnt 6909, 2009 CarswellOnt 6910 (S.C.C.) [River Valley].


(f) Sauer v. Canada (Attorney General)\(^{45}\)

The Sauer case is the “mad cow” class action. In 2003, a cow in Alberta was diagnosed with mad cow disease, as a result of which the borders to the United States, Mexico and Japan were closed to Canadian cattle and beef products with catastrophic economic consequences for the commercial cattle industry. Cattle farmers commenced a class action against the government for grossly negligent regulation of the cattle industry, as well as against the manufacturer of allegedly contaminated feed. The claim against the government was for gross negligence in the design of a 1990 regulation which permitted the use of ruminant meat and bone meal in cattle feed, and for not passing a ruminant feed ban regulation until 1997. Of interest is that the plaintiff pleaded specific, public representations by the government that it regulated cattle feed content to protect commercial farmers, among others. This pleading was critical, in that the Court held that the representations by government could result in a “public assumption of a duty to Canadian cattle farmers to ensure the safety of cattle feed”, and thus a \textit{prima facie} duty.

The government argued that the decisions were purely legislative, and legislative action or inaction cannot form the basis for a claim in tort. The government also argued that the regulation and feed ban decisions were policy rather than operational decisions. However, the Court held that it was not plain and obvious that the decisions were “policy”, and there was an evidentiary onus on the Crown to so establish. Finally, Sauer pleaded that even if the decisions were policy decisions they were bad faith exercises of the discretion to regulate or not. Given the pleadings, the Ontario Court of Appeal held that it was not “plain and obvious” that the claim would fail, and allowed the claim to proceed. The Supreme Court of Canada refused leave from this decision.

Sauer and its progeny are a hard lesson for regulators to take enormous care in the content of their representations. Regulators have little choice but to communicate with stakeholders, as the failure to communicate at all could be problematic in a legal and public policy sense depending on the circumstances. Once regulators “speak”, they open themselves up to potential actions in negligence framed in part as “negligent misrepresentation” cases. Regulators would do well, in looking at their communications, to study Sauer and subsequent decisions that have held that representations gave rise or could give rise to duties of care, and those that held that the representations/communications did not rise to the level where particular


plaintiffs could reasonably rely on them as imposing a duty from the regulator to look after their interests.47

(g) Holland v. Saskatchewan48

The Supreme Court’s 2008 decision in Holland v. Saskatchewan is of particular interest to administrative law lawyers, as it illustrates an interesting 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.

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 Supreme Court of Canada held that there is no cause of action in tort, citing Saskatchewan Wheat Pool.49 However, the Court upheld the claim to the extent that it was a claim for “negligent failure to implement an adjudicative decree”.50 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

48 Holland, supra note 6.
49 Supra note 10 at paras. 8-9.
50 Ibid. at para. 12.
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.\footnote{Ibid. at para. 14.}

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, we leave to another day. However, it is part of the lamentable state of confusion evident in this area of the law.

**Fullowka v. Royal Oak Ventures Inc.**

*Fullowka*\footnote{Fullowka, supra note 3.} is a significant decision of the Supreme Court, which appears to expand the scope of liability of public authorities. The issue was in part whether the Government of the Northwest Territories would be liable to families of miners killed when a striking miner exploded a bomb in a mine shaft in Yellowknife during a strike. The trial court held the Government liable.\footnote{Fullowka v. Royal Oak Ventures Inc., [2005] N.W.T.J. No. 57, 2005 CarswellNWT 55, 2005 NWTSC 60 (N.W.T. S.C.).} The Court of Appeal held that an action could not be maintained because the cause of the deaths was the intentional criminal act of a third party.\footnote{Fullowka v. Royal Oak Ventures Inc., [2008] N.W.T.J. No. 27, 2008 CarswellNWT 32 (N.W.T. C.A.); additional reasons 2008 CarswellNWT 71 (N.W.T. C.A.); affirmed 2010 CarswellNWT 9, 2010 CarswellNWT 10 (S.C.C.).} The Supreme Court decided that the Government did owe a duty of care in negligence, but was not liable on the facts of this case primarily due to the receipt of legal advice.

*Fullowka* involved a violent strike by miners. The striking workers took control of much of the mine, entered the mine on occasion, threatened replacement workers, engaged in acts of arson, vandalism, and other violent acts, and damaged property using explosive devices. Ultimately, a fired striker who had evaded security surreptitiously entered the mine and set an explosive device which was detonated by a trip wire and killed nine miners. The survivors sued the mine owner, its security firm, and the Government of the Northwest Territories as regulator, for failing to prevent the murders. The union was also sued.

With respect to the Government, the plaintiffs alleged that the Government and its individual officers (Minister of Safety and Public Services, and Chief Inspector Mines), failed in their duties to the murdered miners to adopt and implement policies and procedures that would maintain safe working conditions in the mine, and to order cessation of work at the mine until it was safe. Section 42 of the *Mining Safety Act* contained mandatory language that a mining inspector “shall . . . order the immediate cessation of work in . . . a mine . . . that the inspector considers unsafe”, and the inspectors also had a duty under s. 43 to give notice of management of “any matter, thing or practice . . . that, in the opinion of the inspector, is
The Supreme Court held that the Government did owe a duty of care to the miners, based on both the statute and the day-to-day actions of the mining inspectors during the strike. The Court considered the three aspects of a duty of care analysis: foreseeability, proximity, and residual policy considerations that might negate a duty of care. On the issue of foreseeability, the Court upheld the trial judge’s finding that the killing of miners “was the very kind of thing that was likely to happen”, given the awareness of the mine safety division of the prior violence, including explosions, at the site. Thus, the harm was foreseeable.

The Court then held there was a sufficiently close and direct relationship between the inspectors and the miners (proximity) to found a duty of care. Emphasizing that the statute is the source of a duty, the Court looked to the legislation governing workplace safety in mines, which gave inspectors and the Government the power to shut down the mine if it proved unsafe. As importantly, the Court relied on the actual relationship between Government mine inspectors and the deceased miners in holding that this relationship gave rise to a duty of care. The Court found that the relationship between the inspectors and the miners was considerably closer and more direct than the relationships at issue in the Edwards and Cooper cases.

The Court relied on three primary factors:

1. The group of mine workers to whom the duty was owed was a smaller and more clearly defined group than was in the case in Cooper or Edwards, where the duties would have been to the public at large — all clients of all lawyers and mortgage brokers;

2. The mining inspectors had much more direct and personal dealing with the deceased miners, and “the existence, or absence, of personal contact is significant”. Visits by inspectors to the mine during the strike were “almost daily” occurrences, 11 official inspections were conducted, and during tours of the mine, an inspector was accompanied by a member of the occupational health and safety committee; and

3. The inspectors’ statutory duties related directly to the conduct of the miners themselves, whereas the Law Society in Edwards and the Registrar in Cooper had no direct regulatory authority over the claimants who were the clients of the regulated lawyers and mortgage brokers.

The Court also discussed a number of negligent inspection cases, which established that once a delegate elects to exercise a statutory power (such as an inspection), there is a duty at the operational level to use care in doing so. Thus, the public actor owes a duty of care to all who might be injured by a negligent inspection. The Court also reviewed cases illustrating that where a decision to act or exercise a power is discretionary, “inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the bona fide exercise of discretion”.

The Court found that the inspectors had a “clear and well-substantiated belief

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that the mine was unsafe”, and concluded that:56

To sum up, the mine inspectors had a statutory duty to inspect the mine and to order the cessation of work if they considered it unsafe. In exercising this statutory power, the inspectors had been physically present in the mine on many occasions, had identified specific and serious risks to an identified group of workers and knew that the steps being taken by management and Pinkerton’s to maintain safe working conditions were wholly ineffectual. In my view, the trial judge did not err in finding that there was a sufficiently close and direct relationship between the inspectors to give rise to a *prima facie* duty of care.

The Court then held that there were no broad policy considerations that would make the imposition of a duty of care unwise in this case. The Court held that “In order to trump the existence of what would otherwise be a duty of care (foreseeability and proximity having been established), these residual policy considerations must be more than speculative. They must be compelling; a real potential for negative consequences of imposing the duty of care must be apparent”.57 The Court rejected the concern about “indeterminate liability”, since the duty here was to a “finite group of miners working in the mine which the inspectors had inspected repeatedly”. The Court also rejected the concern about conflicting duties, holding that any such conflict must be between the duty proposed and an overarching public duty, and it must pose a real potential for negative policy consequences, and cannot be speculative.58

The most remarkable aspect of the *Fallowka* decision may be in the express recognition that the statute setting out a public authority’s powers and discretion is not the only source of a public authority’s private law duties. Thus, in less than ten years after releasing its watershed *Cooper* and *Edwards* decisions, the Supreme Court has delicately shelved the more definitive *Cooper* and *Edwards* language to the effect that the statute is the only source of a public actor’s private duties. It is this strand of reasoning that was taken up recently in *Taylor*, with the court there holding (as the present paper argues forcefully earlier) that statutes, of course, rarely contain the language of duty and rarely can be looked to as the source of a private law duty of care.59 In that case, the Court of Appeal, after an exhaustive analysis of the legislation and regulations governing Health Canada, concluded that these did not impose on Health Canada a duty to look after patients being implanted with medical devices coming under Health Canada’s mandate to oversee the safety of those devices.60 Having so found, the court held that the applicable legislative scheme does set out the groundwork for the duty of care analysis, but where this legislation does not foreclose the existence of a duty of care, the existence of any duties depends on “the interactions between the regulator and the plaintiff”, an inquiry the court held as “necessarily fact-specific”.61

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56 *Fallowka*, *supra* note 3 at para. 55.
58 *Ibid.* at para. 73.
59 *Supra* note 8 at para. 78.
the Court of Appeal had to deal with the delicate task of explaining how it is that Health Canada in *Taylor* might owe negligence duties to patients when it had held in *Attis* and *Drady* that Health Canada could not owe such duties (Remarkably, the *Drady* case concerned the same type of medical device, and Mr. Drady had at one time been a co-representative plaintiff with Mr. Taylor.) Ultimately, the court concluded that the *Attis* and *Drady* Statements of Claim had simply failed to allege any facts which might show interactions between Health Canada and the plaintiffs, and it was this failure that distinguished those cases from *Taylor*.63

Returning to *Fulloveka*, the Supreme Court ultimately found that the Government had not breached its duty of care. Essentially, the Government was found not to be liable because it had relied in good faith on legal advice that the Government lacked the power to shut down the mine in the circumstances. The legal advice was essentially that an order to close the mines was outside the jurisdiction of the Mine Safety Division, because as strike-related violence, the order would more properly be made by the R.C.M.P. (as a criminal matter), or by the Labour Board (as a labour relations matter.) The Supreme Court agreed with the trial judge that the legal advice was erroneous. The legislation states that an inspector “shall . . . order the immediate cessation of work in . . . a mine . . . that the inspector considers unsafe”. Justice Cromwell stated:

> I am not at all persuaded that it was beyond the statutory jurisdiction of the inspectors to act in the extraordinary situation that presented itself here. They had a clear and well-substantiated belief that the mine was unsafe. As they put it in a report more than three months before the fatal blast, “the lack of security at the mine site is endangering the occupational health and safety of employees”.

However, the Court held that: “It will rarely be negligent for officials to refrain from taking discretionary actions that they have been advised by counsel, whose competence and good faith in giving the advice they have no reason to doubt, are beyond their statutory authority”.64

This has the potential to create ethical issues for counsel advising public bodies on their jurisdiction, since it now appears that legal advice may be a powerful shield against claims of negligence. Further, the decision raises significant concerns as to the burden of the loss caused by negligent administrative action. As between the families of deceased miners who lost their loved ones due to clearly bad legal advice and the government that took that advice and would have, but for the advice, shut down the mine, the Court places the loss caused by those lawyers on the families’ shoulders. One would think that lawyers do not have the power to make legal what is not by simply saying that they think it is legal. Typically courts (including the Supreme Court) will not allow legal advice to be used as a defence but will allow the defendant who takes negligent advice to claim contribution against the lawyer.65

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62 *Supra* note 43.
63 *Supra* note 8 at paras. 92–94.
64 *Ibid.* at para. 89.
(i) **R. v. Imperial Tobacco Canada Ltd.**

In *Knight v. Imperial Tobacco Canada Ltd.*,\(^66\) the Supreme Court heard a joint appeal from two related British Columbia cases: *Canada v. Imperial Tobacco Canada Ltd.*\(^67\) and *British Columbia v. Imperial Tobacco Canada Ltd.*\(^68\) By way of background, the first case from the British Columbia Court of Appeal, *British Columbia v. Imperial Tobacco Canada Ltd.*,\(^69\) was in relation to British Columbia’s *Tobacco Damages and Health Care Costs Recovery Act*. The British Columbia government, under this legislation, sought recovery of health care costs from Imperial Tobacco. Imperial Tobacco, in turn, sought to have Canada added as a third party, as they believed the actions of the Canadian government caused or contributed to the damages being claimed. Canada had promoted and benefitted from advertising certain types of cigarettes as light and mild that were just as harmful as other cigarettes. Imperial Tobacco argued on that basis that Canada’s liability was the same as its own. The lower court struck the third party notice. The Court of Appeal restored it on the basis that it was not plain and obvious that Canada did not owe duty of care to British Columbia.

The second case, *British Columbia v. Imperial Tobacco Canada Ltd.*,\(^70\) was a class action by people who had smoked Imperial Tobacco’s light and mild cigarettes. They were seeking a refund of monies paid for these cigarettes on the basis that Imperial Tobacco had misrepresented the relative safety of those cigarettes. As above, Imperial Tobacco sought to have Canada added as a third party for the same reasons as above. The lower courts struck the third-party notice but the Court of Appeal restored it, again, because it was not plain and obvious that Canada did not owe a duty of care to persons who smoked those cigarettes.

On appeal from both decisions, the Supreme Court considered directly whether there was a sufficiently proximate relationship either between Canada and consumers or between Canada and tobacco companies to find a *prima facie* duty of case in either case. The Court’s analysis in this case is therefore instructive as to the extent to which government regulators could be liable for promoting certain activities to the public at large or to working with an industry to promote seemingly less harmful products.

With regard to the first of these relationships (Canada and tobacco consumers), the Court simply notes that Canada had no direct interactions with members of the plaintiff class other than statements to the general public that low-tar cigarettes

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\(^67\) 2009 BCCA 541, 2009 CarswellBC 3300 (B.C. C.A.) [*Imperial Tobacco*].

\(^68\) 2009 BCCA 540, 2009 CarswellBC 3307 (B.C. C.A.) [*Imperial Tobacco*].


were believed to be less hazardous than the conventional variety. Additionally, the court observes that “the relevant statutes establish only general duties to the public, and no private law duties to consumers”.71 Citing with approval the Ontario Court of Appeal’s decision in Eliopoulos Estate, the Court therefore concludes that the government’s exercise of its discretionary powers in the public interest did not here result in any private-law duties to specific individuals.

With regard to the second relationship (Canada and tobacco companies), the Court’s reasoning is considerably more nuanced. In its pleadings, Imperial Tobacco alleged that “Canada went beyond its role as regulator of industry players and entered into a relationship of advising and assisting the companies in reducing harm to their consumers”.72 Assuming this to be true, the Court found that “Canada’s interactions with the manufacturers goes far beyond the sort of statements made by Canada to the public at large”,73 and would be sufficiently proximate to disclose a \textit{prima facie} duty of care in negligent misrepresentation.

Nevertheless, the Court ultimately declined to find a binding duty of care in this case for policy reasons.74 At its core, the Court felt that the government’s actions stemmed from a broader policy initiative to direct smokers that could not be convinced to quit toward lower-tar cigarettes:

\begin{quote}
In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a “true” or “core” policy, in the sense of a course or principle of action that the government adopted. The government’s alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations. Canada, on the pleadings, developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies’ claims against Canada for negligent misrepresentation must be struck out.75
\end{quote}

This holding is particularly interesting from the standpoint of a government regulator working closely with leaders in a particular industry, and underlines the statements made earlier that tort law is not meant to second-guess government policy initiatives that are reasonably enforced.

\begin{footnotes}
71 \textit{Imperial Tobacco, supra} note 69 at para. 50.
72 \textit{Ibid.} at para. 51.
73 \textit{Ibid.} at para. 54.
74 A very similar conclusion was reached in a recent case of the Nova Scotia Court of Appeal, where it was held that the province’s promotion of gambling was explicitly a policy decision, and therefore was deemed immune from being the subject of a tort action by a gambling addict for his reasonably foreseeable losses, \textit{Burrell v. Metropolitan Entertainment Group}, 2011 NSCA 108, 2011 CarswellNS 812 (N.S. C.A.). In particular, see para. 48.
75 \textit{Ibid.} at para. 95.
\end{footnotes}
(j) Other Cases of Note

Following on the heels of Fullowka, the Supreme Court also released another regulatory negligence decision, Broome v. Prince Edward Island.76 In this case, 57 plaintiffs brought an action against an orphanage for the physical and sexual abuse they sustained while residents at the orphanage, and an action against the Prince Edward Island government for negligently failing to ensure their safety. The court did not find that the circumstances of the case and the application of the Anns/Kamloops test justified the creation of a new category of a duty of care owed by the government to orphaned children. The court also determined that the orphanage was privately owned, not government funded or run. The court also held there was no statutory duty imposed by the legislation, nor a duty owed to all the children at the orphanage from the fact that the government placed some of their wards there.77 However, the court distinguished an important point and ruled that there was a duty of care owed to the children placed in the home by the government. The precedential value of the case is limited as the Court emphasized that their findings were based on an extremely limited factual record and that this, in and of itself, limited the value of their findings.

The Supreme Court had granted leave to appeal last year in Berensden v. Ontario.78 In this case, the owners of a dairy farm experienced difficulties with their cattle. This was allegedly because of water contamination that resulted from buried asphalt and concrete waste from a highway reconstruction project. Testing showed the water did not exceed the level of contaminants considered safe for human consumption. However, when the owners complained to the Ontario government, an alternate water source was provided. But, once the Ministry of Environment conducted further testing and declared the water from the original sources safe, the government stopped providing the alternate water source. The appellant sued the government for negligently depositing the waste and then failing to remove the contamination. The trial judge awarded damages of $1,732,400. When the government appealed to the Court of Appeal, the Court allowed the appeal, set aside the trial judgment, and dismissed the action. After Fullowka, it would have been particularly interesting to see where the Supreme Court went with this judgment, but unfortunately this case was discontinued, so we will not have the benefit of the Court’s judgment.79

77 This reasoning is consistent with the conclusion, though on different reasoning, in Aksidan v. Henley, 2008 CarswellBC 185, [2008] B.C.J. No. 178 (B.C. C.A.) where the court found that the government was not liable for acts of abuse students experienced while at a school. The school here was not under the direct control of the government. Contrast this with cases where the government defendant managed the school where the plaintiff attended, with courts holding that the government owed a negligence duty of care: Seed v. Ontario (2012), 2012 ONSC 2681, 2012 CarswellOnt 5544 (Ont. S.C.J.); affirming Slark (Litigation guardian of) v. Ontario, 2010 ONSC 1726, 2010 CarswellOnt 9465, 6 C.P.C. (7th) 168 (Ont. S.C.J.); leave to appeal refused 2010 ONSC 6131, 2010 CarswellOnt 9235, 6 C.P.C. (7th) 221 (Ont. Div. Ct.).
79 The notice of discontinuance was filed January 24, 2011.
Though on a slightly different point, the Supreme Court has recently released a series of six decisions, often referred to as the “to judicially review or sue” decisions.\(^\text{80}\) All six of the cases involved the issue of whether a party had to apply for judicial review of an administrative/government decision before they could sue under private law. Three of the six cases involved negligence or negligent misrepresentation claims.\(^\text{81}\) In all of the cases, the Supreme Court determined that it was not necessary to judicially review before suing. In TeleZone, for example, the Court determined that the remedies provided through judicial review would be insufficient, particularly where the claim was essentially about monetary loss. TeleZone also canvassed the issue of jurisdiction, and whether the Ontario Superior Court had concurrent jurisdiction to hear private law claims against a federal administrative body. After a lengthy analysis of the issue, the Supreme Court said that “the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review”.\(^\text{82}\)

Finally, on May 12, 2011 the Supreme Court released its decision in Elder Advocates, a proposed class action in which elderly residents of Alberta’s long term care facilities alleged that the government artificially inflated the accommodation charges to subsidize the cost of medical expenses, and the Province of Alberta and Regional Health Authorities who administered and operated Alberta’s health care regime failed to ensure that the accommodation charges were used exclusively for that purpose. On the negligence claim, the Court held that:

The pleadings do not support a negligence claim. While the pleadings arguably evoke negligence in auditing, supervising, monitoring and administering the funds related to the accommodation charges, the legislative scheme does not impose a duty of care on Alberta. While the Minister has a general duty, under the Alberta Health Insurance Act, to provide insured health care services, the plaintiffs have failed to point to any duty to audit, supervise, monitor or administer the funds related to the accommodation charges. Similarly, the Nursing Homes Act and its regulations impose no positive duty on the Crown, but grant only permissive monitoring powers. The same is true of the Regional Health Authorities Act and the Hospitals Act and their accompanying regulations. Furthermore, in the absence of a statutory duty, the fact that Alberta may have audited, supervised, monitored and generally administered the accommodation fees objected to does not create sufficient proximity to impose a prima facie duty of care. The specific acts alleged fall under the rubric of administration of the scheme. The mere supplying of a service is insufficient, without more, to establish a relationship of proximity between the government and the claimants.

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\(^{82}\) Ibid. at para. 76.
The Court struck out the claims in breach of fiduciary duty, negligence, and bad faith exercise of discretion, but allowed the unjust enrichment claim and a Charter s. 15 claim to proceed to trial.

In Ontario there have been some recent successes for plaintiffs outside of the Hill/Finney scenarios. In *Heaslip*, the Ontario Court of Appeal held that the family members of a deceased child could sue Ontario for failing to follow its own policy manual in handling calls for medical assistance. Here, Ontario allegedly failed to follow its policies by negligently not calling for an air ambulance after the deceased injured himself tobogganing. In *Glover*, a motions judge allowed the plaintiffs to proceed with a class action against the City of Toronto over allegedly negligently testing and maintaining a care home’s water tower, which negligence supposedly contributed to a failure to detect an outbreak of Legionnaire’s disease that killed 23 residents of that care home. In *Giroux*, the parents and sister of a woman who married one of her teachers after she graduated have been allowed to claim that this teacher negligently inflicted emotional and psychological harm on them in using the sister to gain access to the teacher’s now wife.

(k) Cases to Watch

It will be particularly interesting to see how the Supreme Court rules in future cases in light of the very recent decision of the Ontario Court of Appeal, *Ault v. Canada (Attorney General)*. In *Ault*, the Court of Appeal upheld a lower court judgment holding that Canada owed a duty of care to seven former employees, and was liable for negligently misrepresenting an opportunity to change employment which included a transfer of their pension monies to a private pension plan by way of a “reciprocal transfer agreement” at substantial benefit to the employees. However, after the employees changed employment at a substantially lower salary to a company called Loba, which had a reciprocal transfer agreement with Canada, the employees found out the arrangements were under investigation by the R.C.M.P. and the Canada Revenue Agency which was known to Canada. Loba’s pension plan was ultimately revoked and the pension monies were never transferred. The Court of Appeal determined that the longstanding employment relationship between the employees and Canada grounded a duty of care, as did Canada’s role as administrator of the employee’s pension plan. Canada was found liable for negligent misrepresentation. The Supreme Court has since denied Canada’s leave to appeal application.


86 2011 ONCA 147, 2011 CarswellOnt 1126 (Ont. C.A.); leave to appeal refused 2011 CarswellOnt 10862, 2011 CarswellOnt 10861 (S.C.C.) [*Ault*].


It will also be interesting to see if the Supreme Court takes on directly the reasoning in *Taylor*, by either agreeing that Health Canada may owe patients duties to ensure the safety of medical devices in particular cases or by adopting the pre-*Taylor* more conservative strand of reasoning in *Attis* and *Drady* holding that such a duty could not arise.

Also interesting to follow will be *Canada (Attorney General) v. Anderson*. The plaintiff in that case sought to certify a class action against the federal government for its funding and involvement with five residential schools in Newfoundland and Labrador over several decades. The action was certified at trial, and the Crown’s appeal was recently denied by the Court of Appeal. In its decision, the Court specifically noted the “special constitutional relationship” between the federal Crown and Canada’s aboriginal peoples, as well as the many operational and administrative obligations held by the federal Crown over the residential schools in question.

Finally, in *Leroux v. Canada (Revenue Agency)*, the British Columbia Court of Appeal held that the Canada Revenue Agency may owe duties to taxpayers to not negligently administer the *Income Tax Act* in assessing a taxpayer’s potential tax liability. If this finding is upheld after a trial, the implications for the administration of tax legislation could be substantial.

4. REDUCING THE ZONE OF POTENTIAL LIABILITY

While the cases are contradictory, in a state of lamentable confusion, and there is no legislative solution under consideration, the following are some general comments regarding steps that administrative decision-makers should consider to reduce the prospect of liability in negligence:

- **Complaints/Public Protection**: Any regulator with a public protection/licensing mandate must properly record, monitor and respond to complaints from the public (*Finney*);
- **Assumption of liability**: The courts look to representations from the regulator that a particularized group will be protected by the regulator (*Sauer* and its progeny). As a result, it is very important to train staff who deal with members of the public, and to record and monitor staff interactions with members of the public. All public statements (website, Chair and Minister’s speeches, etc.) are important. The content and reach of rules, policies and guidelines may also be construed as an assumption of liability. Regulators may assume a liability through public statements over and above statutory duties;
- **Investigations**: Any regulator that conducts investigations and inspections will have to pay particular attention to proper conduct of investigations (*Hill, Fullowka*);
- **Enforcement of statutory requirements**: We hope that most regulators do enforce statutory requirements. That is why regulators are given powers

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and duties. From a governance and accountability perspective, enforcement certainly is desirable. However, a regulator will not necessarily be liable for a policy decision to not act in accordance with a statute (Holland), or to not exercise its discretion to require compliance with statutory provisions. On this point, the Ontario Court of Appeal held in Street v. Ontario Racing Commission that there was no duty of care owed where a statutory discretion permits, but does not require, enforcement, and where a decision respecting the extent of compliance required the Commission to consider a “myriad of objectives consistent with public rather than private law duties”:

- **Policies and Procedures:** Establishing and following sensible policies and procedures in areas of statutory duties are important evidence of how the regulator met the standard of care in a particular case.

These suggestions are all elements of a proper risk management strategy. The key elements of any risk management strategy should be applied to the area of regulatory negligence — generally including identification, assessment and prioritization, management/addressing the risk, and review and reporting. Ultimately, this will improve the ability of the administrative body to provide better public services, and reduce the potential for harm resulting from substandard administrative action.

5. REFORM?

The reality is that the situation outlined above, and the need for pre-emptive action and vigilance, is not likely going to change any time soon. Attempts at reform in the United Kingdom, which resulted in a significant consultation paper published by its Law Commission in 2008 recommending some sweeping changes to public authority liability in negligence, have largely been ignored. As of the date of publication, the Law Commission continues to inform the public that a response from Government has not yet been received. Had the Commission’s recommendations been adopted, a fairly sweeping reform to negligence law in favour of judging administrative actors’ liability by reference to traditional principles of public law liability would have ensued, with liability being judged first by reference to whether the authorities’ actions were invalid from a public law perspective. Without such reform in Canada, the uncomfortable application of private law principles to public authorities outlined above will continue to dominate the discourse.

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6. CONCLUSION

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 action. Continued vigilance by administrative lawyers is essential, to protect members of the public from harm, to discharge the statutory mandate, and to fulfill public expectations.

Credibility Issues Refresher

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March 1, 2017
CREDIBILITY ISSUES REFRESHER

The Six Minute Administrative Lawyer 2017

The Law Society of Upper Canada

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Credibility Issues Refresher

I. Introduction

This 2017 credibility refresher outlines the general legal principles relevant to the assessment of credibility and reliability in the administrative law context, focusing on (a) how administrative tribunals assess credibility and reliability, and (b) how a tribunal’s findings on credibility and are scrutinized on appeal or judicial review. Then, in light of those principles, it discusses recent developments in this area of administrative law, focusing on three cases released in 2016: (a) Stefanov v College of Massage Therapists,¹ (b) Noriega v College of Physicians and Surgeons of Ontario,² and (c) Law Society of British Columbia v Sas.³

¹ 2016 ONSC 848 [Stefanov].
² 2016 ONSC 924 [Noriega].
³ 2016 BCCA 341 [Sas].
II. The Law on Credibility in the Administrative Law Context

(a) How an Administrative Tribunal Assesses Credibility

The starting point in any discussion about how administrative tribunals assess credibility is the Divisional Court’s decision in *Pitts v Ontario (Director of Family Benefits, Ministry of Community & Social Services)*. Although *Pitts* was decided more than thirty years ago, it continues to be cited with frequency by courts and administrative tribunals, particularly in professional discipline cases.

In *Pitts*, the Divisional Court acknowledged the difficulty administrative decision-makers can face in assessing credibility. Unlike a judge, administrative decision-makers may not have the luxury of hearing *viva voce* evidence and evidence may not be subject to cross-examination. Yet, however difficult this task may be, the court emphasized that an administrative board owes a duty to the parties before it to clearly state its grounds for rejecting evidence on the basis of credibility (or, more accurately, a lack of credibility).

Helpfully, the Divisional Court suggested that administrative decision-makers should use the factors provided in jury instructions to help them assess credibility. The court set forth the following factors (the “*Pitts factors*”) to guide administrative decision-makers in their assessment of credibility:

In weighing the testimony of witnesses you are not obliged to decide an issue simply in conformity with the majority of the witnesses. You can, if you see fit, believe one witness against many. The test is not the relative number of witnesses, but in the relative force of their testimony. With respect to the testimony of any witness, you can believe all that that witness has said, part of it, or you may reject it entirely.

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4 (1985), 51 OR (2d) 302, [1985] OJ No 2578 (Div Ct) [*Pitts*].
5 *Ibid* at p. 311.
Discrepancies in a witness' testimony, or between his testimony and that of others, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience and innocent misrecollection is not uncommon. It is a fact also that two persons witnessing an incident or transaction often will see or hear it differently. Discrepancies on trivial detail may be unimportant, but a falsehood is always serious.

In determining the credit to be given to the evidence of a witness, you should use your good common sense and your knowledge of human nature. You might, in assessing credibility, consider the following:

The appearance and demeanour of the witness, and the manner in which he testified. Did the witness appear and conduct himself as an honest and trustworthy person? It may be that he is nervous or confused in circumstances in which he finds himself in the witness box. Is he a man who has a poor or faulty memory, and may that have some effect on his demeanour on the witness stand, or on the other hand, does he impress you as a witness who is shifty, evasive and unreliable?

The extent of his opportunity to observe the matter about which he testified. What opportunities of observation did he in fact have? What are his powers of perception? You know that some people are very observant while others are not very observant.

Has the witness any interest in the outcome of the litigation? We all know that humanity is prone to help itself, and the fact that a witness is interested in the results of the litigation, either as a plaintiff or defendant, may, and often does, quite unconsciously tend to colour or tinge or shade his evidence in order to lend support to his cause.

Does the witness exhibit any partisanship, any undue leanings towards the side which called him as a witness? Is he a relative, friend, an associate of any of the parties in this case, and if so, has this created a bias or prejudice in his mind and consequently affected the value of his testimony?

It is always well to bear in mind the probability or improbability of a witness' story and to weigh it accordingly. That is a sound common sense test. Did his evidence make sense? Was it reasonable? Was it probable? Does the witness show a tendency to exaggerate in his testimony?

Was the testimony of the witness contradicted by the evidence of another witness, or witnesses whom you considered more worthy?
Does the fact that the witness has previously given a statement that is inconsistent with part of his testimony at trial affect the reliability of his evidence?6

*Pitts* remains helpful authority for counsel to provide to administrative decision-makers to equip them with the ability to articulate why a witness is or is not credible. As will be discussed below, it is imperative that administrative tribunals properly explain in their reasons why they found a witness to be credible or not.

(b) The Distinction between Credibility and Reliability

Although the excerpt above from *Pitts* refers to factors that are relevant to “assessing credibility,” it is more accurate to say that they are factors that are relevant to assessing credibility and reliability. These two concepts are often discussed as if they are one and the same, but that temptation should be avoided. It is important to ensure administrative decision-makers are aware of the difference between – and the need to consider – both credibility and reliability. A failure to do so can leave a decision vulnerable to appeal, notwithstanding the high degree of deference that is typically shown to the factual findings of administrative tribunals.7

The Court of Appeal for Ontario has explained the difference between credibility and reliability as follows:

Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness’s ability to accurately

(i) observe;

(ii) recall; and

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6 *Ibid* at pp. 311-312.
7 See e.g. *Karkanis, Re*, 2014 ONSC 7018 [*Karkanis*], where a failure to consider the distinction between credibility and reliability was one of the bases for overturning the decision.
(iii) recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence.  

Thus, when Pitts suggests that decision-makers should consider the extent of the witness’s opportunity to observe the events, the witness’s powers of perception, and the strength of the witness’s memory, the court is speaking about factors that are relevant to reliability. A witness who had only a fleeting instant to observe a key event, who is not particularly perceptive, or who has a poor memory may be testifying truthfully about his recollection, but may be mistaken about what he saw. Although credible, he may not be reliable.

Although decision-makers need not explicitly define the concept of “reliability” in their reasons, they must show that they considered the factors that are relevant to reliability. It is not sufficient for the decision-maker to conclude that a witness appeared honest (i.e. credible), and prefer the witness’s evidence solely on that basis. Rather, the decision-maker must take the extra step and consider the reliability of the witness’s evidence.

(c) Review of a Tribunal’s Credibility and Reliability Findings

On appeal or judicial review, an administrative tribunal’s findings on credibility and reliability will be entitled to significant deference. In Q v College of Physicians & Surgeons (British Columbia) (2003), the Supreme Court of Canada (“SCC”) held that assessments of credibility by a tribunal are entitled to significant deference because they are “quintessentially questions of fact”. Findings of credibility and reliability will be reviewed on a reasonableness

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9 See Noriega, supra note 2, at para. 63.
10 2003 SCC 19 [Q].
11 Ibid at para 38.
standard, meaning that the court should not re-weigh the evidence, second-guess findings of fact, or re-try the case.\textsuperscript{12}

However, where a tribunal does not explain the basis on which their credibility or reliability findings were reached, this may constitute a reversible error.\textsuperscript{13} When a reviewing court considers the sufficiency of a lay tribunal’s reasons on credibility and reliability, the tribunal should not be held to the same standard as a court.\textsuperscript{14} But, the tribunal’s reasons should, at a minimum, address the honesty of the witness and the reliability of the witness’ evidence.\textsuperscript{15}

In \textit{Gale v College of Physicians and Surgeons of Ontario} (2015), the Ontario Divisional Court provided a useful summary of the principles governing judicial review of a tribunal’s credibility findings:

i. Reasonableness is a deferential standard, animated by the principle that certain questions that come before tribunals do not lend themselves to one particular result. It is concerned with whether the outcome falls within a range of possible acceptable outcomes. (\textit{Dunsmuir v. New Brunswick}, 2008 C.J. No. 9 at para. 47; \textit{Law Society of New Brunswick v. Ryan}, 2003 S.C.J. No. 17 at paras. 48-56)

ii. A reviewing court should not seize on one or more mistakes or elements of the decision that do not affect it as a whole. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. (\textit{Dunsmuir v. New Brunswick}, supra, paras. 47-49.; \textit{Law Society of New Brunswick [sic] v. Ryan, supra}, at paras. 48-56)

iii. Deference therefore requires that the Court refrain from subjecting the tribunal's reasons to a "painstaking scrutiny". It would be "counterproductive to dissect" minutely a fact-finder's reasons so as to undermine the fact-finder's responsibility for weighing all of the evidence.

\textit{[A]ppellate review does not call for a word-by-word analysis; rather, it calls for an examination to determine whether the reasons, taken as a whole, reflect reversible error. The task is to assess the overall, common sense meaning, not to parse the}

\textsuperscript{12} \textit{Gale v College of Physicians and Surgeons of Ontario}, 2015 ONSC 1981 at paras 24, 31, 40, and 44 [\textit{Gale}].

\textsuperscript{13} \textit{Karkanis, supra} note 7 at para 65.

\textsuperscript{14} \textit{Venneri v College of Chiropractors (Ontario)} (2008), [2008] OJ No 2278, 238 OAC 143 at para 12 (ONSC).

\textsuperscript{15} \textit{Karkanis supra} note 7 at para 52.

iv. The task of the reviewing court is not to posit alternative interpretations of the evidence, or engage in a reassessment of the evidence. The powers of the appeal court do not amount to a general warrant to retry the case decided by the tribunal. Rather, the task of the reviewing court is to determine whether the Committee's decision is reasonable and that it had "some basis in the evidence." The reviewing court's review of the evidence is "beside the point." (College of Physicians and Surgeons of British Columbia v. Dr. Q., [2003] S.C.C. 19 (CanLII), at para. 41; R. v.C.(T.), [2005] O.J. No. 24 (C.A.) at para. 45)

v. Heightened deference is owed to tribunals' assessments of credibility. (College of Physicians and Surgeons of British Columbia v. Dr. Q., supra at para. 38; F.H. v. McDougall, supra at para. 72; Muhammad v. College of Physicians and Surgeons of Ontario, [2014] O.J. No. 3154 (Div. Ct.) at paras. 4, 6-8)


vii. Where credibility and reliability are an issue, and the trial judge demonstrates she is alive to inconsistencies but accepts the evidence of the witness nonetheless, in the absence of a palpable and overriding error, there is no basis for interference. That is,

Where the trial judge refers to the inconsistencies and deals expressly with a number of them, it must be assumed that she took them into account in assessing the balance of probabilities. (F.H. v. McDougall, supra at para. 70)\(^\text{16}\)

III. Recent Developments

(a) Stefanov v College of Massage Therapists

The Divisional Court’s decision in Stefanov v College of Massage Therapists represents a significant departure from how an administrative tribunal’s credibility findings are typically reviewed. It also sets an extremely high bar for tribunals to meet with respect to their reasons on

\(^{16}\) Gale, supra note 12 at para 8.
credibility. Decisions released since Stefanov have adhered to the traditional deferential approach to the review of a tribunal’s credibility findings, and Stefanov may ultimately prove to be an aberration. Nevertheless, it is still important to review the approach taken in Stefanov, in an effort to identify and avoid similar difficulties relating to credibility determinations.

The case involved allegations of professional misconduct against Mr. Stefanov, a registered massage therapist. Mr. Stefanov was alleged to have sexually abused a patient and to have breached standards of practice. The events at issue occurred in a private massage room with only Mr. Stefanov and the complainant present. With no other witnesses, the outcome of the hearing turned on a credibility assessment. The College’s Discipline Committee Panel (the “Panel”) ultimately determined that the complainant was more credible and found Mr. Stefanov guilty of professional misconduct on most (but not all) of the allegations.17

The court acknowledged a reasonableness standard applied, that the Panel’s credibility findings were subject to a high degree of deference, and that “a reviewing court should not should not minutely dissect the reasons of a tribunal or retry the case.”18 Yet, despite these statements, the Divisional Court subjected the Panel’s reasons to a degree of painstaking scrutiny that is unusual on a reasonableness review. In the court’s view, the Panel’s reasons were so flawed as to produce an unreasonable result. However, in reaching this conclusion, the court appeared to advance a number of alternative interpretations of the evidence and, in some cases, reassessed the evidence altogether. This approach is difficult to reconcile with the general prohibition against “retrying” the case and the particularly deferential stance taken by courts when reviewing a tribunal’s findings of credibility.

17 Stefanov, supra note 1 at paras 1-2 and 50.
18 Ibid at para 59.
Although a full review of the evidence is beyond the scope of this paper, the following criticisms advanced by the Divisional Court highlight the robust approach taken in *Stefanov* to reviewing the Panel’s assessment of credibility:

i. The court was critical of the manner in which the Panel reasoned about the complainant’s inability to recall certain peripheral details such as how the treatment room was set up, whether music was playing, whether the cradle had a fabric covering, etc. The Panel was largely unconcerned that the complainant did not remember these facts because, in its view, many patients would not study details of this nature. However, the Divisional Court took issue with this explanation on the basis that the Panel did “not explain how they would know what most clients take the time to consider during a massage. There was no evidence on this point.” This statement suggests that the Divisional Court interpreted the Panel’s comment as a factual finding about what most clients observe when getting a massage, rather than simply as an application of one of the usual *Pitts* criteria, namely: did the witness’s evidence accord with “common sense” and were the discrepancies on a “trivial detail” that did not detract from the witness’s overall reliability. Under the usual approach to assessing credibility/reliability, these are matters on which one would not expect to lead specific evidence.

ii. The court criticized the Panel for failing to explain why it found the complainant credible on certain points when it had rejected her evidence on other points. In particular, the Panel rejected the complainant’s evidence that Mr. Stefanov had improperly draped the sheet so as to expose certain body parts and her evidence that at one point, he bent down

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19 *Ibid* at paras 67 and 77.
20 *Ibid* at paras 83 and 105.
at the foot of the bed and looked under the sheet. The Panel rejected her evidence as honest but mistaken on these points, concluding that the bulk of the blankets and the way they were arranged would not have permitted certain body parts to be exposed or visible, even if Mr. Stefanov had bent down.\textsuperscript{21} The court held that the Panel should have explicitly discussed whether the complainant could have been mistaken on the rest of the allegations, in light of her mistaken testimony on these points. The Panel’s explanation for why it believed the main allegations was not viewed as sufficient. Rather, the court seems to suggest that a further explicit discussion of why the complainant might be mistaken on some points but not on others was also required. Once again, this seems to hold the Panel to an exacting standard that is more rigorous than the traditional approach to reasonableness review.

iii. The court criticized the way in which the Panel relied on some unusual terminology that Mr. Stefanov claimed he had used during the massage. In Mr. Stefanov’s written statement after the complaint was made, he provided a fair amount of detail and reported that he had asked the complainant if she “felt secure” during the massage. The Panel found that this was not a typical question massage therapists were trained to ask, and therefore questioned the truthfulness of this statement.\textsuperscript{22} However, the court noted that English did not appear to be Mr. Stefanov’s first language, and criticized the Panel for not considering this possible explanation. In doing so, the court appears to be to be suggesting an alternative interpretation of the evidence instead of deferring to the Panel’s differing (but arguably reasonable) analysis of this issue.

\textsuperscript{21} Ibid at paras 80 and 104.
\textsuperscript{22} Ibid at paras. 96-97.
The Divisional Court’s analysis in Stefanov sets a very high bar for lay tribunals to meet when providing reasons for their credibility assessments. However, the Divisional Court’s decision in Noriega v College of Physicians and Surgeons of Ontario (2016), released only a month later, applies a much more traditional approach to reviewing a tribunal’s credibility findings. This suggests that Stefanov may continue to be an outlier, although it is too early to make any confident predictions.

(b) Noriega v College of Physicians and Surgeons of Ontario

In Noriega v College of Physicians and Surgeons of Ontario, the Discipline Committee (the “Committee”) of the College found Dr. Noriega guilty of misconduct for sexual abuse of a patient. Similar to Stefanov, the incident in question took place with only Dr. Noriega and the complainant in the room and, thus, credibility was central to the outcome of the hearing. On the totality of the evidence, the Committee found the complainant to be credible and reliable, whereas they found that Dr. Noriega was neither clear nor precise in his evidence and that his answers were often evasive and scripted.23

The Divisional Court performed a reasonableness review of the Committee’s credibility findings, applying the principles outlined in the Gale decision discussed above.24 The Committee explained why they found the complainant credible, despite inconsistencies and gaps in memory in her evidence. The reasons demonstrated that the Committee was alert and live to Dr. Noriega’s arguments about the complainant’s lack of memory and inconsistent evidence. The Committee considered these arguments, but chose to reject them and explained the basis for doing so. The court ultimately determined that the Committee’s findings were reasonable and supported by the

23 Noriega, supra note 2 at paras 39-42.
24 Ibid at para 58.
evidence. In reaching this conclusion, the court noted that the Committee was not obliged to “define reliability” in order to adequately assess the credibility and reliability of the complainant. It was clear that the Committee had reviewed the factors that were relevant to reliability and found the complainant to be credible.

Stefanov and Noriega provide an interesting contrast. Although it is tempting to dismiss Stefanov as inconsistent with the prevailing legal principles, the Ontario Court of Appeal has denied leave to appeal, and the decision should not be ignored.

In light of this reality, it would be prudent for counsel appearing before administrative tribunals to take extra care to equip the tribunal with the ability to adequately explain their credibility findings. As a practice point, counsel would be wise to provide the tribunal with the Pitts decision and, with reference to the Pitts factors, outline in detail how the tribunal ought to reason through inconsistencies in the evidence to arrive at the desired conclusion.

(c) Law Society of British Columbia v Sas

In Law Society of British Columbia v Sas, a hearing panel of the Law Society of British Columbia found that Ms. Sas had misappropriated trust funds and withdrew trust funds to pay fees and disbursements without delivering bills to clients. In relation to one of the allegations, the Panel accepted the evidence of a part-time bookkeeper (Ms. Clarke) over Ms. Sas and another bookkeeper (Ms. Langston). The Panel rejected the evidence of Ms. Sas and Ms. Langston

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25 Ibid at paras 63-67 and 72.
26 Ibid at paras. 63-67.
because, among other things, they were evasive, argumentative, non-responsive, and provided implausible explanations.27

On appeal, the British Columbia Court of Appeal (“BCCA”) held that the hearing panel did not make any palpable or overriding error in its assessment of credibility. The hearing panel rejected Ms. Sas and Ms. Langston’s evidence because they were argumentative, evasive, and non-responsive. The BCCA held that these were meaningful and proper bases for assessing the evidence and that the hearing panel provided a detailed assessment of the substance of the evidence.28

Further, the fact that the hearing panel did not mention certain discrepancies in Ms. Clarke’s evidence was not a reversible error, because the discrepancies were of limited importance. The BCCA reiterated that a tribunal does not need to refer to every piece of evidence when giving its reasons. A failure to mention evidence that is of limited importance to the issues does not result in a palpable and overriding error.29 Much like Noriega, the BCCA’s decision in Sas reflects the more established deferential standard of review applied to the credibility findings of an administrative tribunal.

IV. Conclusion

The overwhelming line of cases state that an administrative tribunal’s findings on credibility and reliability will be entitled to significant deference on review. However, the Divisional Court’s decision in Stefanov highlights the importance of a tribunal’s providing detailed reasons to support its credibility findings. In order to equip a tribunal with the ability to provide

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27 Sas, supra note 3 at paras 1 and 23.
28 Ibid at paras 33-35.
29 Ibid at paras 40-42.
good reasons for their credibility findings, counsel must ensure that they explain in detail why a witness should, or should not, be considered credible. The *Pitts* decision remains a useful authority for this purpose.