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Note on Canadian Cases: The Jurisdiction of Tribunals to Control Counsel Conduct and Disqualify Counsel based on Conflicts of Interest¹

The purpose of this note is to bring attention to certain Canadian authorities relating to the power of tribunals to control the conduct of counsel appearing before them, including the power to disqualify counsel from acting due to a conflict of interest which would affect the fairness of the proceedings. These authorities were brought to my attention by counsel on a motion to disqualify opposing counsel which was heard by me as a sole arbitrator of a non-international commercial arbitration. As it turned out, there was no dispute in that case as to my jurisdiction to grant the order.

On reviewing the authorities cited, it would appear that although none of the cases directly relate to a commercial arbitration under a provincial arbitration statute, the principle is well established that the power to entertain such applications and make such orders are a necessarily implied adjunct to the power of any tribunal to control its own process. The power of arbitral tribunals to control their own process, subject to the agreement of the parties and some statutory limitations, is clearly recognized and established by all provincial arbitration statutes.

Many discussions of this issue begin by contrasting the *inherent* jurisdiction possessed by courts with the fact that the jurisdiction of arbitral tribunals is based on the consent of the parties and therefore cannot be said to be “inherent”. It is therefore interesting to read a decision of the Supreme Court of Canada which builds a bridge between the inherent jurisdiction possessed by superior courts and the “implied” jurisdiction of statutory courts, which do not have inherent jurisdiction, to control the conduct of counsel. As was stated in *R v. Cunningham*, [2010] 1 S.C.R. 331 at paras. 18-20:

[18] Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice (see I.H. Jacob, “The Inherent Jurisdiction of the Court” (1970), 23 *Curr. Legal Probs.* 23, at pp. 27-28). Inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner. As counsel are key actors in the administration of justice, the court has authority to exercise some control over counsel when necessary to protect its process. In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, this Court confirmed that inherent jurisdiction includes the authority to remove counsel from a case when required to ensure a fair trial:

The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. [p. 1245]

...

[19] Likewise in the case of statutory courts, the authority to control the court’s process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a “doctrine of jurisdiction by necessary implication” when determining the powers of a statutory tribunal:

... the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime

(*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51)

Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.

[20] Applications regarding withdrawal or removal of counsel, whether for non-payment of fees, conflict of interest or otherwise, are the types of matters that fall within the necessarily implied authority of a court to control the conduct of legal proceedings before it.

It is noteworthy that in *Cunningham* the Supreme Court of Canada upheld the power of a statutory court to *prevent the withdrawal* of counsel from the case – arguably an even more draconian measure than disqualification ! However, since counsel in that case applied for permission to withdraw there does not seem to be any reason why a statutory court should not have refused to grant permission where it felt that withdrawal would undermine its process. Also, the public law aspects of the statutory court in *Cunningham* (dealing with criminal cases) may have had a strong influence on the decision and may indeed, offer an important dis-

inction from commercial arbitration tribunals. In any event, the Court does not appear to have dwelt on the distinction between an application by one party to disqualify the counsel employed by the other side and an application by counsel for one of the parties to withdraw. The jurisdiction to deal with both was held to be within the implied jurisdiction of the statutory court for reasons that are highly transferrable to the private arbitration context.

The existence of this implied jurisdiction with respect to statutory tribunals (in this case an adjudicator under the *Canada Labour Code*) was also confirmed by the Federal Court of Canada in *Genex Communications Inc. v. Fillion*, [2007] F.C.J. No. 371 (F.C.) paras 22 and 23 in which it was said:

22 It is clear upon reading paragraph 242(2)(b) [of the *Canada Labour Code*] that an adjudicator is master of his or her proceedings. This authority is in compliance with the rule stated by the Federal Court of Appeal in *Fishing Vessel Owners' Assn. of British Columbia v. Canada (Attorney General)*, 1 C.P.C. (2d) 312 (F.C.A.), at page 319:

Every tribunal has the fundamental power to control its own procedure in order to ensure that justice is done. This, however, is subject to any limitations or provisions imposed on it by the law generally, by statute or by the rules of Court.

23 Therefore, the power to control its procedure should logically include the adjudicator's power to ensure procedural fairness during a hearing. I agree with the adjudicator R.C. Dumoulin, who wrote the following in his preliminary decision in *Iny-Somberg v. Laurentian Bank of Canada*, [1999] C.L.A.D. No. 526, at paragraph 14: "The principles of audi alteram partem and procedural fairness should be safeguarded by the adjudicator during the pre-hearing process as well as in the conducting of the hearing itself." This duty to enforce procedural fairness must include among other things the duty of ensuring an impartial hearing. In *Smith Mechanical Inc. v. Thomson*, [1985] C.S. 782, [1985] Q.J. No. 124 (QL), the Honourable Mr. Justice Charles D. Gonthier of the Quebec Superior Court, as he then was, wrote the following:

[TRANSLATION]

para. 12 An impartial hearing implies not only impartiality on the part of the tribunal, but also independence and disinterestedness on the part of the lawyers who are tasked with asserting the rights of their clients. This also implies that a litigant must have [access] to his or her counsel in confidence, which can only be ensured through the protection of confidential information secrecy and total loyalty.

In *Genex*, the decision of the labour adjudicator to disqualify counsel for one of the parties to the adjudication was upheld. The court did so after determining that the standard of

review on the question of jurisdiction to make the order was a standard of correctness.

In *Universal Workers' Union v. Labourers' International Union of North America*, [2004] O.J. No. 2249 (S.C.J.), the Supreme Court of Ontario reversed a determination by the Ontario Labour Relations Board that it did *not* have jurisdiction to disqualify counsel. The Board's determination that it did not have jurisdiction was in line with numerous previous boards that had come to the same conclusion on similar applications. In rejecting these decisions, Justice Nordheimer provided the following analysis at paras 16 to 25:

16 There is one decision of the Board which does appear to address the issue directly and that is 150960 Canada Inc. Const., [2002] O.L.R.D. No. 777 where the Board said, at para. 9:

"Even if there was any merit to the claim by counsel for Local 598 that the solicitors and counsel for the applicant are in a conflict of interest (a matter on which we express no opinion), the Board does not, in our view, have the power to control access to practise' before the Board and therefore does not have the authority to direct the solicitors and counsel for the applicant to cease representing the applicant before the Board in this application. The remedies, if any, with respect to the concerns of counsel for Local 598 about the solicitors and counsel for the applicant must be sought in another forum. The request made by counsel for Local 598 that the Board determine that a conflict of interest exists and direct the applicant's solicitors and counsel be removed is therefore dismissed."

17 In all of these decisions, the Board consistently makes reference to section 23(3) of the Statutory Powers Procedure Act, R.S.O. 1990, c. S.22 which states:

"A tribunal may exclude from a hearing anyone, other than a barrister and solicitor qualified to practise in Ontario, appearing as an agent on behalf of a party or as an advisor to a witness if it finds that such person is not competent properly to represent or to advise the party or witness or does not understand and comply at the hearing with the duties and responsibilities of an advocate or advisor."

18 The Board appears to conclude from the reference in that subsection to "other than a barrister and solicitor" that it has no jurisdiction to preclude a lawyer from appearing before it. With respect, I do not consider that to be the proper interpretation of the subsection. Section 23(3) does not purport to address the issue of lawyers appearing before tribunals in situations where they may have a disqualifying conflict. Rather, the section expressly empowers tribunals to exclude agents from appearing for parties if the tribunal is of the opinion that the agent is not competent to undertake the task. At the same time, however, tribunals are expressly precluded from ruling on the competence of lawyers who may appear for parties or



witnesses. Competence is, of course, not the basis of the concern raised by the application here.

19 Regarding whether a lawyer or law firm is the subject of a disqualifying conflict which ought to prevent that lawyer or law firm from appearing on a matter, the more relevant provisions in the Statutory Powers Procedure Act are sections 23(1) and 25.0.1. Section 23(1) states:

“A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.”

Section 25.0.1 states:

“A tribunal has the power to determine its own procedures and practices and may for that purpose,

- (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
- (b) establish rules under section 25.1.”

20 In my view, these sections, either individually or collectively, give the Board authority to determine whether a lawyer or law firm representing any party is or is not in a conflict of interest and, in the former case, then allows the Board to make the appropriate order disqualifying that lawyer or law firm. In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), Mr. Justice Goudge said, at para. 55:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.”

21 Similarly, a tribunal has the right to prevent the abuse of its processes by virtue of section 23(1). Permitting a lawyer or law firm to appear for a party when that lawyer or law firm is in a position of conflict of interest regarding another party is, in my view, clearly a misuse of the tribunal’s procedure and one that would be manifestly unfair to the objecting party.

22 Alternatively, it is a matter that the tribunal can properly address under its power to determine its own procedures and practices and to ensure compliance with them. I find support for this latter conclusion in the decision of *Wilder v. Ontario Securities Commission* (2000), 47 O.R. (3d) 361 (Div. Ct.) where it was argued that the Ontario Securities Commission could not take certain actions against a lawyer because it violated the Law Society of Upper Canada’s exclusive jurisdiction to regulate the professional conduct of lawyers. In rejecting that contention, Madam Justice Swinton said, para. 20:

“In proceedings such as these, the Commission is not usurping the role of the Law Society, as its objective is not to discipline the lawyer for professional misconduct; rather, its concern is to remedy a breach of its own Act which violates the public interest in fair and

efficient capital markets, and to control its own processes.” [emphasis added]

23 There is another reason for reaching the conclusion that specialized tribunals, such as the Ontario Labour Relations Board, have such authority. Fundamental to the decision as to whether a lawyer is or is not in a position of conflict is whether information in the possession of that lawyer might be used to the detriment of the objecting party. As Mr. Justice Sopinka said in *MacDonald Estate v. Martin*, supra, at p. 1260:

“Typically, these cases require two questions to be answered: 1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? 2) Is there a risk that it will be used to the prejudice of the client?”

24 The Board is in a much better position, with its specialized knowledge and expertise, to know whether the lawyer or law firm is in possession of confidential information, whether the confidential information is relevant to the issues that the Board has to determine and whether that confidential information could be used to the detriment of the objecting party. It makes more sense for the tribunal, who must make the ultimate determination of the issues on the hearing before it, to decide whether any conflict alleged against the lawyer is real for only apparent, based on the usual practices of the lawyers and law firms who appear before it. For example, in this case the Board might conclude that whether information the lawyer and law firm either did or might have become possessed of as a consequence of acting for the objecting party in the certification hearing could not possibly prejudice the objecting party in respect of the current unfair labour practices hearing. The Board is in a much better position to determine whether that is the reality of the situation than the court would be.

25 I will also say that the possibility that, on a subsequent judicial review of any decision that the Board might reach on the issue, the court “would not likely defer to the Board’s judgment in this area” is not a proper basis for the tribunal to decline to decide the issue in the first instance.

Once again, the analysis and its applicability to arbitral tribunals, which similarly are empowered by legislation to establish procedures with the objective of conducting proceedings which are fair to all parties, is compelling.

While arbitration is based on consent, as with all agreements, freedom of action of the parties to the agreement is limited by the terms of the agreement. In the case of arbitration, this includes submission to the power of the tribunal to prescribe rules that make the proceeding fair and to render decisions that restrict conduct of the parties or their counsel that defeats or undermines that objective.

An important point that emerges from the foregoing analysis is that, in considering applications to disqualify counsel, the tribu-

nal is not usurping the role of any professional body which may regulate counsel in a particular case – nor should it be applying the rules of conduct of any particular governing body. The tribunal is only concerned with that which affects the fairness of its own proceeding. In making its decision, the tribunal is not concerned with the right of a given counsel to practice law, only with

the right of a party who has submitted to the arbitration process to use counsel whose involvement makes the process unfair. ❧

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Note portant sur des affaires canadiennes concernant la compétence des tribunaux pour contrôler la conduite des avocats et les disqualifier en cas de conflit d'intérêts¹

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La présente note vise à attirer l'attention sur certains organismes de réglementation canadiens en ce qui concerne le pouvoir qu'ont les tribunaux de contrôler la conduite d'un avocat qui plaide devant eux, y compris le pouvoir de le disqualifier en raison d'un conflit d'intérêts qui pourrait porter atteinte à l'équité des procédures. Ces organismes de réglementation ont été portés à mon attention par un avocat dans le cadre d'une requête visant à disqualifier l'avocat de la partie adverse et que j'ai entendu en ma qualité d'arbitre unique dans une affaire d'arbitrage commercial non international. En fait, ma compétence pour décréter cette mesure dans cette affaire était incontestable.

Après examen des organismes mentionnés, il semble que même si aucune affaire ne se rapporte directement à l'arbitrage commercial en vertu d'une loi provinciale sur l'arbitrage, il existe un principe bien établi voulant que le pouvoir de recevoir de telles demandes et le fait de décréter de telles mesures sont nécessairement implicites et en complément du pouvoir de tout tribunal de contrôler sa propre procédure. Le pouvoir qu'ont les tribunaux d'arbitrage de contrôler leur propre procédure, sous réserve de l'accord des parties et de certaines restrictions statutaires, est clairement reconnu et établi par toutes les lois provinciales sur l'arbitrage.

De nombreuses discussions sur cette question commencent en comparant la compétence *inhérente* des tribunaux au fait que la compétence des tribunaux d'arbitrage se base sur le consentement des parties et qu'en conséquence, cette compétence ne peut être qualifiée d'« inhérente ». Il est donc intéressant de lire une décision de la Cour suprême du Canada qui établit un lien entre la compétence inhérente des tribunaux supérieurs et la compétence « implicite » des tribunaux statutaires, qui n'ont pas de compétence inhérente, pour contrôler la conduite des avocats. Tel que mentionné dans l'affaire *R. c. Cunningham*, [2010] 1 R.C.S. 331 aux paragraphes 18 à 20 :

[18] Une cour supérieure a la compétence inhérente nécessaire à l'exercice de sa fonction judiciaire ainsi qu'à l'exécution de son mandat d'administrer la justice (voir I.H. Jacob, « The Inherent Jurisdiction of the Court » (1970), 23 *Curr. Legal Probs.* 23, p. 27-28), ce qui comprend le pouvoir de décider du déroulement de l'instance, de prévenir l'abus de procédure

et de veiller au bon fonctionnement des rouages de la cour. Comme l'avocat joue un rôle central dans l'administration de la justice, la cour a un certain pouvoir sur lui lorsqu'il s'agit de faire respecter sa procédure. Dans l'arrêt *Succession MacDonald c. Martin*, [1990] 3 R.C.S. 1235, notre Cour confirme que la compétence inhérente englobe le pouvoir de déclarer un avocat inhabile à occuper afin d'assurer un procès équitable à l'accusé :

Les tribunaux, qui ont le pouvoir inhérent de priver un avocat du droit d'occuper pour une partie en cas de conflit d'intérêts, ne sont pas tenus d'appliquer un code de déontologie. Leur compétence repose sur le fait que les avocats sont des auxiliaires de la justice et que le comportement de ceux-ci à l'occasion de procédures judiciaires, dans la mesure où il peut influencer sur l'administration de la justice, est soumis à leur pouvoir de surveillance. [p. 1245]

...

[19] De même, dans le cas d'un tribunal d'origine législative, le pouvoir de faire respecter sa procédure et le droit de regard sur la manière dont les avocats exercent leurs fonctions s'inferent nécessairement du pouvoir d'être une cour de justice. Notre Cour a confirmé que les pouvoirs d'un tribunal d'origine législative peuvent être déterminés grâce à une « doctrine de la compétence par déduction nécessaire » :

... sont compris dans les pouvoirs conférés par la loi habilitante non seulement ceux qui y sont expressément énoncés, mais aussi, par déduction, tous ceux qui sont de fait nécessaires à la réalisation de l'objectif du régime législatif . . .

(*ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 51)

Même si dans cet arrêt, le juge Bastarache renvoie à un tribunal administratif, la même règle de la compétence par déduction nécessaire vaut pour un tribunal d'origine législative.

[20] La demande d'autorisation de cesser d'occuper ou celle visant à priver l'avocat du droit d'occuper, qu'elle soit présentée par exemple, en raison du non-paiement des honoraires ou d'un conflit d'intérêts, ressortissent au pouvoir dont dis-

