Natural Justice and Ineffective Assistance of Counsel in Administrative Law Hearings

By

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Our law is settled on the recognition that ineffective assistance of counsel in a criminal trial can impact on the fairness of a criminal trial and quash a conviction for any crime but this policy is not so well recognized in the civil forum. (R v. G.D.B. [2000] 1 S.C.R. 520 - R v. J.B. 2011 ONCA 404) The simple rationale underlying the policy is well stated by Doherty J. A. in R v. Joanise (1995) 102 C.C.C. (3d) 35 (Ont. C.A.) at p. 57: "Where counsel fails to provide adequate representation, the fairness of the trial, measured both by reference to the reliability of the verdict and the adjudicative fairness of the process used to arrive at the verdict, suffers. In some cases the result will be a miscarriage of justice." Under our law an appellant must be able to establish the following three points to succeed on an appeal involving ineffective assistance of counsel. First, the appellant must establish the facts underlying the allegation of inadequate representation on a balance of probabilities. Second, the appellant must establish that the acts or omissions amount to incompetence. Lastly, the appellant must establish that the ineffectiveness resulted in a miscarriage of justice by undermining either the appearance of a fair trial or the reliability of the verdict. Our courts have determined the last question first since there must be a nexus between the ineffectiveness and the result.

The claim of ineffective assistance of counsel in criminal trials is so well established and recognized in our criminal law that the Court of Appeal for Ontario has a specific policy on the handling of such appeals in criminal matters in that court. Surprisingly, there does not appear to be

any such policy with respect to the quality of legal representation which litigants in civil proceedings receive from their lawyers. Some observers rationalize this failure by pointing to the ability of litigants to sue their lawyers for negligence. However, that "knee-jerk" response overlooks the fact that the criminal litigant has this option and much more.

In this brief paper I will attempt to state a case for the recognition of ineffective assistance of counsel in the civil context and for now expressly in the administrative law context.

Denial of Natural Justice:

Material witnesses:

In circumstances where a person stands accused of discreditable conduct, judicial misconduct, securities fraud or non-compliance or the breach of the Ontario Human Rights Code it stands to reason that ineffective assistance of counsel has the potential to adversely impact the fairness of the hearing and the reliability of the evidence and decision and amount to a denial of natural justice. Indeed our Divisional Court correctly concluded in Audmax v. HRTO 2011 ONSC 314 (Div Crt.) than an unrepresented litigant was denied natural justice and fairness by virtue of a Human Rights Tribunal of Ontario adjudicator's failing to provide an unrepresented litigant an adjournment to enable that party to secure the evidence of a material witness. Clearly this denial of natural justice would occur in the same way if the litigant had counsel who made the proper request and it was denied. However, where counsel fails to make the proper request in similar circumstances that failure amounts to ineffective assistance of counsel and a breach of natural justice.

Language impediments:

Just as the circumstances in which a duty of care in negligence are not closed so too are the circumstances in which a litigant can be denied of natural justice and fairness in an administrative law proceeding which may render a hearing void. In Dungus v. Toronto Police Service a French speaking litigant whose complaint was written in the French language was self-represented before the HRTO, a tribunal whose enabling legislation and rules of procedure provide litigants with a right to a hearing in French or English and the adjudicator failed to address his language needs and proceeded with the hearing in English. This omission on the part of the adjudicator is arguably a breach of natural justice which impaired the reliability of the evidence and the fairness of the proceedings. Clearly, if Mr. Dungus had counsel at his hearing who overlooked this important point in circumstances where there is evidence to support a language impediment that ought not to remedy the breach of natural justice in the circumstances.

Jurisdictional questions:

Statutory schemes like the Justices of the Peace Act, R.S.O. 1990 ch. J.4 which call for a two-step process involving an investigation of a complaint and then a formal hearing depending on the outcome of the investigation are excellent candidates for ineffective assistance of counsel claims. Under this particular statutory scheme the receipt of a written complaint from a complainant triggers the appointment of a "complaints committee" which is tasked with investigating the subject complaint. At the conclusion of their investigation the "complaints committee" can decide to, among other options, dismiss the complaint or order that a formal hearing be heard before a "hearing panel". Since the receipt of a written complaint is a pre-condition to this statutory actors taking of jurisdiction the question of what constitutes a complaint within

the framework of the statute is a serious question of law going to the issue of jurisdiction. Although the statute indicates that any person may make a complaint about the conduct of a justice of the peace it expressly expressly prohibits other justices of the peace, judges or the Attorney General from bringing complaints on behalf of others and directs them to provide such complainants with information about the role of the Justice of the Peace Council in the justice system and about how a complaint may be made and to refer them to the Justices of the Peace Review Council.

Clearly it would be contrary to the express language of the statute for the Attorney General to interview complainants, take will-say statements from them and send those to the JPRC as a complaint. The same would apply to a complaint submitted by a justice of the peace or judge in similar circumstances. Arguably a complaint stemming from the Deputy Attorney General or the Assistant Attorney General in similar circumstances is equally objectionable. That is not to say that these individuals may not be able to bring their own complaints on matters which they have direct knowledge of.

Counsel acting for a justice of the peace in such a proceeding who fails to address the question of whether or not the alleged complaint complies with the statutory scheme would have arguably failed to provide his or her client with effective representation and accordingly deprived them of natural justice.The fact that the matter proceeds to a formal hearing without the lawyer addressing this point does not cure the problem.

Biased Investigation:

What happens if the investigation is clearly biased on its face ? For example, should not the investigators be bound by the audi alteram partem rule -i.e. hear both sides ? Also, if the investigators request a written response from the litigant when investigating allegations of sexual harassment-type allegations should not the response be put to the alleged victims ? Should not the litigant's written response be considered by the "complaints committee" who decides whether or not the matter should proceed to a full hearing ?

Improper delegation:

Under the Justices of the Peace Act supra the investigation of complaints are expressly reserved for the "complaints committee." What if the investigation was conducted by someone or persons other than the "complaints committee" ?

Failure to act:

What happens if the litigant is represented by counsel during the entire two stage process and counsel fails to see or raise any of these issues by way of a preliminary motion before the hearing panel or a case conference with a judge - as provided by the enabling legislation ? What if counsel puts the litigant on the stand to testify without proper preparation ? What if counsel makes admissions which are clearly harmful to the litigant's case without consultation or consent ?

COMMENTARY:

The right to effective assistance of counsel is not exclusively reserved to defendants in criminal cases. In any legal proceeding in which a litigant has a right to counsel it must be presumed that he or she has the right to effective representation of counsel. Anything less requires express legislation from the legislature to the contrary.

Any argument that the litigant is absolutely barred from raising such failures by his or her counsel on judicial review is simplistic and fails to appreciate the supervisory function of the superior court in our system of justice. Granted, if the litigant's lawyer unsuccessfully raised these issues this may create an answer to the alleged breaches of jurisdiction, natural justice and fairness. However, where they were not addressed the litigant can not be said to have had a fair hearing in accordance with law. This is so not because I say so but because the Supreme Court of Canada said so in Dunsmuir v. New Brunswick 2008 SCC 9 in the following words:

"By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling stature itself, the common law or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes."

Note: This piece is written for the sole purpose of drawing attention to an issue of public importance, namely, the right of litigants to the effective representation of counsel in all legal proceedings. Democracy and the Rule of Law work best with public discourse on issues of public importance.