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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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The Limits of "Unknowable" Motives and Deliberative Secrecy: *Commission scolaire de Laval v Syndicat de l'enseignement de la region de Laval*, 2016 SCC 8

FACTS: B, a teacher, was summoned to attend a special meeting of the executive committee of his employer, the Board. The purpose of the meeting was to determine whether B's judicial record should result in termination of his employment. The committee heard from B in a partially *in camera* meeting, and then held a totally *in camera* meeting, which excluded B and his union representative. After these were complete, the committee, sitting in public, adopted a resolution that terminated B's employment contract.

The Union representing B filed a grievance. It alleged that the executive committee had not followed the proper procedure for dismissal under the collective agreement, which required "thorough deliberations" by the committee. In the course of the inquiry into that grievance, the Union summoned three members of the executive committee who were present for the meeting where B's contract was terminated. The Board objected to having these members testify, arguing that their motives were irrelevant and "unknowable", and that they were shielded from examination by the principle of deliberate secrecy.

The arbitrator dismissed these objections and allowed the executive committee members to be examined. The arbitrator's decision was overturned by the Superior Court, but restored after a further appeal to the Court of Appeal.

DECISION: Appeal dismissed.

The principle the motives of a collective decision-maker are "unknowable" does not apply in this case. It only applies to collective decisions of a legislative, regulatory, policy or purely discretionary nature made by a public body. The committee's resolution to terminate B's contract occurred in the context of a contractual relationship. This is not the type of decision that attracts the principle that motives are unknowable, and thus the principle cannot be relied upon to argue that questions relating to motives of committee members are irrelevant.

The scope of deliberative secrecy also has no application in this case. Secrecy remains the general rule for the deliberations of administrative bodies performing adjudicative functions, subject

to certain exceptions. But the committee was not performing an adjudicative function when deciding to terminate B's contract. This decision cannot be characterised as "adjudicative" merely because it involved the application of statutory rules; rather, the committee was acting as an employer in the context of a contractual relationship to which the principles of employment law applied.

Although the Court was unanimous on the articulation and application of the principles set out above, it split 4-3 on the standard of review.

Gascon J, for the majority, held that a reasonableness standard applies. He characterised the question before the Court as an evidentiary issue, over which the arbitrator had exclusive jurisdiction. For the majority, the presumption of reasonableness that applies where an administrative tribunal is interpreting or applying its home statute was not rebutted in this case.

Côté J, for the concurring judges, would have applied a correctness standard. She considered the case to raise general questions of law of central importance to the legal system and outside the decision-maker's area of expertise, thus falling within a recognised exception to the presumption of reasonableness.

COMMENTARY: This decision clarifies that the general principles shielding administrative decision-makers from questions on their deliberative processes have their limits.

In particular, if a tribunal's decision is not a collective one that is legislative in nature (so as to attract the rule concerning unknowable motives), or one that is adjudicative in nature (so as to attract deliberative secrecy), then its members are vulnerable to being questioned on their deliberations, subject to relevance. Decisions relating to an employment relationship, as in this case, are an obvious example.

At the same time, tribunals can take some comfort in the confirmation that *most* administrative decision-making contexts will attract some degree of protection against questioning of their deliberative processes. The scope of the rule concerning unknowable motives and the principle of deliberative secrecy – particularly when taken together – are quite broad.

The Court's stark divide on the standard of review does little to resolve the confusion in what is already a vexing area of administrative law: how to characterise the question before a tribunal and determine whether it fits into one of the categories justifying correctness review initially set out in *Dunsmuir*. Both sets of reasons raise valid considerations. For the majority, the prevailing factors are the evidentiary nature of the decision, the context in which it is being made and the powers of the decision-maker. For the concurring judges, the paramount consideration is the important and legal nature of the questions that must be resolved to determine the outcome of the evidentiary decision. In difficult cases such as these, where numerous factors pulling in different directions are at play, the "categorical" approach is problematic. But it remains to be seen whether the Supreme Court is prepared to revisit that framework.

Judicial Review of Credibility Findings: *Stefanov v College of Massage Therapists of Ontario*, 2016 ONSC 848 (Div Ct)

FACTS: A client complained to the College that S, a member, had improperly draped her and had touched her sexually during a massage therapy session. S denied the allegations. A contested hearing took place before a panel of the College Discipline Committee. The outcome of the hearing turned on the panel's assessment of credibility. In written reasons, the panel found the complainant was "very credible" and S was not. Although the panel dismissed some of the allegations, it found that others were proven on a balance of probabilities. The panel ruled that S had breached the standards of practice of the profession; engaged in sexual abuse of a patient; and engaged in conduct relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by

members as disgraceful, dishonourable or unprofessional. S appealed to the Divisional Court.

DECISION: Appeal allowed.

The applicable standard of review was reasonableness. However, the panel's reasons were so flawed that the result was unreasonable. The matter was referred back for a new hearing before a differently constituted panel of the Discipline Committee.

The panel correctly stated that the College had the burden of proving its case on a balance of probabilities, based on clear, convincing and cogent evidence. Because sexual abuse is one of the most significant and serious findings the panel can make against a member, the panel was required to act with care and caution in assessing and weighing all the evidence. Relying on *Re Bernstein and College of Physicians and Surgeons of Ontario*,[1] the Court held that the panel must ensure that the evidence is of such a quality and quantity to justify a finding of sexual abuse.

This was a classic credibility case. The panel found that the complainant's version of events to be "more probable" than S's version, but its pathway to that conclusion was incomplete, not transparent and unintelligible. There was minimal consideration of S's evidence and an unreasonable explanation given as to why his evidence was rejected. The panel found the complainant to be honest but failed to do a proper analysis as to whether her evidence was reliable. As a result the panel's credibility assessment of the complainant was flawed and incomplete.

The panel gave sparse consideration to the complainant's inability to recall details and gave no consideration to the inconsistencies in her evidence. Further, the panel did not consider the relevance of its rejection of two of the allegations in its credibility assessment. The panel also gave minimal consideration to S's evidence and unfairly characterised and scrutinised his evidence. In addition, in finding that the complainant's conduct after the massage supported her testimony, the panel failed to appreciate that after-the-fact conduct can only provide circumstantial evidence of an event where there are no other explanations for the conduct. In this case, the complainant's emotional state after the massage could have been explained by her honest but mistaken belief that inappropriate draping had left her improperly exposed.

COMMENTARY: The Divisional Court's decision in this case is a remarkable departure from several settled legal principles, particularly those applicable to court review of credibility findings under the reasonableness standard.

The Divisional Court's reference to *Re Bernstein* is puzzling. *Re Bernstein* represents an outdated line of cases holding that the standard of proof can shift in civil or professional discipline cases based upon the seriousness of allegations. The approach was conclusively put to rest by the Supreme Court in *FH v McDougall*.[2] Though the Divisional Court referred to *McDougall*, the reason for and significance of its reliance on *Re Bernstein* in describing the burden of proof is difficult to comprehend. Indeed, this is the only case the authors found released after *McDougall* that relies on *Re Bernstein*.

The Divisional Court's scrutiny of the evidence and the panel's reasons for its credibility findings is unbefitting reasonableness review. Its approach holds administrative tribunals to a exacting standard for credibility findings that few could be expected to meet.[3] The Court's approach contrasts starkly with another decision from the same court released only a month later: *Dr Noriega v The College of Physicians and Surgeons of Ontario*.[4] Like *Stefanov*, the *Dr Noriega* case was an appeal from the findings of a health college Discipline Committee, based primarily on the complainant's testimony, that a member had committed sexual abuse of a patient. In

[1] (1997), 15 OR (2d) 447 (Div Ct)

[2] 2008 SCC 53, [2008] 3 SCR 41

[3] See similar comments in Richard Steinecke, "Giving Good Reasons for Credibility Findings" in *Grey Areas: A Commentary on Legal Issues Affecting Professional Regulation*, March 2016, no. 204

[4] 2016 ONSC 924 (Div Ct)

dismissing the appeal, the Divisional Court provided a summary of the principles that apply in cases that turn on credibility findings. The Court's approach in *Stefanov* is arguably unfaithful to a number of them, including the following.

- 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.
- Deference 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.
- 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.
- Heightened deference is owed to tribunals' assessments of credibility.
- An appellate court should not interfere with a trial judge's assessment of a complainant's evidence simply because it would have arrived at a different result.
- When credibility and reliability are in issue, and the trial judge shows she is alive to inconsistencies, but accepts the evidence of the witness nonetheless, in the absence of palpable and overriding error, there is no basis for interference.[5]

The Court in *Stefanov* was highly critical of the panel's reasons, delved into the minutiae of the evidence, and undermined the panel's findings of fact in a manner inappropriate for reasonableness review. The *Dr Noriega* decision suggests that *Stefanov* may be an outlier. The College has sought leave to appeal to the Court of Appeal. If leave is granted, the Court may reaffirm the previously well-understood and accepted approach in these kinds of cases.

Assessing if Regulatory Authorities owe a Duty of Care in Negligence: *Canada v Scheuer*, 2016 FCA 7

FACTS: This was an appeal from a decision of the Federal Court dismissing a motion by the Canada Revenue Agency to strike out a statement of claim alleging that the CRA negligently allowed a fraudulent tax shelter to be marketed with CRA approvals.

Because the appeal arose from a motion to strike, the Court of Appeal accepted the facts as alleged by the taxpayer in the statement of claim, as follows. Global Learning Group Inc accepted specified payments from taxpayers in exchange for units of a trust. The trust received education software from GLGI, which was then donated at fair market value to educational charities. Taxpayers received tax receipts for the amount of the donations.

S, one such taxpayer, paid $80,000 to GLGI between 2004 and 2006, for which he received tax receipts totalling over $500,000. The CRA reassessed S's tax returns, disallowed the charitable tax credits claimed and assessed interest on the taxes owing.

The CRA had issued a tax shelter identification number to GLGI. The CRA had been aware of potential issues with GLGI since 2000. S sued the CRA. The gist of his claim was that CRA 1) negligently operated the regime for issuing tax shelter numbers, and 2) failed to warn investors of its concerns with GLGI by continuing to allow GLGI to market its tax shelter, knowing that individual claims for charitable tax credits would be disallowed.

[5] *Ibid*. See para 58 and cases cited therein.

DECISION: Appeal allowed. Statement of claim struck out, with leave to amend.

Dawson JA, writing for the Court, applied the *Anns-Cooper* test in assessing the alleged duty of care. Relying on the relevant provisions of the *Income Tax Act,* she concluded that the CRA owes no duty to taxpayers in the administration of tax shelter identification numbers. In particular Dawson JA relied on the fact that the *ITA* prohibits any person from accepting contributions to a tax shelter without first obtaining an identification number from the CRA. Where such a person applies in the prescribed form, the CRA is under a statutory obligation to issue the number, and retained no discretion to refuse issuance. Moreover, the tax shelter is required to disclose prominently a disclaimer that the identification number "is for administrative purposes only and does not in any way confirm the entitlement of an investor to claim any tax benefits associated with the tax shelter". Given this statutory context, Dawson JA found it unnecessary to consider whether the proximity branch of the *Anns-Cooper* test was met; it was clear that any *prima facie* duty of care would be negated by policy concerns. No duty of care could be imposed where the CRA acted pursuant to a statutory duty without discretion.

With respect to the alleged failure to warn, Dawson JA again struck out the claim on the basis of the second stage of the *Anns-Cooper* test. Quoting from *Cooper*, she found that "to impose a duty of care in these circumstances would be to effectively create an insurance scheme for investors at great cost to the taxpaying public". She held that taxpayers participate in tax shelter schemes at their own risk, and it is more appropriate for them to seek indemnification from their professional advisers than the public purse.

The Court affirmed the principle that a simple breach of statutory duty does not give rise to a private law duty of care without more, such as a showing of bad faith. The taxpayer had pleaded bad faith in only a vague and generalised manner, and so this was disregarded by the Court. The plaintiffs were given leave to amend their claim to particularise the allegation of bad faith.

COMMENTARY: Dawson JA's decision is a forceful reassertion of orthodox principles of public authority liability. The Court did not refer to the more radical approach to analysing these issues discussed in *Paradis Honey v Canada*.[6]

The Court's willingness to bracket the issue of proximity and move directly to the consideration of policy factors suggests a potential shortcut for regulatory bodies seeking to shut the door to a duty of care. Regardless of whether proximity or foreseeability could be made out, the statutory framework was inconsistent with the recognition of a private law duty of care. The position of the taxpayer, as a participant in a tax shelter, was arguably an even more appropriate party to bear the risk of fraud than the victims of mortgage broker fraud in *Cooper*, given the contentious nature of tax shelters.

This decision may also be seen as a rebuke to the recognition in *Leroux v Canada*[7] of a duty of care owed by the CRA to the taxpaying public in performing audits. Appeal proceedings in the *Leroux* case were settled by the parties in January, 2016. To the extent that a general duty of care exists, taxpayers will find it difficult to identify a particular context in which a court is willing to give it life, not least where losses stem from participation in tax shelters.

On the other hand, taxpayers may take some comfort from the recent decision of the Quebec Court of Appeal in *Agence du revenue du Québec c. Groupe Enico Inc.*[8] In that case the QCCA upheld an award of damages of $2.4 million (including $1 million in punitive damages) for misconduct by the Revenue Quebec audit and collections departments that caused the bankruptcy of Enico. A Revenue Quebec auditor conducted a secret audit while at Enico under false pretences. The auditor employed an inappropriate methodology, and the trial judge found that he knowingly made false entries and deliberately destroyed a box of records in order to inflate Enico's assessed taxes (and thus meet a performance target). Revenue

[6] 2015 FCA 89
[7] 2014 BCSC 720
[8] 2016 QCCA 76

Quebec improperly withheld approximately $1 million in R&D tax credits Enico was counting on to finance its operations as a set off against the taxes supposedly owing, and unreasonably seized Enico's bank account (which caused Enico's bank to call in a loan, leading to its bankruptcy).

Merits and Penalty Hearings by Differently Constituted Panels: *Ontario Securities Commission v MRS Sciences Inc*, 2015 ONSC 6317 (Div Ct)

FACTS: The appellants were charged with certain violations of the *Securities Act*. Proceedings were initiated against them under s. 127 of the *Act,* which allows the OSC to make one or more orders in the public interest upon a finding that the *Act* has been contravened. A hearing on the merits was held before a two-person panel, and at the close of the hearing, the panel reserved its decision. More than 15 months later, the panel released a decision in which it found the appellants in contravention of the *Act*. Since the panel's decision did not address the issue of sanction, a sanction hearing was required. However, the term of office of each of the two panel members had expired shortly after the release of the decision on the merits. As such, the OSC secretary advised the appellants that a new panel would be convened to determine the appropriate sanction and costs.

The appellants brought a motion challenging the jurisdiction of the sanction panel and the fairness of having a new panel to determine the issues of sanctions and costs. They argued that the term of office of the each of the panel members ought to have been extended pursuant to s. 4.3 of the *Statutory Powers Procedures Act*, which provides: "If the term of office of a member of a tribunal who has participated in a hearing expires before a decision is given, the term shall be deemed to continue, but only for the purpose of participating in the decision and for no other purpose." The sanctions panel disagreed, and the motion was dismissed. The appellants appealed to the Divisional Court.

DECISION: Appeal dismissed, Gordon RSJ dissenting.

Molloy and Corbett JJ held that it was open to the sanctions panel to find that the merits hearing and the sanctions hearing were two separate "hearings" for the purpose of s. 4.3 of the *SPPA*, which occurred in the context of one overall proceeding. In particular, Molloy and Corbett JJ relied on the fact that the *SPPA* contemplates that a "hearing" (used in s. 4.3) and "proceeding" (used elsewhere) are not synonymous, and that there is also a difference between these words in the OSC's own *Rules of Procedure*. While they accepted that Gordon RSJ's interpretation of s. 4.3 was one possible reasonable approach to the issue, they were not satisfied it was the only reasonable interpretation.

Gordon RSJ, in dissent, would have allowed the appeal. In his view, the merits hearing and sanctions hearing were two stages in a single quasi-judicial "hearing" for the purpose of s. 4.3. As such, the panel members' terms of office were deemed to continue for the purpose of participating in the sanctions hearing. He explained that the scope and subject matter of any particular hearing is defined by the requests made in the document initiating proceedings. In this case, the Notice of Hearing made clear that the purpose of the hearing was to determine which, if any, of the orders available under s. 127 would issue. The merits panel did not make an order to that effect. Rather, the merits panel's reasons for decision simply set out the necessary findings upon which the hearing could continue to the sanctions stage.

COMMENTARY: This is the first decision to consider whether a merits hearing and a sanction hearing are a single "hearing" for the purpose of s. 4.3 of the *SPPA*. Rather than definitively resolving the issue, however, this decision simply highlights that there are two reasonable interpretations of this provision available. Absent future guidance on this issue, it would appear that moving forward, it will be open to tribunals to pick either interpretation.

That being said, the majority's decision provides some guidance on the factors a tribunal may consider when determining whether a merits hearing and sanctions hearing are two stages of a single, quasi-judicial hearing. In particular, panel members will want to consider the procedure and composition of the tribunal, and assess the impact on the tribunal and its procedures if s. 4.3 is applied to extend the term of panel members who participate in a merits hearing through to the end of the sanctions hearing.

In the case of the OSC, there was a legislated, policy-based decision to maintain a tribunal that is small in number, with a composition that rotates overtime. This decision was made despite the fact that OSC proceedings are often lengthy and complex, and can involve a significant time gap between the determination of a case on its merits and the date of the sanction hearing. For this reason, the panel was of the view that an interpretation of s. 4.3 that treated the merits hearing and the sanction hearing as one hearing would not be consistent with the makeup of the OSC and how it operates.

Panel Member's Participation in Hearing After Term Expires: *Brooks v Ontario Racing Commission*, 2016 ONSC 1136 (Div Ct)

FACTS: The Director of the ORC was concerned that B, a licensee, had permitted his brother, a licensee whose licence was suspended, to be involved in the training of horses at B's stable, contrary to the Rules of Standardbred Racing.

Following an investigation, the Director issued a Notice of Proposed Order to suspend the licences of B and his stable (the "Applicant"). The Commission dismissed a preliminary motion by the Applicants alleging they had been denied sufficient particulars and disclosure (the "Procedural Decision"). A few months later the hearing proceeded on the merits. The Commission then released its decision on the merits and made numerous findings of wrongdoing against the Applicants, suspended their licences and fined them (the "Merits Decision").

The Applicants sought judicial review of both decisions and an associated third decision. Of note, with respect to the Merits Decision they argued that the Vice Chair presided over that hearing when he had no jurisdiction to do so because his term had expired and, further, their right to natural justice had been breached by the failure to advise the parties his term had expired until the Merits Decision was released.

DECISION: Application dismissed.

Section 4.3 of the *Statutory Powers Procedures Act* provides: "If the term of office of a member of a tribunal who has participated in a hearing expires before a decision is given, the term shall be deemed to continue, but only for the purpose of participating in the decision and for no other purpose."

Here, the Vice Chair's term expired on November 7, 2012, the day after the release of the Procedural Decision and months before the hearing on the merits began on May 14, 2013. Prior to the commencement of the merits hearing, no *viva voce* evidence had been heard. None of the materials filed in relation to the Procedural Decision were entered as exhibits for the purposes of the merits hearing.

The Commission correctly held in the Merits Decision that by virtue of s. 4.3 of the *SPPA*, the Vice Chair was entitled to continue to participate in the hearing until a decision was made. Applying the Ontario Court of Appeal's decision in *Piller v Assn of Ontario Land Surveyors*,[9] the Divisional Court noted that the sole purpose for which the panel was convened was to deal with the disciplinary proceedings against the Applicants; that the *Racing Commission Act* provides no other forum for dealing with preliminary matters; and that, therefore, the Vice Chair's participation in the hearing commenced with his participation in the procedural motion. Although it would have

[9] 2002 CanLII 44996

been preferable to do so, the Vice Chair's failure to raise with the parties the issue of his jurisdiction to continue on the matter did not breach the Applicants' right to natural justice, as this was not an issue that affected the case they had to meet or the manner in which the hearing against them proceeded.

COMMENTARY: This case presents a slightly different fact scenario for the application of s. 4.3 than *Ontario Securities Commission v MRS Sciences Inc.* The case affirms the holding in *Pillar* that the hearing of preliminary matters may constitute the commencement of proceedings for the purposes of s. 4.3 of the *SPPA* such that an expired term can be "deemed to continue" from the hearing of a preliminary motion to the hearing on the merits. However, the Court strongly cautions that prior to moving forward in a hearing following the expiration of a term, the tribunal member ought to raise the issue with the parties and provide them an opportunity to make submissions on it. As the Court notes, "The risk of not doing so is obvious - had [the Commission] been wrong, the matter would have had to be reheard by a different panel." As such, when a tribunal member is aware that her or his term is to expire while he or she is seized of a matter, it is best practice to draw this fact to the attention of the parties involved and hear submissions before determining whether the panel member will have jurisdiction to proceed following the term's expiration.

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The editors extend special thanks to Steven Aylward, Pam Hrick and Tiffany O'Hearn Davies, all of Stockwoods LLP, for their valuable contributions to this issue.