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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Supreme Court divides yet again on standard of review: *Quebec (Attorney General) v. Guérin*, 2017 SCC 42

FACTS: Under Quebec's *Health Insurance Act*,[1] the pay and working conditions of health care professionals are set out in a Framework Agreement. The Agreement includes a Protocol whereby the Minister and the medical specialists' Federation can jointly designate laboratories eligible to receive a "digitization fee" designed to encourage modernization of equipment. Section 54 of the *Act* provides that any "dispute resulting from the interpretation or application of [the Framework Agreement] is submitted to a council of arbitration, to the exclusion of any court of civil jurisdiction."

G, a radiologist and member of the Federation, applied for a declaration that certain clinics were eligible for the digitization fee. His application was denied. G then submitted a dispute to the council of arbitration, but the arbitrator found that he lacked jurisdiction to grant G the declaration sought (because only the Minister and the Federation could decide matters of eligibility) and that G lacked standing (because only the Federation could bring such a complaint).

On judicial review, the motion judge found the arbitrator's decision unreasonable. A majority of the Court of Appeal upheld that decision.

[1] CQLR, c A-29.

DECISION: Appeal allowed (Côté J., dissenting). The award of the council of arbitration should be restored.

The four-judge majority, led by Wagner and Gascon JJ. (and joined by the Chief Justice and Karakatsanis J.), applied a reasonableness standard. The council of arbitration was called on to interpret and apply its enabling statute, the Framework Agreement and the Protocol, all of which are at the core of its mandate and expertise.

The majority rejected G's contention that the case raises a "true question of jurisdiction", emphasizing that such questions will be rare, exceptional and "must be understood in the narrow sense of whether or not the tribunal had the authority to make the inquiry". Here, the council of arbitration had the jurisdiction to interpret and apply the Framework Agreement and the Protocol, including any issues relating to standing. An arbitrator can dismiss a proceeding as not constituting an arbitrable dispute without such a result necessarily leading on its own to a conclusion that the proceeding raises a true question of jurisdiction.

The majority also rejected G's argument that the "rule of law" requires application of the correctness standard: "The fact that a question of law might give rise to conflicting interpretations does not on its own support a conclusion that the correctness standard applies." In any event, the majority finds that there are no conflicting lines of authority here.

In the result, the majority determined that the arbitrator's decision was reasonable, both on the issue of whether G's matter could be arbitrated and on the issue of whether G had standing.

The concurring opinion of Brown and Rowe JJ. reaches the same ultimate result, but applies the correctness standard. For these two judges, the question of whether the arbitrator had the authority to decide G's matter was clearly jurisdictional. In response to the majority's reasoning, Brown and Rowe JJ. drew a distinction between issues of jurisdiction (*i.e.* who has competence to decide what issues) and those of arbitrability (*i.e.* whether an issue is capable of being legally determined, akin to justiciability).

The concurring justices found the arbitrator's decision that he lacked the authority to decide G's matter to be incorrect. However, they agreed with the majority that the standing issue attracted reasonableness review, and that the arbitrator's decision that G lacked standing was reasonable. Unlike the majority, Brown and Rowe JJ. made a point of emphasizing that questions of standing could, in proper circumstances, be subject to correctness review.

Finally, in her dissenting opinion, Côté J. concluded that the correctness standard applies, endorsing Brown and Rowe JJ.'s analysis on this point. For Côté J., however, correctness applied both to the question of whether the arbitrator could hear G's case, and to the question of G's standing. She concluded that the arbitrator's decision on both issues was incorrect.

COMMENTARY: This case is yet another example of the Supreme Court's deep divide when it comes to the standard of review. Other recent cases where the Court has split on this issue include *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*[2] and *Wilson v. Atomic Energy of Canada Ltd.*[3] Given this trend, the differing approaches of the justices appear to be calcifying.

Although the details of the disagreement between the judges in each case are unique, one unifying theme may be that certain justices – Moldaver, Brown, Côté and Rowe JJ. in particular – are simply more comfortable applying the correctness standard than others. In *Wilson*, the dissenting judges justified correctness review on

[2] 2016 SCC 47 (which was the subject of a case comment in Issue No. 8 of this newsletter).
[3] 2016 SCC 29 (which was the subject of a case comment in Issue No. 6 of this newsletter).

the basis of an entirely new category (which they dubbed "rule of law" concerns). In *Edmonton East*, they did so largely on the basis of an appeal provision in the decision-maker's home statute. And in *Guérin*, they reach the same conclusion by reviving the "true question of jurisdiction" category, which many thought to be on life support following the Court's decision in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*.[4]

How and when this tension will eventually resolve remains to be seen. The balance may turn, in part, on the views of the Court's newest appointee (who will take their seat after the Chief Justice retires later this year).

Looking at the standard of review issue from first principles, there is much to commend in the concurring opinion of Brown and Rowe JJ. Their forceful embrace of "true questions of jurisdiction" harkens back to the core principle of judicial review laid down by the majority in *Dunsmuir v. New Brunswick*: courts have a constitutional power and duty to ensure tribunals do not exceed their lawful authority.[5] Against this backdrop, the notion that true questions of jurisdiction do not exist – or unduly narrowing that category's borders – is difficult to defend.

Justices Brown and Rowe also offer an interesting insight into why the issue of jurisdiction has proven so vexing, noting that a tribunal's jurisdiction (which attracts a correctness standard) is governed by its home statute (the interpretation of which presumptively attracts a reasonableness standard). They are careful to state that their concurring reasons "do not presume to cut this Gordian knot". It may be that the knot does not need cutting: the home statute *presumption* can co-exist with – and be rebutted by – true questions of jurisdiction. But for such an approach to satisfy the concerns of Brown and Rowe JJ., one would have to be willing to recognize jurisdictional questions if and when they arise.

This appeal also raises the vexing question of when standing will amount to a true question of jurisdiction. The majority suggests the answer is rarely, if ever, since standing will almost always relate to the interpretation of a tribunal's home statute. Justices Brown, Rowe and Côté share the view that questions of standing *can* be jurisdictional where a tribunal is confined by legislation only to hear cases from a certain class of complainants.

Again, there is much to be said in support of the minority view on this issue. It keeps the analytical focus of the standard of review exercise on legislative intent and the constitutional basis for judicial review, rather than simply applying the 'home statute' presumption. Indeed, many of the fissures in the Court's standard of review jurisprudence can be traced back to what some might consider an over-reliance on that presumption. To be clear, deference is generally appropriate where a tribunal is interpreting its home statute. But almost every question decided by a tribunal can be characterized as relating to the interpretation of its home statute. Surely the more important, overarching question reviewing courts must ask is what was envisioned by the legislature and/or required by the Constitution? Did the legislature intend the question to lie within the tribunal's decision-making authority or not? The home statute presumption may be a useful shortcut in answering this question (since most cases don't raise true jurisdictional questions), but it will not always be determinative.

Put differently, there seems to be a growing consensus at the Court – albeit still a minority one – that the presumption of reasonableness for home statutes established in *Alberta Teachers'*

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[4] 2011 SCC 61.

[5] 2008 SCC 9 at para. 94. Justices Brown and Rowe also take their meaning of "true questions of jurisdiction" from *Dunsmuir* (at para. 59), noting that such questions arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter".

Association can be rebutted in an increasing array of circumstances.

Contents of record on judicial review: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128

FACTS: This decision relates to a ruling on a preliminary motion in connection with 15 consolidated applications for judicial review challenging the approval of the Trans Mountain Pipeline Expansion Project, including by an Order in Council dated November 29, 2016. The Tsleil-Waututh Nation argued that the decision of the Governor in Council was unsupported in the record before it and breached the duty to consult and accommodate.

The applicant brought a motion challenging the inadequacy of the record produced by Canada, seeking a production order requiring Canada to produce supplementary documents. The Attorney General of Canada asserted cabinet confidentiality under s. 39 of the *Canada Evidence Act* in relation to certain of the documents sought and held that others were not part of the tribunal record.

DECISION: Motion dismissed (Stratas J.A. sitting alone as the motion judge).

With respect to the claim of cabinet confidentiality, Stratas J.A. emphasized the limited scope for judicial review of a certificate under s. 39 of the *Canada Evidence Act*. He held that cabinet confidentiality would extend not only to a memo placed before the Governor in Council, but also to supporting documents bundled together with it as appendices.

Stratas J.A. examined in detail a number of issues relating to the content of the record on judicial review and the remedies available where the applicant alleges that the record is deficient. His reasons recognized the importance of providing the tribunal record to the reviewing court in order to ensure that administrative decision makers are not "immunized" from effective judicial review. However, he also stressed the countervailing importance of proportionality in judicial review proceedings in light of s. 18.4(1) of the *Federal Courts Act*, which he characterized as a "Parliamentary commandment" that judicial review applications be heard and determined "without delay and in a summary way."

Stratas J.A. placed strict limits on the ability of an applicant to compel production of materials beyond those contained in the record before the tribunal. Evidence on a judicial review application is typically limited to the evidence before the tribunal. However, in some cases, "exceptional evidence" that go beyond the tribunal record may be admissible. Such evidence may be admissible to show general background circumstances, as well as procedural defects in the tribunal process or a complete absence of evidence for its decision, where these would not be apparent on the face of the tribunal record.

However, while "exceptional evidence" may be admissible in some cases, Stratas J.A. emphasized the difference between admissibility and the means to place it before the reviewing federal court. In effect, there are four ways an applicant can place exceptional evidence before a reviewing court: i) by affidavit; ii) by cross-examination of a responding affiant; iii) by subpoena under r. 41 of the *Federal Court Rules*; or iv) by converting an application for judicial review into an action. A subpoena under r. 41 will be available only in rare cases, where the evidence is necessary, not otherwise available, and likely relevant (and not part of a "fishing expedition"). Affidavit evidence and cross-examination will be the normal means of obtaining "exceptional evidence."

Rule 317 of the *Federal Court Rules* requires a tribunal to produce "material relevant to an

application that is in the possession of [the decision-maker]…and not in [the applicant's] possession." One of the main legal issues in this case was whether r. 317 required Canada to produce the contents of the tribunal record only, or whether it could require Canada to produce "exceptional evidence," (*e.g.* documents in the possession of other government agencies that were not relied on by the Governor in Council). Justice Stratas held that r. 317 applied only to evidence that formed part of the tribunal record and could not be used as a type of "production order." He distinguished earlier cases to the contrary and held that exceptional evidence could only be obtained through r. 317 in the rare case where such evidence was actually part of the tribunal record.

In the event, Stratas J.A. held that the Tsleil-Waututh Nation had failed to prove that Canada had neglected to produce any documents required under r. 317.

COMMENTARY: This decision is a forceful endorsement of the need for efficiency and proportionality in judicial review proceedings. It is to this extent part of the trend set by the Supreme Court in *Hryniak v. Mauldin*.[6] Stratas J.A. put this point forcefully: "this Court will not delay or adjourn these consolidated applications so that every last crumb of information sought by the information requests, no matter how microscopic, can be gathered."

This decision contains an extensive and eloquent explanation of legal principles relating to the content of the record on judicial review in Federal Court. While Stratas J.A. endorsed a relatively narrow scope for compelling production of "exceptional evidence," this does not leave the applicant without remedies in the face of a barren record. Stratas J.A. cautioned that the limited procedural remedies available to flesh out a sparse record were a potential Trojan horse for the respondent. If the record is insufficient to permit meaningful judicial review of the decision, this could result in an order quashing the decision altogether. He also noted that in appropriate cases an adverse inference could be drawn against the respondent for failing to adduce relevant evidence in its possession.

[6] 2014 SCC 7.

Role of investigative delays in penalty decisions: *Law Society of Upper Canada v. Abbott*, 2017 ONCA 525

FACTS: The Hearing Division of the Law Society Tribunal found Abbott, a lawyer, to have engaged in professional misconduct by knowingly participating in mortgage fraud. It ordered revocation of Abbott's licence to practise law.

Abbott appealed to the Appeal Division. The Appeal Division upheld the Hearing Division's factual findings, but a majority of three modified the penalty by substituting a two-year suspension for the revocation order. The majority did so largely as a result of the "inordinate and unacceptable" delay that it found had occurred in the Law Society's investigation and prosecution of the misconduct allegations. Two dissenting members of the Appeal Division would have upheld the revocation order.

The Law Society's appeal to the Divisional Court was dismissed. The Law Society appealed to the Court of Appeal.

DECISION: Appeal allowed. Order of the Hearing Division reinstated.

The Appeal Division is required to defer to a penalty decision of the Hearing Division. The Appeal Division must apply the reasonableness standard and consider whether the Hearing Division's penalty falls within the range of possible, acceptable and defensible outcomes that are open on the evidence.

In determining the penalty for knowing participation by a lawyer in mortgage fraud, priority must be given to the public interest in maintaining the integrity of the profession. In prior decisions the Law Society Tribunal established licence revocation as the presumptive penalty for knowing participation in a mortgage fraud. This presumptive penalty was considered and effectively adopted by the Divisional Court in the 2014 case *Bishop v. Law Society of Upper Canada*.[7] There is, as yet, no precedent for a penalty lower than revocation for a lawyer who has knowingly participated in a mortgage fraud. The Divisional Court recognized in *Bishop* that mitigating factors amounting to exceptional circumstances could justify a departure from the ordinary disposition of revocation. However, such factors will normally have to rise to the level where it would be obvious to other members of the profession and to the public that in the circumstances it was clearly not necessary to provide reassurance about the integrity of the profession.

The Appeal Division majority accepted that the presumptive penalty of revocation applied to the case; however, it found errors of law that in its view entitled the Appeal Division to reach its own determination on penalty. As a result, it substituted a two-year suspension. In so doing, the majority failed to defer to the Hearing Division's penalty decision and to apply the reasonableness standard.

The majority of the Appeal Division considered it to be part of the Law Society Tribunal's function to "curb inordinate delay". But under the *Law Society Act*, questions of policy and resource allocation belong to Convocation, not to the Law Society Tribunal. It is a serious matter for an adjudicative body to disturb, on grounds of investigative and prosecutorial delay, what would otherwise be the ordinary operation of the disciplinary system. This is because two public interests are in tension: the public interest in the fairness of the administrative process and the public interest in the enforcement of the legislation. The Hearing Division considered those two interests and decided that the public interest in enforcement prevailed in this case. That assessment was reasonable and the Appeal Division erred in setting it aside.

While accepting that delay causing prejudice can be a mitigating factor in many cases, the Hearing Division considered and rejected the argument that the substantial delay in the investigation justified in this case a lengthy suspension rather than revocation. The Appeal Division majority identified several mitigating factors in the Hearing Division's reasons, but they are all quite generic (for example, that Abbott's conduct was unimpeached prior to and after the transactions in issue, that there was a limited number of transactions over a few months, that he testified wilfully and honestly, and that he had a reputation for honesty and integrity).

At bottom, the majority simply disagreed with the Hearing Division's reasoning about the effect of the delay as an exceptional circumstance warranting mitigation of Abbott's penalty and a departure from presumptive revocation. In the absence of a palpable and overriding error of fact, a misapprehension, or an error of law, an appellate body may not intervene in a penalty decision. No such error was made in this case.

It is arguable that delay could mitigate the presumptive penalty of licence revocation if the delay amounts to an abuse of process; however, a member should be obliged to establish that the delay was so egregious and caused him such personal prejudice that revoking his licence to practise law would bring the regulatory system for lawyers into disrepute. The Hearing Division did not err by insisting the penalty should be reduced only were the member could show that the delay was the cause of "serious prejudice". The Appeal Division majority erred in holding otherwise.

[7] 2014 ONSC 5057.

In setting a penalty, an adjudicator should take into account in possible mitigation factors such as investigative and procedural delay, prejudice to the public interest in timely investigative and procedural process, and prejudice to the interests of licensees more generally. However, to convert revocation into a lesser penalty that allows a member to continue practising law requires egregious personal prejudice of the kind necessary to establish an abuse of process. This case does not meet that standard.

The Appeal Division majority's findings that the Hearing Division made errors of law reflect its strong resolve to impose a lesser penalty than revocation in order to send a message to the Law Society that delay is unacceptable. In doing so, the Appeal Division exceeded its responsibility as an adjudicative body. It did not defer to the Hearing Division but actively sought to subvert its reasoning. The penalty of licence revocation ordered by the Hearing Division should be reinstated.

COMMENTARY: The Court's reasons provide guidance for professional disciplinary tribunals regarding the role of investigative and prosecutorial delay in fashioning appropriate remedies. The decision confirms that substantial delay can be a mitigating factor in the penalty analysis, including one that could justify a departure from a presumptive penalty. However, at least in cases where the presumptive penalty is revocation, the Court's decision suggests that it would be an error of law for a discipline tribunal to impose a lighter penalty because of delay unless it finds serious prejudice resulting from the delay.

Also noteworthy is the Court's comment that the Appeal Division "exceeded its responsibility as an adjudicative body" in reducing the penalty to send a message regarding delay. A discipline process encompasses the full course of any misconduct matter, from investigation through to adjudication, and many tribunals might reasonably see it as part of their role and responsibility to consider investigative delays and, where necessary, speak against them through their decisions. The Court's decision in this case suggests that tribunals should exercise great caution in doing so, unless the bar of "serious prejudice" is met.

Scope of judicial review extends to leadership decisions of political parties: *Graff v. New Democratic Party*, 2017 ONSC 3578 (Div Ct)

FACTS: G wanted to run as a candidate for leadership of the federal NDP. He submitted his application to participate in the leadership race, and met the basic requirements set out in the NDP's Leadership Rules. The NDP's National Director had some questions regarding G's application and the two engaged in a number of email exchanges to address those questions. Eventually, in late December 2016, the National Director rejected G's application to run for the leadership, without reasons. G's appeal to the NDP's Officers was also rejected without reasons.

In March 2017, G brought an application for judicial review of those decisions. The NDP then agreed to give G a fresh written hearing, and the National Director provided a letter to G outlining his concerns with G's application.

After providing G an opportunity to present written submissions, the National Director again rejected his application. This time, the National Director did offer reasons. G appealed again. The Officers rejected his appeal, saying that they "have determined that we see no reason to over turn the decision. We are satisfied with the reasons provided by [the National Director]."

G brought an application for judicial review, arguing that the NDP failed to follow its own Leadership Rules; that there was a reasonable apprehension of bias on the part of the National

Director; and that his decision was substantively unreasonable. In response, the NDP argued that its decisions were not subject to judicial review.

DECISION: Application dismissed.

Applying the *Setia* factors[8], Nordheimer J. concluded that the NDP's decisions were subject to judicial review. He accepted that not all of the *Setia* factors militated in favour of this conclusion; for example, as an unincorporated voluntary association, the NDP was not exercising a public decision-making power and it is not an agent of government (or controlled by the government). On the other side of the scale, however, the NDP's activities are "inextricably linked to the public domain", as "the decisions of political parties do have a very serious and exceptional effect on the interests of every Canadian citizen." He also noted that the NDP (like other parties) receives considerable public funding and effectively controls access to those who wish to become part of the Canadian government.

The *Setia* factors are "not a checklist". What makes a matter sufficiently "public" depends on the facts of the case and the overall impression registered upon the Court. Here, that impression caused Nordheimer J. to conclude the decisions were amenable to judicial review.

Turning to the merits of the dispute, Nordheimer J. concluded that although the NDP's leadership Rules could have been drafted more clearly, they did not preclude the National Director's authority to reject G (despite the fact G met all basic requirements for entering the leadership race).

On the issue of whether the decisions were tainted by a reasonable apprehension of bias, Nordeimer J. favoured the application of the "closed mind" test – as opposed to the more common test that asks "what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude" – but did not ultimately decide the issue. Regardless of the proper test for a reasonable apprehension of bias, the applicant has not met it here. Justice Nordheimer also found that the internal appeal process (to the NDP Officers) "does, to a certain degree, help to alleviate some of the concerns" regarding bias.

Finally, Nordheimer J. found that the National Director's decision to reject G's leadership application was substantively reasonable, particularly when that decision "is accorded the high degree of deference to which, in my view, it is entitled… Within the broad compass of fairness, political parties ought to be entitled to make their own decisions."

COMMENTARY: From an administrative law perspective, this decision is significant for a number of reasons.

First, it is the latest in a series of post-*Setia* decisions in Ontario where courts have extended the scope of judicial review to private, voluntary associations.[9] (It also appears to be the first decision anywhere in Canada where the leadership decisions of a political party were subject to judicial review.) Although *Setia* itself was a case where the Court of Appeal concluded judicial review was unavailable based on an application of the relevant factors, the general trend since then reflects an expansive view of judicial review – one that extends to decisions of sports leagues, referee associations, student unions and now political parties.

The issue of whether and to what extent judicial review extends to private voluntary associations will be front and centre before the Supreme

[8] These eight factors were initially laid out by Stratas J.A. in *Air Canada v. Toronto Port Authority*, 2011 FCA 37, and later adopted by Goudge J.A. in *Setia v. Appleby College*, 2013 ONCA 753.

[9] Other decisions include: *West Toronto United Football Club v. Ontario Soccer Association*, 2014 ONSC 5881; *Gymnopoulos v. Ontario Association of Basketball Officials*, 2016 ONSC 1525; and *Courchene v. Carleton University Students' Association,* 2016 ONSC 3500.

Court of Canada this fall term. In *Judicial Committee of the Highwood Congregation of Jehovah's Witnesses v. Wall*,[10] the Supreme Court will have to decide, among other things, whether to endorse the *Setia* factors (which thus far have been adopted only in Ontario and by the federal courts) and whether to extend judicial review to an ex-communication decision of a private religious order. It remains to be seen how Ontario's prevailing approach to determining amenability to judicial review – as reflected in *Graff* – will be impacted by *Wall.*

Justice Nordheimer's decision is also notable because it appears to be the first Ontario case to explicitly endorse judicially reviewing the decisions of private voluntary associations for substantive reasonableness (as opposed to a failure to follow the association's own rules, or to abide by the tenets of procedural fairness).[11] This conclusion is sound: if a decision is sufficiently public in nature to engage a court's discretion to entertain judicial review, then that decision should be subject to the full range of arguments available on judicial review – including substantive unreasonableness. Of course, as Nordheimer J. suggests in this case, sometimes the range of reasonableness will be quite broad.

Finally, although *Graff* does not ultimately decide the point, it raises an interesting issue concerning the proper test for bias in the context of private voluntary associations. Justice Nordheimer's favoured approach – the "closed mind" test – is typically used in the context of policy-making or investigative-type decisions. At the same time, an *obiter* passage from the Supreme Court of Canada could be read as supporting the application of the "closed mind" test for bias in the case of voluntary associations (without making any definitive conclusion).[12] Surprisingly, the issue does not yet appear to have been the subject of a firm judicial determination by any court. If the scope of judicial review in Ontario continues in the vein of *Graff*, then it likely the issue will be raised again.

Proving a reasonable apprehension of bias: *S.G. v. Criminal Injuries Compensation Board*, 2016 ONSC 7485 (Div Ct)

FACTS: S.G. brought an application before the Criminal Injuries Compensation Board (the "Board") for compensation under the *Compensation for Victims of Crime Act*[13] on the basis that she had been the victim of a sexual assault. At the close of the hearing, the Board delivered oral reasons denying the application. The Board was not convinced there was sufficient evidence that the alleged assault took place.

S.G. appealed to the Divisional Court on the basis that the conduct of one Board member during the hearing gave rise to a reasonable apprehension of bias and resulted in a denial of procedural fairness. In support of her appeal, S.G. sought to introduce fresh evidence in the form of affidavits sworn by the law clerk and articling student who had represented her before the Board. The affidavits contained evidence that one Board member aggressively cross-examined S.G. throughout her evidence and that the interventions reflected stereotypical and erroneous assumptions about sexual assault

[10] Supreme Court of Canada File No. 37273, scheduled to be heard on November 2, 2017. The Alberta Court of Appeal's decision in *Wall* was previously the subject of a case comment in Issue No. 7 of this newsletter.

[11] Some previous decisions explicitly stated that the grounds of review would be limited to ensuring that the association followed its own rules, did not act in bad faith and followed the rules of natural justice: see *Courchene v. Carleton University Students' Association,* 2016 ONSC 3500 at paras. 19-20.

[12] See *Graff* at para. 31 (citing *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 SCR 165)

[13] RSO 1990, c C.24

victims. The articling student objected but the line of questioning continued.

Two months after S.G. perfected her appeal and filed her motion for fresh evidence, the Board issued 31 pages of reasons explaining why the application had been dismissed.

DECISION: Appeal granted; matter remitted for a re-hearing before a different panel.

The fresh evidence should be admitted. At the time the appellant perfected her appeal, there were no written reasons from the Board. The Board had delivered oral reasons but there is no transcript of those reasons. The court held that affidavit evidence attesting to the conduct of a tribunal member during the hearing is admissible to disclose a breach of the rules of natural justice that cannot be assessed by reference to the record.

In cases where a reasonable apprehension of bias is alleged, the court must ask whether a reasonable person, viewing the matter realistically and practically and having thought the matter through, would conclude that the decision-maker would likely not decide the matter in an impartial way. The objective test is contextual and fact-specific, and it ensures not only the reality, but the appearance, of a fair adjudicative process.

The court held that the conduct of the Board member, looked at cumulatively, gave rise to a reasonable apprehension of bias. The Board member asked a number of questions that reflected rape myth stereotypes, including asking questions about why S.G. did not scream or run away, why she delayed in reporting the assault, and why she continued to associate with the offender after the assault. In addition, the Board member questioned S.G. in an aggressive manner and demonstrated impatience, if not skepticism, by shaking his head and sighing several times during S.G.'s testimony.

Further, the Board's reasons, issued months after the initial decision and after the appeal had been launched, are irrelevant to the determination whether the Board member's conduct during the hearing gave rise to a reasonable apprehension of bias. Reasons issued months after the fact cannot cure the appearance of unfairness during the oral hearing.

S.G. did not waive her right to challenge the decision on the basis of a reasonable apprehension of bias. Waiver requires the litigant to know of a potential issue of bias and not take steps to raise it until after an unfavourable decision has been released. S.G.'s representative objected to the line of questioning that reflected rape myths, and explained the basis for the objection. It was not necessary to bring a motion asking for the member to recuse himself to avoid a finding of waiver.

This is a case where costs are appropriately awarded against the Board. The Board appeared as a party to the appeal and took an adversarial position on the merits. It is reasonable for the appellant to expect costs in those circumstances.

COMMENTARY: Administrative proceedings are generally more flexible and informal than court proceedings. Parties are often unrepresented, and in some instances (as is often the case in hearings before the Board), interested parties do not appear at the hearing. As a result, administrative decision-makers often need to play a more active and inquisitorial role to ensure that the process is fair, and should not be discouraged from questioning witnesses where it is important to the disposition of the case.

That being said, it is a foundational principle of our legal system that decision-makers must be, and appear to be, free of bias and impartial to the outcomes of the cases they decide. This case confirms this important principle, and reminds administrative decision-makers that the right to intervene is one of degree.

Decision-makers should be careful not to leave their position of neutral fact-finder and cross the line into cross-examiner,[14] and they should most certainly avoid reliance on speculative myths and stereotypes about sexual assault victims, as these only serve to hinder the search for truth and impose harsh and irrelevant burdens on complainants.[15]

This case is also an interesting example of a situation where affidavit evidence of a person present at the hearing under review is admitted on appeal. While the power to admit affidavit evidence should be used sparingly, the courts will admit this evidence where, as in this case, there is no transcript of the proceeding below and the affidavit evidence is necessary to fill gaps in the record.

As such, practitioners will be well-served by remembering to take careful notes in cases where they have objected to questioning by a decision-maker or have reason to believe that a decision-maker's conduct may give rise to a reasonable apprehension of bias. Tribunal members should also ensure that they are taking notes during oral hearings and recording objections from counsel, particularly in cases where counsel has raised concerns about a tribunal member's conduct. In such cases, decision-makers will be well-advised to provide written reasons for their decision and to address counsel's objections in those reasons.

Bias due to overlapping functions of tribunal members: *A.C., MD v. College of Physicians and Surgeons of Ontario*, 2017 CanLII 44047 (ON HPARB)

FACTS: Dr. C. appealed to the Health Professions Appeal Review Board (the "Board") from a decision of the College of Physicians and Surgeons of Ontario's Registration Committee denying Dr. C. a certificate of registration authorizing postgraduate education.

In 2011, Dr. C. had been in the process of undertaking residency training in the plastic surgery program at McMaster University when he was placed on a leave of absence with pay upon being charged under the *Criminal Code* for drugging and sexually assaulting two women. Dr. C. was acquitted of all charges at trial.

In 2015, following his acquittal, Dr. C. applied for a certificate of registration authorizing postgraduate education. Dr. C. was advised that the College's Inquiries, Complaints and Reports Committee ("ICRC") had referred allegations against him of professional misconduct to the Discipline Committee. The referral was based on the same factual allegations, from some of the same complainants, that had led to the criminal charges in respect of which Dr. C. had been acquitted.

These discipline proceedings were eventually withdrawn against Dr. C., but not before the Registration Committee denied Dr. C.'s request for a new certificate. The Committee found that Dr. C.'s past and present conduct did not afford reasonable grounds for belief that he would practise medicine with decency, integrity and honesty and in accordance with the law, and that he has sufficient knowledge, skill and judgment to engage in the kind of medical practice authorized by the certificate. In its reasons, the Committee advised that "an acquittal in a criminal trial does not mean that the alleged conduct did not occur; rather, the Applicant's acquittal simply meant that the trial judge did not find that the Crown had proved the allegations against the Applicant beyond a reasonable doubt". The Committee then went on to note the different standard of proof that it applies when it "weighs the evidence before it on a balance of probabilities, to determine whether it is more likely than not that the events occurred." The Registration

[14] *R. v. Stucky*, 2009 ONCA 151 at para 65.
[15] *R. v. Mills*, [1999] 3 SCR 668 at para 119.

Committee's order was made one day after the ICRC's referral of the allegations to discipline.

Dr. C. appealed to the Board.

DECISION: Appeal granted. The Board required the Registration Committee to direct the College Registrar to issue a certificate of registration to Dr. C. authorizing postgraduate education in Ontario.

One member of the ICRC panel that considered the allegations against Dr. C. was also a member of the Registration Committee that decided his application for a certificate. Members of the ICRC cannot sit on the Discipline Committee, but they can – and, in this case, one did – sit on both the ICRC and the Registration Committee, which denied Dr. C.'s application. In this case, the overlap in that individual's functions as a member of both the ICRC and his functions as a member of the Registration Committee gave rise to a reasonable apprehension of bias.

Where permitted by statute, overlapping functions do not automatically give rise to a reasonable apprehension of bias. However, the member's participation on the Registration Committee the day after he was a member of the ICRC panel that referred the allegations to discipline creates a perception that he approached his duties on the Registration Committee with a preconceived view as to the merits of Dr. C.'s application. This led to a reasonable apprehension of bias.

A reasonable apprehension of bias also arose from the fact that College Discipline Counsel had participated in Registration Committee meeting and asserted "deliberative privilege" in response to a request for disclosure of the nature of her involvement: "a prosecutor playing the dual role of legal counsel to the Committee, in a forum protected by deliberative privilege, undermines the Applicant's legitimate expectation of a fair and transparent proceeding."

The Registration Committee also erred in making a finding of fact that Dr. C.'s sexual encounter with one of the complainants was non-consensual. The Registration Committee did not receive any *viva voce* evidence, meaning that it effectively preferred the evidence of the complainant and a third party (who did not testify in the criminal case) over the interview evidence of Dr. C. Credibility findings based on a written record are inherently "unreliable and unfair". In these circumstances, the Committee's failure to defer in any way to the observations of fact and credibility made by the judge in the criminal trial is difficult to defend: "while there may be instances where a professional registration body might properly arrive at a finding contrary to that made by a judge in a criminal trial, where that is the case, there must be a clear and justifiable basis for so doing."

The Board did not remit this matter back for reconsideration, but instead decided the issue directly.

COMMENTARY: This case is an important reminder that overlapping functions – either on the part of tribunal members, or on the part of prosecuting counsel – can create natural justice problems.

Even where a governing statute contemplates or permits overlapping functions (as it did here by allowing the same member to sit on the ICRC and the Registration Committee), such overlap will not every case meet the requirements of procedural fairness. Statutory authorization of overlapping roles does not automatically immunize those overlapping roles from giving rise to a reasonable apprehension of bias in a particular case. The situation may be different where a statute *requires* overlapping roles – since clear statutory language will override common law principles of fairness, unless there is a constitutional hook – but that was not this case.

Regulators would be well advised to carefully consider how various committees charged with making different decisions are staffed. In some

cases, there may be efficiencies gained by overlapping roles. In others, however, the risk of procedural unfairness may outweigh any potential benefits.

Finally, the HPARB's stinging criticism of the Registration Committee's handling of the evidence demonstrates the limits of a paper record when it comes to issues of credibility. Where credibility is a major focus in a given case, decision-makers should ensure they have the benefit of *viva voce* evidence from the relevant parties, if at all possible. Credibility decisions made without an oral hearing are inherently vulnerable to attack, especially if the conclusion reached differs from the findings made in a prior proceeding that did have the benefit of an oral hearing (in this case, a criminal trial). The fact that the two proceedings may operate under different standards of proof does not detract from this proposition. ⚖

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