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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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IN THIS ISSUE

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Correctness standard of review applies for procedural fairness questions: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69

FACTS: Alberta Transportation applied before the Canadian Transportation Agency (the "CTA") under s. 101(3) of the *Canada Transportation Act*[1] for authorization of the construction of a road bridge over a railway. It also asked for the costs of the construction project to be apportioned between it and Canadian Pacific Railway Company ("CP"). CP resisted the attempt to make it pay for a portion of the costs.

While the CTA's decision on the application was under reserve, CP learned that Alberta had secured federal infrastructure funding for a related project, and asked the CTA to suspend its decision until CP had received documents under the Freedom of Information and Protection of Privacy Act and the Access to Information Act. The CTA refused to adjourn and ultimately granted Alberta Transportation's application, apportioning the costs of the project 85/15 between it and CP.

CP appealed the CTA's cost apportionment decision to the Federal Court. Among other grounds of appeal, CP argued that the CTA breached the duty of fairness in refusing CP's request for an adjournment, and proceeding in the absence of the requested documents.

[1] SC 1996, c 10

DECISION: Appeal dismissed. In respect of the procedural fairness ground of appeal, the Federal Court of Appeal (Rennie JA; Gleason and Laskin JJA concurring) held that the standard of review for procedural fairness issues is correctness or, alternatively, that there is no standard of review, but that in this case the duty of fairness was met.

The Court followed *Mission Institute v Khela*, 2014 SCC 24, in which the Supreme Court of Canada stated that "the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be 'correctness'."

The Court's task was to square a correctness standard of review with the well-established principle that the duty of procedural fairness at common law must be calibrated by considering, among other things, the procedural choices made by the decision-maker (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 27).

The Court noted that some of its decisions had expressed the view that the law on this point is unsettled. For instance, in *Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59, Stratas JA (in dissent), relied on the "deference" point in *Baker* and other cases to conclude that the standard of review for procedural fairness is reasonableness, albeit with a variable margin of appreciation. In that case, Stratas JA wrote that "'correctness with a degree of deference' is a *non-sequitur*. It would be like describing a car as stationary but moving."

For the Court in *CP*, this was a category error: *what the duty of fairness requires* is not the same thing as *whether the decision-maker met that duty*. An element of deference in the former does not mean that a reviewing court shows any deference in relation to the latter. And it is the latter question to which a standard of review would apply.

Further, the "standard of review" is typically applied to the consideration of *outcomes*, not the *procedure* leading up to them. It may be more accurate to say that no standard of review applies and that the reviewing court may simply ask itself whether the procedure below was fair. The Court noted that the Supreme Court, in *Moreau-Bérubé v Noveau-Brunswick*, 2002 SCC 11, stated that procedural fairness "requires no assessment of the appropriate standard of judicial review." The Court also noted that certain procedural matters do not lend themselves to a standard of review analysis at all, such as when bias is alleged.

COMMENTARY: Thanks to inconsistent decisions, including some from the Federal Court of Appeal itself, there has been confusion in recent years over the question of standard of review and procedural fairness.[2] Ultimately, however, whether procedural fairness should be approached on a reasonableness standard with a variable margin of appreciation, or a correctness standard with an element of deference in the preliminary analysis of what the duty entails, or on no standard of review at all, may be an academic question with little or no impact on outcomes.

The different views on this issue may flow from how different judges and commentators see reasonableness review. Recall that *Dunsmuir* stated that reasonableness review concerns both *reasoning process* and *outcomes*: "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." The exact relationship between these two "modes" of review has never been clearly set out.

If one sees reasonableness review as chiefly scrutinizing *outcomes* (as the court in *CP* may have – see para 44), then procedural fairness sits

[2] These issues are explored further in an article co-written by Andrea Gonsalves and Pam Hrick of Stockwoods LLP: "Reasonable, Correct, or Simply Fair?: Exploring the Standard of Review for Procedural Decisions", OBA Institute, February 2018.

uneasily with it. If, however, one sees reasonableness review as encompassing the review of decision-making *process*, then procedural fairness seems more capable of being brought under the umbrella of the review of the decision itself.

If one prefers the latter view, and one accepts the notion (as some judges appear to) that there is no practical difference between having a "correctness" standard and a reasonableness standard where in some cases there is only one permissible outcome (see e.g. *McLean v Executive Director of the British Columbia Securities Commission*, 2013 SCC 67 at para 38), one might even venture that all review of administrative decisions could be synthesized into a single exercise where there is a single standard of review (reasonableness) under which process, reasoning, and outcome are all scrutinized in evaluating whether the ultimate decision was reasonable.

The Federal Court of Appeal's analysis of this issue brings welcome clarity for counsel and courts, who can now comfortably avoid addressing standard of review where procedural fairness is the grounds for judicial review. However, the *CP* decision fails to confront the fact that some issues raised on judicial review have elements of both procedural fairness and substantive review. For issues where procedural and substance overlap, the clean dichotomy created in *CP* might prove unworkable.

Penalty decision upheld as fit and reasonable: *College of Physicians and Surgeons of Ontario v Peirovy*, 2018 ONCA 420

FACTS: P is doctor at a walk-in clinic. In 2009 and 2010, six of his female patients complained of improper sexual touching by P. The College's Discipline Committee found that P had sexually abused four patients and committed disgraceful, dishonourable or unprofessional conduct in respect of a fifth. P also pled guilty to criminal charges of simple assault in relation to two of the complaints involving sexual abuse.

In finding P guilty of misconduct, the Discipline Committee rejected P's argument that the complainants had misunderstood his actions as sexual in nature. It found that P's touches (which involved touching breasts under the pretense of a medical exam, but in fact without medical purpose) were objectively sexual in nature, regardless of his motivation.

At the subsequent penalty hearing, one expert testified that P was at low risk to re-offend and there was no evidence of personality pathology, personality disorder, psychopathy or sexual deviance. Another expert testified that P lacked awareness of his professional responsibilities in maintaining appropriate boundaries, but had made efforts to remediate his communication skills.

The College sought revocation of P's licence, while P's position was that a suspension of four months would be appropriate. His counsel referred the Discipline Committee to a number of previous cases where 3-6 month suspensions were imposed in similar circumstances. The Discipline Committee ultimately suspended P's licence for four months and imposed restrictions on his practice (including a prohibition on being alone with female patients) for twelve months thereafter. It found that revocation is reserved for the most egregious conduct or for members with a high risk of repeat misconduct. Those circumstances were not present in P's case. The Discipline Committee noted that maintaining public confidence in the profession's ability to regulate itself is a "shifting standard" and that protection of the public is of paramount importance.

The Divisional Court allowed the College's appeal of the penalty order, quashed the penalty as being manifestly unfit and unreasonable, and remitted it to the Discipline Committee for reconsideration.[3] P appealed with leave of the Court of Appeal.

[3] A summary of the Divisional Court's decision can be found in the February 2017 edition of this Case Review.

DECISION: Appeal allowed and Discipline Committee's penalty order restored (Benotto JA dissenting).

Justices Rouleau and Roberts denounced P's behavior, but recognized the Discipline Committee has expertise in assessing allegations of misconduct and determining appropriate penalties. For that reason, its decisions are owed deference and courts should interfere with its penalty decisions only where there has been an error in principle or the penalty is clearly unfit. The Divisional Court had failed to apply the reasonableness standard of review properly in this case, instead substituting its own view of an appropriate penalty.

The majority's conclusion rested on two findings. First, it rejected the Divisional Court's conclusion that the Discipline Committee had made inconsistent findings of fact. The Discipline Committee's finding at the liability stage of the hearing that P's misconduct was objectively sexual was not inconsistent with its finding at the penalty phase that his lack of awareness of his behaviour may have been a factor in explaining his misconduct. The latter finding was supported by expert evidence and was not inconsistent with the fact he pleaded guilty to simple assault, for which a sexual motivation need not be proven.

Second, the Divisional Court had erred in concluding that the penalty was manifestly unfit. Rather, it "represented the Discipline Committee's careful consideration of all relevant factors and was within the range of reasonable outcomes." The Court of Appeal noted that the length of the penalty was consistent with previous similar cases and that P had practised with supervision for five years following the complaints being lodged. Properly reading its decision, the Discipline Committee also had not proceeded on the basis that revocation was available only in narrowly constrained circumstances. Finally, the fact that the legislature had recently decided that touching of a sexual nature – likely including the conduct of which P had been found guilty – would result in mandatory revocation moving forward was of no moment in assessing P's case.

In dissent, Benotto JA found that the Divisional Court did not err in its application of the reasonableness standard. There were inconsistencies between the Discipline Committee's liability and penalty decisions, which were sufficient to render the penalty decision unreasonable. The Discipline Committee's finding regarding the impact of P's awkwardness, lack of skill, and unawareness was also without foundation. Further, reasonableness is not a static concept: "Where society has evolved such that a range no longer reflects societal values, there is reason to question the validity of the range." The short suspension given to P was clearly an unfit penalty. Justice Benotto concluded that "[b]y imposing a penalty that undermines public confidence in the self-regulation of medical professionals, fails to protect the public, and is inconsistent with the eradication of sexual abuse of patients by physicians, the Discipline Committee rendered an unreasonable decision."

COMMENTARY: This decision is a clear message from the Court of Appeal that reviewing courts must give significant deference to penalty decisions of specialized professional discipline tribunals. The majority was stern in its rebuke of what it viewed to be the Divisional Court's "disguised correctness review" of the Discipline Committee's decision. In contrast, Benotto JA found that the Divisional Court properly engaged in reasonableness review by identifying significant errors in principle in the Discipline Committee's reasons and found that the penalty imposed was clearly unfit

The majority further emphasized the important role of consistency in penalty decisions, while recognizing that tribunals are not bound by their previous jurisprudence. While upholding this decision as reasonable in part because it is consistent with previous decisions of the College's Discipline Committee, the majority also hints at paragraph 83 that a disciplinary tribunal could reasonably increase penalty

ranges through carefully considered decisions at first instance.

The two strongly-worded and diametrically opposed opinions in this case raising the important issue of sexual abuse in the medical profession suggest deeper underlying problems with the current approach to court review of discipline tribunal penalty decisions. It should be kept in mind that this case came before the courts not as a judicial review application but rather as a statutory appeal, under the very broad appeal provision in s 70 of the *Health Professions Procedural Code*,[4] which allows an appeal to the Divisional Court "on questions of law or fact or both" and gives the Court "all the powers of the panel that dealt with the matter". In light of those appeal provisions, one could argue that the courts have greater latitude that the majority suggests to intervene in the penalty decision and correct the Discipline Committee's course in an area where its past penalty decisions do not reflect current societal standards.

The majority's decision is arguably consistent with the prevailing approach to statutory appeals in the professional discipline context, which has been firmly in place since the Supreme Court's 2003 decision in *Dr Q v College of Physicians and Surgeons of British Columbia*.[5] But the outcome in this case also indicates there may be fundamental problems with that approach that warrant its reconsideration. Courts, parties and tribunals would benefit from an approach that better respects the legislative intent that there be appeals "on questions of law or fact" and that the Divisional Court have "all the powers of the panel that dealt with the matter".

Correctness standard applied following established jurisprudence: *Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559

FACTS: A father filed a freedom of information access request seeking litigation records between his children and the Children's Lawyer for Ontario. The records included privileged and non-privileged reports relating to his children, all documents filed with the court, social worker's notes, and the notes of the lawyers acting for the Children's Lawyer.

Subsection 10(1) of the *Freedom of Information and Protection of Privacy Act*[6] provides that "every person has a right of access to a record or a part of a record in the custody or control of an institution", subject to certain exemptions.

The Children's Lawyer took the position that the *FIPPA* does not apply to private litigation files, since those records were not "in the custody or under the control" of the Ministry of the Attorney General (MAG). The Assistant Information and Privacy Commissioner of Ontario rejected this argument and required MAG to respond to the father's request.

Applying a reasonableness standard on judicial review, the Divisional Court upheld that the Commissioner's order. The Children's Lawyer appealed.

DECISION: Appeal allowed.

For the purposes of this newsletter, the most interesting aspect of the Court of Appeal's decision is that it applied the correctness standard of review to the question of whether records are "in the custody or control" of a given institution.

Writing for a unanimous panel, Benotto JA relied on the first stage of the standard of review analysis, finding that a series of prior cases decided between 1997 and 2011 had "satisfactorily determined that correctness applies in this case." Those cases had looked at

[4] Schedule 2 to the *Regulated Health Professions Act, 1991*, SO 1991, c 18.
[5] 2003 SCC 19.
[6] RSO 1990, c F 31

the specific question of whether a record was "in the custody or control" of a given institution. In response to the argument that these cases relied on the increasingly vanishing concept of "jurisdiction", Benotto JA found that jurisdictional questions were only part of what drove the analysis in the prior case law. The line of decisions applying correctness also relied on the fact that the test for custody or control was outside the specialized expertise of the decision-maker and, in at least one case, the fact that the outcome would impact "thousands of individuals across the province".

In any event, the Court of Appeal concluded that the same result would follow under the second stage of the standard of review analysis. The question at issue in this case falls into one of the 'correctness' categories identified in *Dunsmuir*: a question that is of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise. In particular, Benotto JA drew an analogy between "the confidential relationship between the Children's Lawyer and children" and questions impacting solicitor-client privilege, which attracted correctness review in *Alberta (Information and Privacy Commissioner) v University of Calgary* ("Alberta IPC").[7]

Applying the correctness standard, the Court of Appeal concluded that given the relevant context, the Children's Lawyer must operate separately and distinctly from MAG, and that ultimately MAG does not have custody or control of the requested records.

COMMENTARY: This decision stands out as a rare case where a reviewing court is willing to apply the correctness standard. There are at least two ways to look at the implications for future cases, insofar as it relates to the standard of review.

At one level, this case is a narrow but natural consequence of the Supreme Court of Canada's decision in *Alberta IPC*, which reinvigorated (if only slightly) the 'central importance' category of correctness review. In *Alberta IPC*, Justice Côté – a reliable proponent of correctness review – was finally able to pen a majority opinion applying that standard due to the importance of solicitor-client privilege and the Alberta IPC's lack of expertise in such matters. The Court of Appeal rightly notes the similarities between the interests in *Alberta IPC* and the confidential relationship between the Children's Lawyer and child-clients engaged in this case. But it is doubtful that this line of reasoning in support of correctness review extends far beyond the relatively rare scenarios raised in cases like this one and *Alberta IPC*.

The broader reading of the Court of Appeal's decision is that it breathes new life into the first stage of the standard of review analysis as a basis for correctness review. Reliance on this stage is uncommon, particularly given recent Supreme Court jurisprudence casting considerable doubt on any attempt to ground correctness review in the concept of "jurisdiction". But the Court of Appeal's decision suggests that reviewing courts should not automatically discard older case law applying a consistent standard to a certain type of question, simply because it adverts to a question being jurisdictional in nature. If those decisions reflect other strands of argument broadly consistent with the post-*Dunsmuir* jurisprudence, then they may still provide a basis for correctness review – even in a world where that standard is increasingly difficult to justify under the second stage of the standard of review analysis.

The Court of Appeal's approach here raises an interesting question: at what point is it appropriate for reviewing courts to ignore a line of decisions applying the correctness standard where that jurisprudence falls out of step (at least in part) with the general principles articulated in more recent cases? If courts are too quick to do so, then the first stage of *Dunsmuir* risks being pointless; if they are too reticent, then the standard of review in certain contexts risks becoming an almost arbitrary

[7] 2016 SCC 53

function of how many cases managed to apply correctness review based on a certain category before the Supreme Court narrowed or extinguished that category. These questions are not merely academic. As the Supreme Court considers revamping the state of administrative law this fall, it would be wise to consider just what role (if any) there should be for the last decade of post-Dunsmuir standard of review jurisprudence.

Prematurity doctrine applies to ruling on solicitor-client privilege: *Cheng v Ontario Securities Commission*, 2018 ONSC 2502 (Div Ct)[8]

FACTS: Staff of the Ontario Securities Commission commenced regulatory enforcement proceedings against C and others in April 2017. The main allegation against C was that he had unlawfully engaged in insider tipping. In advance of the merits hearing, C brought a motion to exclude certain evidence on the ground that it was protected by solicitor-client privilege. The presiding Commissioner concluded that solicitor-client privilege did not apply to the evidence in question and dismissed C's motion.

C brought both an appeal from and an application for judicial review of the Commissioner's decision. In response, Staff of the OSC brought motions to quash both the appeal and the judicial review application on the ground of prematurity.

DECISION: Motion granted. Appeal and judicial review application quashed.

Regarding C's proposed appeal, s. 9(1) of the *Securities Act*[9] sets out the scope of appeal rights from OSC decisions. That provision allows a person or company directly affected by a "final decision" of the OSC to bring an appeal to the Divisional Court. C argued that "final decision" refers to any determination of a substantive right. In this case, C's right to solicitor-client privilege was a substantive right and that the Commissioner's determination that it did not apply was therefore a final decision.

The Divisional Court rejected this argument for two reasons. First, on a plain reading, s. 9(1) of the Securities Act contemplates appeals of decisions that are made after proceedings are completed – this is what "final" refers to. In addition, the Divisional Court expressed a broader policy rationale for rejecting C's argument. The Court noted C was trying to import into the interpretation of s. 9(1) the jurisprudence from civil courts respecting final and interlocutory orders; but civil proceedings are quite different than regulatory proceedings. In regulatory matters the preferred course is to allow matters to run their full course before the tribunal. The administrative hearing process would grind to a halt if mid-hearing rulings generally were subject to immediate appeal. This would have negative public policy implications.

Dealing with the application for judicial review, the Court held that the doctrine of prematurity applied. This doctrine provides that absent exceptional circumstances, a party cannot seek judicial review of a decision made during an administrative process until that process has concluded. C argued that his matter raised an exceptional circumstance because of the importance of solicitor-client privilege and the fact that any damage caused by disclosure of privileged communications could not be cured if the ruling on privilege is later set aside. The Divisional Court rejected these arguments. The threshold to establish "exceptional circumstances" is high. That exception should be reserved for cases where the decision at issue is "so tainted" that the result of the later judicial review application would be preordained; this would only happen in rare cases. The Court found that the OSC's determination of whether solicitor-client privilege applied did not constitute an exceptional circumstance. The Commissioner made a determination about the

[8] Stockwoods LLP was counsel of record for the Ontario Securities Commission in this case.
[9] RSO 1990, c S.5.

application of the privilege after a lengthy hearing and she gave detailed reasons for her decision. This was not one of the rare cases where early intervention was warranted because of a "danger of manifest unfairness in the hearing".

COMMENTARY: This case re-affirms the long-standing principle that parties in the midst of ongoing administrative proceedings have a high bar to overcome to gain interlocutory access to the courts.

The Divisional Court's narrow interpretation of the statutory appeal provision in s. 9(1) of the *Securities Act* is consistent with the well-established policy of ensuring that administrative law matters are permitted to unfold efficiently and conclude expeditiously, without interlocutory forays into court.

However, of greater significance in this decision is holding on the application of the prematurity doctrine. Prior to this decision there was no case that dealt squarely with the issue of whether a decision rejecting solicitor-client privilege constitutes an exceptional circumstance justifying interlocutory intervention by the court. In holding that it does not, the Court clarified that when assessing whether exceptional circumstances exist, the focus of the analysis will be not on the merits of the decision below, but rather on the process used to make that determination. Here because the motion before the OSC accorded with basic principles of procedural fairness, (including the fact that there was a lengthy hearing, that Mr. Cheng was able to provide evidence, and that the reasons for the decision were detailed), the Court found that no exceptional circumstances arose.

Finally, the decision is notable because C argued that to succeed on the motion to quash, the OSC had to show that it was "plain and obvious" that the application for judicial review would not succeed on the ground of prematurity. The Court questioned this argument, distinguishing motions to quash for prematurity from other cases where this high threshold has been applied. From a policy perspective we note that this holding is consistent with the more general policy in administrative law that interlocutory judicial reviews should be reserved for exceptional circumstances. That said, in some cases the high bar may be appropriate because three judges hear the application for judicial review on its merits whereas only one judge hears a motion to quash, and consideration of the full record available on the application may lead those judges to conclude that the application should be decided on its merits, despite apparent prematurity.

Regulator's duty to accommodate a licensee's disability: *Law Society of Ontario v Burtt*, 2018 ONLSTH 63

FACTS: B was a lawyer and LSO licensee. In connection with a prior proceeding, the LSO obtained two reports which indicated that B suffered from depressive symptoms that left him feeling "frozen" and affected his ability to respond to the LSO during specified timeframes. B was reprimanded in that earlier proceeding and required to undergo counselling.

One year later, the LSO received a complaint from a client of B and requested a response from B to the allegations. B requested an extension of time to respond, on the basis that he was dealing with depression and a family illness. B obtained several extensions of time but did not provide a written response to the complaint.

The LSO did not act on the information in its possession indicating that B's depression rendered him unable to respond to the LSO within specified timeframes. The accommodation offered by the LSO was limited to extensions of time and an offer to downscale the scope of response required. Eventually these were exhausted.

The LSO commenced a conduct application against B for failing to reply promptly and completely to the LSO's communications, contrary to the Rules of Professional Conduct. In

the course of the proceedings, B filed a medical report indicating that his depressive symptoms "cause him to "freeze" when he needs to take independent steps to respond to the Law Society".

DECISION: Application dismissed.

B's medical condition was the direct cause of his failure to respond in the manner required by the LSO.

Notwithstanding that B did not disclose prior to the hearing that he was unable to respond in writing, sufficient information was available to the investigators to alert them to the existence of a condition requiring accommodation.

In circumstances where the LSO knew or ought to know of an existing mental health issue, it had a duty to canvass potential accommodations before deciding that protection of the public interest demanded a traditional written response and, subsequently, required prosecution. An alternative formulation of the demand may have been sufficient and obviated the need to engage the regulatory process.

B's obligation to cooperate must be considered in light of his mental health diagnosis. B did not fail to comply with his regulatory obligations; rather he failed, by reasons of his mental health, to comply with the manner in which the LSO demanded compliance.

COMMENTARY: In *Burtt*, the licensee's disability was considered not merely as a mitigating factor on penalty. Rather, having regard to B's mental health, the presiding Bencher found that the allegation of failure to comply had not been made out. This is the first known case in which a failure to accommodate was accepted as a defence to an allegation of failure to cooperate.

In certain respects this decision is limited to its specific facts. The reasons emphasize that the LSO had in its possession medical records that should have guided its accommodation of B.

Moreover, the Tribunal found that the fact B's disability caused him to "freeze" related directly to the alleged misconduct without impacting his ability to serve clients competently. Nonetheless, the decision suggests more generally that a regulator with information that an individual has a disability relevant to their ability to comply with the regulator's requirements has a duty to consider and accommodate that disability in determining the appropriate regulatory response to non-compliance.

In holding that regulators are obliged to have particular regard to the mental health of their membership, this case highlights the increasingly common intersection between mental illness and professional discipline. Protracted and costly misconduct proceedings may be avoided altogether by an approach that views accommodation as part of a regulator's public interest mandate.

Also significant in this case is the relationship between a regulator's duty to pursue accommodation and the fact that vulnerable licensees are often self-represented. *Burtt* recognizes the unique challenge faced by unrepresented licensees requiring accommodation in commending the role played by voluntary duty counsel in obtaining an outcome that likely could not have been achieved without representation.

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THE NEWSLETTER

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