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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Imposed consultation creates reasonable apprehension of lack of independence: *Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals)*, 2019 ONCA 518

Facts: Following a car accident in 2012, S applied to the Licence Appeal Tribunal ("LAT") for a determination that she met the threshold of "catastrophic impairment" within the meaning of the *Statutory Accident Benefits Schedule*, which would entitle her to enhanced benefits. The LAT Vice-Chair heard the matter and issued a decision determining the threshold was not met. Two months later, S's counsel received an anonymous letter stating that before the decision was released, it had been reviewed and altered by the Executive Chair of the tribunal cluster to which the LAT belongs, the Safety, Licensing Appeals and Standards Tribunals ("SLASTO").

On judicial review, the Divisional Court set aside the LAT's decision and referred the matter back for a new hearing.[1] The LAT's review process lacked the required safeguards of adjudicative independence, thereby creating a reasonable apprehension of lack of independence. The uncontested evidence of SLASTO's head of legal services was that an adjudicator "is expected to

[1] Our analysis of the Divisional Court's decision can be found in Issue No. 19 of this Case Review.

send the decision for peer review" upon completing a draft and that he had sent the decision to the Executive Chair, without the LAT Vice-Chair's knowledge, because it was the LAT's first catastrophic impairment decision. There was no formal or written policy protecting an adjudicator's right to decline to participate in a review by the Executive Chair or make changes proposed by her. The Divisional Court held that while an adjudicator's discussion of a draft decision with colleagues does not necessarily breach the rules of natural justice, the Executive Chair had imposed a review that was not requested by the Vice-Chair. A reasonable apprehension of lack of independence existed in the circumstances.

The LAT and SLASTO appealed.

Decision: The Court of Appeal unanimously dismissed the appeal.

The Court held that the Divisional Court had correctly identified and applied the test for reasonable apprehension of bias: "whether 'an informed person, viewing the matter realistically and practically – and having thought the matter through' would think that it is more likely than not that the decision-maker would decide fairly."

It had also correctly applied the Supreme Court's jurisprudence on preparation of reasons by administrative tribunals. The Court recited the "basic principle" that "only the adjudicators could request consultation and that their superiors in the administrative hierarchy could not impose it on them." The Court observed that the LAT's review process was not a "purely qualitative or editorial exercise"; the Executive Chair undertakes reconsideration of the LAT adjudicator's decisions and has power over their reappointment; there was no formal policy protecting an adjudicator's right to refuse to participate in a review process, which confirmed that the LAT had not communicated to adjudicators any right to review; on the LAT's own evidence, adjudicators were "expected" to participate; and, in this case, the Executive Chair had reviewed and commented the decision without the adjudicator's prior knowledge or consent. Taking all of these factors into consideration, as well as the finding that the adjudicator did make "significant" changes to the decision following the Executive Chair's comments, the Court concluded that the Divisional Court's analysis of the issue of a reasonable apprehension of a lack of independence was correct.

Commentary: This decision provides important practical guidance to tribunals on how to structure an internal review process to avoid a reasonable apprehension of lack of independence. It is best practice to create and clearly communicate to tribunal members a fulsome written policy on the process by which they may consult with their colleagues regarding their own decisions. Such a policy should set out that participation in any consultation process is not mandatory and that it must be initiated by the tribunal member or members whose decision is to be reviewed. That the decision may be "significant" for the tribunal will not justify reviewing and commenting on the decision of a fellow tribunal member without notice or consent.

Generous approach to public interest standing in cases raising questions of law: *Alford v Canada* 2019 ONCA 657

Facts: A is a law professor specializing in constitutional law and national security. He relied on public interest standing to challenge the newly enacted *National Security and Intelligence Committee of Parliamentarians Act*[2] for violating parliamentary privilege. The application judge denied him standing because there was no proper

[2] SC 2017, c 15

factual context for the challenge and A did not represent the perspective of individuals directly affected by the law.

Decision: Appeal allowed.

The constitutionality of the Act is a legal question. The application judge erred in denying A standing on the basis that the application lacked proper factual context because a factual context would have no bearing on the challenge. Additionally, because the constitutional challenge is a "pure question of law" diversity in perspectives would not assist the court.

In finding that the application judge had erred, the Court of Appeal applied the three-part framework most recently affirmed by the Supreme Court of Canada in *Downtown Eastside Sex Workers United Against Violence Society v Canada*.[3] The Court of Appeal found that there was a serious issue to be tried as to the constitutionality of the legislation. A had a genuine interest in the issue as he had published articles on the topic and participated in parliamentary committee hearings relating to the legislation. In addition, the challenge was a reasonable and effective way to bring the matter before the court because A was "highly competent" and motivated to represent the issues properly.

Commentary: This decision demonstrates a generous approach to public interest standing for "pure questions of law". The traditional framework for public interest standing considers whether litigants who are not directly affected by the law can nonetheless show a "genuine interest" in the issues raised in a case. Following the Supreme Court's guidance in *Downtown Eastside* that the factors to be considered in the court's exercise of discretion to grant public interest standing should not be treated as a "rigid checklist", the court accepted that A having published on the topic and engaging in the legislative process was enough to demonstrate his "genuine interest in the issue". Further, in evaluating whether the challenge was a reasonable and effective way to bring the matter before the court, the court focused on A's competence. It is notable that the litigant in this case was a law professor, which may have made it easier for the court to find he was "highly competent and able to represent the constitutional issues at stake". It is unclear if the same latitude would be afforded to experts in other fields seeking public interest standing.

The case is also notable because the court considered the nature of the issues in the case (being purely questions of law) in deciding that the lack of a factual context and of the views of those most affected was not a barrier to public interest standing. Due to the importance of the principle of legality to the rule of law, challenges to the constitutionality of legislation or to other exercises of state authority should not be prevented from coming before the court simply because no person who is directly affected has brought a case forward.

As the principles governing public interest standing apply equally to administrative law, this case could have a bearing on the availability of public interest standing before administrative tribunals. In *Delta Air Lines Inc. v Lukács*[4], the Supreme Court recently cautioned that administrative bodies must take a "flexible and discretionary approach" when determining public interest standing, specifically stating that the factors from *Downtown Eastside* should not be applied in a way that precludes potential public interest litigants from meeting the test.

[3] 2012 SCC 45

[4] 2018 SCC 2

The approach from the Ontario Court of Appeal, viewed in light of the flexible approach mandated by the Supreme Court, expands the open door to litigants with the expertise and motivation to challenge administrative decisions, particularly those that engage pure questions of law.

Credibility, retrospectivity and the complications of mandatory revocation: *Ontario (College of Physicians and Surgeons of Ontario) v Lee*, 2019 ONSC 4294 (Div Ct); *Ontario (College of Physicians and Surgeons of Ontario) v Kunynetz*, 2019 ONSC 4300 (Div Ct)

Facts: In July 2019, the Divisional Court released decisions in two statutory appeals from decisions of the Discipline Committee of the College of Physicians and Surgeons of Ontario. The cases involved common issues regarding findings of sexual abuse of patients, credibility assessments, and the retrospective application of the *Protecting Patients Act 2017*. Among other things, that legislation amended the *Regulated Health Professions Act, 1991* to (a) remove the power of the Discipline Committee to include gender-based terms in its penalty orders and (b) impose mandatory revocation for additional forms of sexual abuse of patients.

The first case involved Dr L, a rheumatologist who was alleged to have committed sexual abuse of three patients. After a four-day hearing in which the three patients and Dr L gave evidence, the Committee held that Dr L had engaged in sexual abuse and disgraceful, dishonourable and unprofessional conduct with Patients A and C, but made no findings in relation to Patient B. In reaching those findings, the Committee accepted the evidence of Patients A and C and did not accept Dr L's denials. The Committee expressed concerns about the reliability of Patient B's evidence. The Committee ordered revocation of Dr L's license and other terms. Revocation was discretionary in the circumstances of Dr L's case and the Committee found that it was appropriate given the gravity of Dr L's misconduct. In refusing to allow Dr L to practise with a "practice monitor" for all female patients, the Committee concluded that a retrospective application of the *RHPA* amendments was appropriate because the amendments had a public protection purpose and that, even if the amendments did not have retrospective effect, such a gender-based term was inappropriate and revocation was appropriate. The Committee also ordered Dr L to post security to reimburse the College for counselling costs for both Patient A and C in the total amount of $32,120 (two times the maximum of $16,060) even though Patient C had no intention of seeking or obtaining counselling. Dr L appealed the Committee's misconduct findings and the penalty.

The case of Dr K involved allegations of sexual abuse and disgraceful, dishonourable or unprofessional conduct involving four patients. In respect of three patients, it was alleged that Dr K failed to leave the room while the patient was undressing, failed to use drapes, and removed clothing without warning. In respect of two patients (C and D), it was alleged that Dr K pressed his genitals against their leg in the course of an examination. In respect of Patient B, it was alleged that he touched her breasts in a manner not consistent with the clinical examination. The Committee made findings of professional misconduct in respect of all four patients.

Regarding Patients C and D, the Committee found that Dr K engaged in conduct that would reasonably be regarded as disgraceful, dishonourable or unprofessional by allowing his abdominal fat pad to contract their bodies without warning, apology or excuse. The Committee held that the amendments to the *RHPA* had retrospective effect and that revocation was mandatory with respect to the finding of sexual

abuse relating to the touching of Patient B's breasts. Even if the amendments did not have retrospective effect, the Committee concluded that revocation was appropriate. The Committee ordered Dr K to pay costs in the amount of $145,460. Dr K appealed the Committee's misconduct findings and the penalty and costs decision.

Decision: Both appeals were allowed, in part.

In respect of the Committee's credibility findings, the Divisional Court in both cases emphasized the need for adequate credibility findings in order for the Committee's conclusions to be complete, transparent and intelligible as required for the decision to survive review on the reasonableness standard. In Dr L's case, the Committee's findings of misconduct regarding Patients A and C were upheld, with the Court noting that the Committee made findings as to the credibility and reliability of the evidence of those patients that were founded in the evidence and were not conclusory or generic. The Committee listed and considered the criteria that are often used to assess credibility and reliability. Having found that the evidence of Patients A and C was credible and reliable, the Committee considered the denials of Dr L in contrast to the strength and cogency of their evidence and found that it was irreconcilable. That finding was reasonable.

The court's review of the Committee's credibility assessments in Dr K's case arrived at the opposite conclusion. The Committee did not instruct itself as to how to assess credibility and reliability. It did not analyze the evidence of Patient B and Dr K by applying the usual criteria for making findings of credibility and reliability. The Committee rejected all of Dr K's evidence because he said he had no individual memory of the events in issue, but it should have considered whether the evidence he gave about what he "would have done" and what his usual practice would have been was credible and reliable. The Committee was selective in its consideration of discrepancies and inconsistencies and failed to consider the entirety of Dr K's evidence. By isolating Dr K's evidence on one single point (in respect of which the Committee concluded he had changed his evidence) the Committee failed to consider his evidence in an even-handed manner. That unfairness was compounded by the emphasis the Committee placed on Patient B's demeanour as supportive of her credibility. The Committee failed to assess any of the evidence relating to the allegation that Dr K had touched Patient B's breasts on the standard of clear, convincing and cogent evidence.

The appeal in Dr L's case involved a discrete issue as to whether the College was offside the rule in *Browne v Dunn* for failing to cross-examine Dr L with respect to each of the issues that he had denied in his direct examination. The court noted that the rule is rooted in trial fairness. Dr L was aware of the allegations against him and had the opportunity to explain his side fully in his examination-in-chief. Where the confrontation of a witness's evidence is general and known to the witness, and the witness's view on the contradictory matter is apparent, there is no need for confrontation and no unfairness to the witness in any failure to do so.

Dr K's case, which was longer and more complex than Dr L's at the discipline hearing stage, raised a handful of other issues on appeal in respect of the Committee's liability findings and decisions on motions. The Divisional Court held that the Committee erred in law and unreasonably reversed the burden of proof in respect of the finding that the touching of Patient B's breast lacked a clinical justification. The court also agreed with Dr K that the Committee's finding that he engaged in disgraceful, dishonourable or unprofessional conduct by allowing his fat pad to come into contact with his patients' bodies, without warning, apology or excuse, was unreasonable. The Notice

of Hearing had alleged that Dr K had engaged in professional misconduct by pressing his genitals against the leg of two patients. He responded to that allegation. He was given no notice of, and had no opportunity to respond to, the significantly different allegation of allowing contact between his abdominal fat pad and Patients C and D, which surfaced for the first time in the Committee's reasons for decision and did not arise in the particulars of the allegations, in cross-examination or in closing submissions. In response to Dr K's grounds of appeal regarding the Committee's decisions on various pre- and mid-hearing motions, the Court commented on the complexity of the case. With the amendments to the *RHPA* in the *Protecting Patients Act, 2017* increasing the cases in which revocation may be ordered, it can be anticipated that similar complex motions will be brought. Committees will need to pay greater attention to the essential function of assessing witness credibility and reliability, and to the standard of proof based on clear, cogent and convincing evidence. It may be prudent for tribunals affected by the amendments to address scheduling and training issues in advance of such complex hearings, and establish policies and procedures to respond appropriately.

Both cases involved the issue of whether the amendments effected by the *Protecting Patients Act, 2017* have retrospective effect. The analysis in the Dr K decision is more detailed. In both cases the Discipline Committee had found the amendments to apply retrospectively and the same panel of the Divisional Court found that they did not. The court applied the correctness standard of review for this issue, held that it was a legal question of central importance to the legal system and outside the specialized expertise of the Committee. Noting the presumption against retrospectivity, the court held that there was no indication in the Act that the Legislature had turned its mind to whether the amendments would operate retrospectively or not, and no other basis to find that the presumption had been displaced.

In Dr L's case, the court held that the Committee had improperly relied on the Divisional Court's decision in *Ontario (College of Physicians and Surgeons of Ontario) v Peirovy*,[5] instead of the Court of Appeal's decision allowing the appeal in that case and finding the Divisional Court's analysis to be in error.[6] The Committee made several errors in principle in imposing revocation. It failed to consider the objectives of penalty and to balance the evidence with respect to each one; it did not consider the principle of proportionality; and it rejected the criterion of consistency on the basis that prior cases were "out of step with present day society's values and expectations." The court sent the issue of penalty back to the Committee for a new decision. The court also allowed the appeal with respect to the counselling fees reimbursement relating to Patient C and reduced the amount ordered to $16,060.

In respect of Dr K, based on the court's findings as to liability and the non-retrospective effect of the amendments, the court held that the penalty of revocation was unreasonable. The misconduct findings that survived the appeal were that Dr K had removed patient clothing without warning or consent and committed two breaches of an interim order. Due to an interim suspension and the revocation imposed by the Discipline Committee, Dr K had not worked for 45 months. A suspension greater than that period of time would unlikely be imposed for the remaining findings of misconduct. Accordingly, rather than send the matter back to the Committee, the court imposed a suspension up to the date of the release of the decision. Given Dr K's success on the appeal, the Court ordered that there be no costs of the discipline hearing.

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[5] 2017 ONSC 136
[6] 2018 ONCA 420

Commentary: These two decisions address many issues of importance to professional discipline tribunals, particularly those governed under the *Regulated Health Professions Act*.

First, the decisions are an important reminder of the need for robust, detailed credibility and reliability findings, especially in cases that turn on competing evidence between a professional and a complainant. Credibility and reliability assessments should address the well-established criteria, and do so in a detailed, specific way, with reference to the evidence and demonstration that a witness's evidence has been considered in its totality and in full context.

Second, the Dr L decision is a useful, concise summary of the rule of *Browne v Dunn* – it is a rule of trial fairness that should be approached purposively rather than strictly. Provided a witness has notice of the area of confrontation and has had an opportunity to set out their evidence on the matter, the lack of a direct confrontation is not unfair to the witness.

Third, the Dr K decision demonstrates the problems that arise from shifting allegations. The notice of hearing in a discipline case frames the allegations against a professional and serves the critical function of giving the professional notice of the case to be met. For a tribunal to find liability on some basis other than what is provided in the notice of hearing, and without it having been raised with the professional in some other way, undermines the purpose of the notice and the professional's right to be heard.

Fourth, tribunals affected by the amendments implemented through the *Protecting Patients Act, 2017* are well advised to heed the Divisional Court's recommendations that they establish policies and procedures to deal with the increase in complex motions that are undoubtedly to accompany the expanded occasions of mandatory revocation. Training of tribunal members and sound practices for scheduling will also be critical in ensuring that tribunals can deal with complex motions efficiently and competently.

Fifth, the decisions put to rest the question of whether the amendments have retrospective effect. One might take issue with the Divisional Court's approach and whether it conforms with conventional approaches to retrospectivity. In particular, the court did not address in Dr K the threshold question of whether the relevant amendments are procedural or substantive in nature and did not offer a clear rationale for why it did not apply the general rule that the presumption against retrospectivity of substantive changes is displaced because the amendments are for public protection. However, now that the amendments have been in effect for more than two years, there are unlikely to be many more cases in coming before discipline committees that raise the issue. The Divisional Court's decision at least offers the benefit of certainty on the issue.

Sixth, the Dr L decision helps clarify the principles that a professional discipline tribunal must take into account when exercising its discretion on penalty. The objectives of public protection, general and specific deterrence, rehabilitation and maintaining public confidence in the regulator's ability to regulate the profession are generally considered and remain important; however, tribunals often do not (at least expressly) consider proportionality of the penalty having regard to the nature of the conduct and the professional's blameworthiness. That factor should be included in penalty decisions, as well as the consistency between the penalty and other cases.

Finally, in terms of broader administrative law doctrine, it is of interest that the Divisional Court applied the correctness standard to the issue of the retrospective application of the amendments on

the basis that it is a question of law of importance to the legal system as a whole and outside of the Committee's specialised expertise. In doing so, the Divisional Court relied on *Dunsmuir v New Brunswick*.[7] That category of correctness has been applied by appellate courts on a handful of occasions after *Dunsmuir*, but has been hotly debated by the judges on the Supreme Court of Canada in recent years[8] and criticised by some, and its scope and relevance are presently unclear. Rather than offer much explanation as to why the retrospectivity issue fits within that category rather than attracting the presumption of reasonableness, the Divisional Court simply asserted it. We must look to the Supreme Court's anticipated decision in the *Vavilov*, *Bell Canada* and *NFL* cases for clarity on this category of correctness review.

Failure to reflect *Charter* values framework is fatal to reasonableness; *Aryeh-Bain et al. v. Canada (Attorney General)*, 2019 FC 964

Facts The applicants are a political candidate and potential voters, all of whom are Orthodox Jewish Canadians. They sought to have the Chief Electoral Officer (CEO) exercise his discretion to recommend a change in the date of the federal general election (October 21) since that date conflicts with the Jewish High Holiday of Shemini Atzeret, during which the applicants would be unable to engage in voting or campaigning.

In his responses to queries from Orthodox Jewish voters and Jewish organizations asking for the date to be moved, the CEO focused on the fact that he did not enjoy the statutory power to move the election date (only to make recommendations) and that a wide range of operational considerations are engaged in choosing the election date. Ultimately, he declined to recommend that the election date be changed.

The applicants brought an application for judicial review, arguing that the CEO failure to take *Charter* values into account.

Decision: Application allowed.

Under the framework established in *Doré v Barreau du Québec*[9], where an administrative decision-maker exercises their statutory discretion in a manner that engages a *Charter* protection, reasonableness requires that the decision reflect a proportionate balancing of the *Charter* protection with the statutory mandate.

In this case, the CEO's decision not to exercise his statutory power to recommend moving the election date engages the voting rights protected under s. 3 of the *Charter*. The central purpose of s. 3 is to ensure the right of each citizen to participate meaningfully in the electoral process.

Accordingly, the CEO had to consider if the applicants' observance of their religious freedom interferes with their rights to meaningful participation in the upcoming general election considering that, because of their religious beliefs, they are prevented from fully participating in the activities in the lead up to election day, and prevented from casting their ballot on election day. The record does not disclose that the CEO gave any true consideration to these issues.

The CEO also had to consider whether the exercise of his discretion to recommend a date change was an option or avenue reasonably open to him that would reduce the impact on the applicants' *Charter* rights and still allow the CEO to further the relevant statutory objectives. Again, there is a lack of evidence on the record to demonstrate that the

[7] 2008 SCC 9

[8] See, for example, *Barreau du Québec v Québec*, 2017 SCC 56

[9] 2012 SCC 12

CEO undertook the requisite proportionate balancing.

Without evidence of the CEO's consideration of the *Charter* values in play, the CEO's reasons and explanations for pressing forward with the fixed election date (focused primarily on operational or logistical concerns) are unreasonable. Although it is possible for decision-makers to implicitly consider *Charter* values, this Court cannot defer to a decision that does not provide any explicit or implicit evidence of proportionate *Charter* balancing. It is the CEO's responsibility to provide evidence of engagement with the *Charter*.

Commentary: This case is one of the latest in a growing line of jurisprudence where administrative decisions have been overturned on judicial review for a failure to demonstrate balancing of *Charter* values in accordance with the *Doré* framework.

Indeed, in another case released only three days later (*Kattenberg v Canada*, 2019 FC 1003), the Federal Court struck down a decision by the Canadian Food Inspection Agency's Complaints and Appeals Office to allow wine labels from Israeli settlements in the West Bank to say "Product of Israel", in part because it failed to address freedom of expression issues implicated by the complaint (*i.e.* the ability of people to express their political views through their purchasing decisions).

Both cases underline the importance of decision-makers acknowledging the role of the *Doré* framework (at least in concept, if not by name) and properly identifying what goes on each end of the balancing scale under that framework. Deference is likely to flow once these basic elements are reflected in a decision, but without them an administrative decision-maker is vulnerable to a finding that they acted unreasonably.

There is some tension between this search for *Doré*'s fingerprints by lower courts and the more lenient approach taken by the Supreme Court when reviewing administrative decisions for compliance with *Doré*. As recently as in *Trinity Western University v Law Society of Upper Canada*, the Supreme Court emphasized that reviewing courts applying *Doré* should consider the reasons that were offered or "could have been offered" in support of a particular decision.[10] In that case, there were no reasons provided at all, and yet the Court was still prepared to conclude that the Law Society's decision was reasonable.

To be certain, deference to reasons that are deficient (or entirely absent) presents its own problems.[11] And where *Charter* protections are seriously implicated, it is certainly understandable that reviewing courts would ideally want to see some indication that administrative decision-makers are alive to the relevant concerns and the kind of proportionality inquiry *Doré* requires. At the same time, however, requiring decision-makers who are not acting in any sort of formal adjudicative capacity (and who may have limited constitutional expertise) to apply and articulate the *Doré* analysis for every complaint engaging a *Charter* protection raises some difficult practical and methodological questions, as other courts have noted.[12] The ultimate solution to these thorny problems may require revisiting *Doré* itself—and examining, with some more nuance, how and whether it ought to apply outside the context of discretionary, adjudicated decisions.

[10] 2018 SCC 33 at para 29.
[11] See discussion of *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 in Issue No. 8 of this Case Review.
[12] See, for example, *ET v Hamilton-Wentworth District School Board*, 2017 ONCA 893

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