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Professional Regulation Newsletter

COVID-19 Issue 1, 2020

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Remote Hearings for *SPPA* Tribunals

On March 25, 2020, the Government of Ontario passed the *Hearings in Tribunal Proceedings (Temporary Measures) Act, 2020*, S.O. 2020, c. 5, Sched. 3 (the "*HTPA*") in response to the COVID-19 pandemic.

The *HTPA* gives broad powers to administrative tribunals governed by the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "*SPPA*") to control the conduct of their hearings including case management hearings, pre-hearing conferences, and alternative dispute resolution processes. In particular, the *HTPA* gives tribunals the authority to conduct a hearing in person, electronically, in writing, or by any combination of these methods, as the tribunal considers appropriate. The *HTPA* also allows tribunals to give directions and make rules and orders with respect to the format and conduct of their hearings, as well as on any ancillary matters such as the notice of the hearing, service or filing of materials, and attendance, recording, or public access at the hearing.

In the event of a conflict between the *HTPA* and the *SPPA*, any other Act or regulation, or any rules made by a tribunal under the *SPPA*, the provisions of the *HTPA* will prevail. Similarly, any order, direction, or rule made by a tribunal under the *HTPA* prevails over any other Act, including the *SPPA*, and any other rules made by the tribunal under any other Act. The *HTPA* applies to ongoing proceedings that were commenced before the *HTPA* came into force, in addition to new proceedings commenced going forward.

With respect to judicial review applications and appeals from tribunals, the Ontario Divisional Court suspended all in-person hearings through a Notice to the Profession dated March 15, 2020, but continued to hear urgent matters remotely by telephone, video conference, and in writing. Effective April 6, 2020, the Divisional Court has begun scheduling remote hearings for non-urgent matters as well. However, a party in a matter that was previously scheduled for a hearing in the coming weeks will need to obtain a new date for the hearing by contacting the Divisional Court by email, in accordance with the Divisional Court's Notice to the Profession dated April 2, 2020.

The Ontario Superior Court of Justice has also strived to maintain the open court

principle during the suspension of in-person hearings by advising that any member of the media or the public who wishes to hear or observe a remote proceeding may email their request to the local courthouse staff in advance of the hearing.

As institutions adjust to the public health directions regarding social distancing in the context of COVID-19, legislation such as the *HTPA* provides administrative tribunals with the flexibility they need to conduct their proceedings remotely. Administrative tribunals and courts alike will need to adapt to the present circumstances by reconsidering their rules and procedures in order to ensure that they can continue to carry out their mandates in the public interest with as little disruption as possible.

Alex Smith, Associate

— KC —

Virtual Commissioning and Notarizing

In response to the challenges raised by COVID-19, administrative tribunals have had to adapt their practices to changing circumstances in order to fulfill their mandates while following public health directions on social distancing. One solution is to use virtual means such as video conferencing to allow parties to remotely commission and notarize documents for remote hearings. However, these practices raise risks that needs to be managed when determining whether remote commissioning or notarizing is appropriate in the circumstances.

The commissioning of affidavits is governed by the *Commissioners for Taking Affidavits Act*, R.S.O. 1990, c. C.17 (the "*CTAA*"). Section 9 of the *CTAA* provides that every oath and declaration shall be taken "in the presence of" the person administering the oath or declaration, who must satisfy himself or herself of the genuineness of the deponent or declarant's signature. The law has been evolving on whether the words "in the presence of" mean that the parties must be physically in the same room together, however in response to the COVID-19 pandemic, the Law Society of Ontario (the "LSO") has stated that it will for the time being interpret these words as not requiring the lawyer or paralegal to be in the physical presence of the client.

While this means that legal professionals may commission documents for clients remotely (e.g. using video conferencing software), such practices may raise concerns about fraud, undue influence, capacity, duress, and other potential risks. In order to manage these risks, legal professionals should take steps such as confirming that the client consents to proceeding remotely, assessing whether the client may be subject to undue influence or duress, and staying alert to the possibility that some individuals may attempt to use these unusual circumstances to commit fraud or other illegal acts. Legal professionals will also need to consider practical matters such as how to provide clients with copies of documents executed remotely.

The notarizing of documents is governed by the *Notaries Act*, R.S.O. 1990, c. N.6. Section 3 of the *Notaries Act* provides that a notary public's powers apply to documents "that may be brought before him or her for public protestation". Due to COVID-19, the LSO has advised that it will interpret this provision as permitting legal professionals to carry out their commissioning functions and to verify signatures or marks remotely, for example using video conferencing. When using video conferencing for these purposes, legal professionals must manage the same risks at issue with remote commissioning, and must ensure that their video connection and resolution are sufficiently clear to identify the document, signature, and the individual(s) present.

However, the LSO has also advised that "[d]espite COVID-19, where verification of true and genuine copies of original

documents is required, lawyers or paralegals must continue to *physically examine* original documents against the copies." In these circumstances, it is not acceptable for the legal professional to examine the original document online, through video conferencing, or in a scanned form. This does not necessarily mean that the legal professional needs to be in the physical presence of the client, as the LSO has clarified that the original document and copy can be physically delivered to the legal professional, notarized, and then returned to the client.

The *Smarter and Stronger Justice Act, 2020* (also known as "Bill 161") is a piece of pending legislation which if it becomes law, includes proposed amendments to the *CTAA* and the *Notaries Act* which would make it expressly permissible for the powers under these Acts to be exercised remotely.

These changes will support administrative tribunals by allowing parties to prepare documents such as affidavits for use in remote hearings while social distancing measures are in place. However, when commissioning or notarizing documents remotely, it is important to remain mindful of the risks inherent in such practices so that these risks can be appropriately managed.

Alex Smith, Associate

— KC —

Divisional Court applies appellate standard of review in Professional Discipline Context

In Schoelly v. College Massage Therapists of Ontario, 2020 ONSC 1348 ("Schoelly") the Divisional Court (the "Court") applied the appellate standard of review to an appeal from a decision of the Discipline Committee of the College of Massage Therapist ("Discipline Committee") and in so doing, became one of the first decisions to consider the recent decision of the Supreme Court of Canada, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("Vavilov"), in the Professional Discipline Context.

Background

Jose Schoelly ("Mr. Schoelly") was a registered massage therapist.

The Discipline Committee found that Mr. Schoelly had committed professional misconduct by committing sexual abuse by touching a patient's genitals and by breaching a draping procedure which exposed the patient's breasts during a twisting stretch.

The Discipline Committee's reasons for decision, released in November 2018, were detailed and included a thorough credibility analysis which concluded that the patient was credible. The Discipline Committee accepted the patient's evidence over that of Mr. Schoelly. The Panel concluded that Mr. Schoelly has committee sexual abuse as defined by the *Code*.

At the Penalty Hearing of February 4, 2019, College Counsel submitted that revocation was mandatory when there is a finding of sexual abuse and referred to subparagraph 51(5)3vi of the *Code*. The Discipline Committee accepted those submissions and imposed revocation as part of the penalty. Costs of $49,750.00 were also ordered.

Mr. Schoelly appealed both the finding of misconduct with respect to sexual abuse and the penalty, as well as the costs ordered.

Section 70 of the *Health Professions Procedural Code (*"*Code*"), provides that an appeal from a decision of the Discipline Committee lies to the Court on a question of law or fact or both.

Divisional Court Decision

There were three issued before the Court on the appeal:

1. Did the Discipline Committee err in concluding that deliberate sexual touching occurred?

2. Did the Discipline Committee's Decision give rise to a reasonable apprehension of bias?

3. Did the Discipline Committee err is its decisions on penalty and costs?

In rendering its decision the Court specifically referenced the *Vavilov* case and applied the appellate standards of review confirmed by it.

As to the first issue of whether the Panel erred by concluding that deliberate sexual touching occurred, Mr. Schoelly's argument was that, contrary to the finding of the Panel, he was more credible that the patient.

The Court concluded there was evidence to support the findings of fact by the Discipline Committee. It doing so, it applied the standard of overriding and palpable error applicable in appellate review and found there was no such error on the part of the Discipline Committee. As a result, the Court upheld the Discipline Committee's findings of misconduct.

The Court also rejected Mr. Schoelly's claim of reasonable apprehension of bias, finding that no such bias had been proven.

The third issue before the Court on the Appeal was an issue in two parts (a) the costs the Member was ordered to pay and (b) the penalty imposed by the Discipline Committee.

(a) As to costs, the College had filed evidence in support of its request for costs and no evidence was filed on behalf of Mr. Schoelly with respect to his inability to pay. As a result, the Court found there was no basis to interfere with the Discipline Committee's exercise of discretion with respect to its order on costs.

(b) As to penalty, during the Appeal, counsel for the College acknowledged that revocation was not in fact mandatory in the circumstances of sexual touching in this case, as had been argued by College Counsel before the Discipline Committee.

The legislative changes mandating revocation for the type of sexual touching at issue took effect in 2017 and were not retrospective. Given that the incidents at issue tool place in 2014, the legislative changes did not apply to them and so revocation was not in fact a mandatory penalty.

However, College Counsel argued that the Discipline Committee would have ordered revocation in any event. The Court did not accept this argument and was not persuaded that if revocation had not been mandatory it would have been imposed.

In the result, the Court found that the revocation was unreasonable and substituted the Discipline Committee's decision on penalty with its own, which was a suspension which would be lifted on the date the Court's Decision was released as Mr. Schoelly had been suspended since September 2017, and so in effect he had already been suspended for two years and six months from September 2017 to March 2020.

It substituting the Discipline Committee's decision on penalty with its own, the Court reiterated the principle that only in rare and unusual circumstances will the Court interfere with the decision of a discipline committee on the question of penalty. In this case, however, the penalty Decision was based on an error of law to which the appellate standard of review of correctness applied.

Takeaways

This case serves as a reminder that, following the Supreme Court's decision in

Vavilov, the appellate standard of review will now apply to decisions of discipline committees where there is a statutory right of appeal. Deference will be granted to findings of fact, which are subject to the standard of review of palpable and overriding error. Questions of law however, will attract the more stringent correctness standard.

Accordingly, discipline committees of professional regulators must be mindful of these standards in making their decisions and crafting their reasons.

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