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Professional Regulation Newsletter

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Text Messages Taken Without Permission, Admissible in Judicial Misconduct Case

The Ontario Judicial Council ("OJC"), in discipline proceedings involving Justice John Keast, found that the admission into evidence of Justice Keast's text messages that had been obtained without his knowledge or consent did not violate his rights under the *Canadian Charter of Rights and Freedoms* (the *"Charter"*) because the individual who obtained the messages was not a state actor.

Background

In January, 2016, while seized of a case involving the Children's Aid Society for the District of Sudbury and Manitoulin (the "CAS"), Justice Keast discovered that a young person he knew was at risk of immediate harm. Between January and March, 2016, Justice Keast sent text messages regarding this issue to a personal friend who worked at the CAS. When nothing had been done with respect to the young person at risk, he sent text messages to his personal friend in which he said intemperate and inappropriate things about two CAS employees whom he felt were not doing their jobs and who were potential witnesses in the case he was presiding over.

An unnamed individual became suspicious about Justice Keast's personal involvement in the case. This individual made copies of the text messages on his phone without his knowledge or consent and gave those messages to the CAS. The CAS then brought a complaint against Justice Keast alleging judicial misconduct.

OJC Proceedings

During discipline proceedings before the OJC, Justice Keast first sought to have his text messages excluded from evidence because they were unlawfully obtained. He argued that the CAS is a state agent, and that it breached his *Charter* rights when it provided the OJC with copies of text messages that it knew had been "stolen".

He argued that the text messages therefore could not be admitted because to do so would bring the administration of justice into disrepute under s. 24(2) of the *Charter*.

The OJC rejected this argument and admitted the text messages into evidence. It noted that under s. 32 of the *Charter*, its provisions only apply to the Parliament and government of Canada, and to the legislature and government of the provinces.

In order to succeed in excluding the text messages based on his *Charter* rights, Justice Keast would therefore need to show that the search or seizure of his phone was performed by the government or someone acting on its behalf. In this case, the individual who copied the text messages from Justice Keast's phone did so in their private capacity and was not a state actor.

While the CAS may be a state actor, the OJC found that it was not involved in the search or seizure of Justice Keast's phone. All the CAS did was receive the text messages from the individual, and, after receiving legal advice, provide those text messages to the OJC in its complaint against Justice Keast. Because Justice Keast failed to show any involvement of a state actor, his *Charter* rights were not infringed and s. 24(2) was not engaged.

The OJC went on to state that even if it was required to apply s. 24(2), the context of alleged judicial misconduct favoured admission of the evidence. The OJC found that in such a context, "it is virtually inconceivable that the administration of justice would be better served by excluding the evidence of the alleged misconduct, rather than admitting it."

With the admissibility of the text messages into evidence, Justice Keast fully acknowledged his misconduct. The OJC found that Justice Keast demonstrated a "serious lack of judgment" in that, among other things, he communicated confidential information, used a personal relationship to obtain confidential information, and raised the potential for an appearance of bias against the CAS.

That being said, the OJC also noted numerous mitigating factors, including that he had an unblemished 17-year record on the Bench with no prior misconduct, was well-intentioned in that he sought to protect the interests of a vulnerable young person, his actions did not occur in the courtroom or in public, and there was no concern that he would do this again.

The OJC emphasized that the purpose of sanctioning a judge for judicial misconduct is not to punish the judge, but to repair any damage done to the integrity and repute of the administration of justice. After considering the relevant factors, the OJC ordered that Justice Keast be reprimanded, that he make certain apologies, and that he be suspended, without pay, for a period of 30 days.

Takeaways

1. Text messages (and potentially e-mails) obtained without an individual's knowledge or consent, may be admissible evidence in professional discipline proceedings

provided that they were not obtained by a state actor.

2. If the text messages were obtained by a state actor, an analysis would have to be conducted pursuant to s. 24(2) of the *Charter* as to whether they should be excluded from evidence.

Christopher Wirth, Partner
Alex Smith, Articling Student

— KC —

Provocation Found not to be a Defence to Allegations of Professional Misconduct

In *Johnson v. Law Society of British Columbia*, the British Columbia Court of Appeal recently upheld a decision of the Law Society of British Columbia Review Board which had found that provocation is not a defence to an allegation of professional misconduct, but only one of many factors to be considered in determining whether a lawyer had engaged in professional misconduct by using profanity in a courthouse hallway during an altercation with a police officer.

Background

The incident took place at the Kelowna courthouse. Martin Drew Johnson ("Mr. Johnson") was acting for a client who was being tried on an assault charge with respect to his estranged wife. Mr. Johnson met with the Crown counsel and Constable B, a potential Crown witness, in the hallway while the trial was adjourned for the afternoon break. Mr. Johnson asked Constable B to attend the former matrimonial home with his client while the client picked up a few of his belongings.

When Constable B refused, the exchange became heated, and Constable B stated, "Don't for a minute think that I don't know who you are or what you are about."

Mr. Johnson responded by cursing at the police officer. At this point their chests or stomachs were touching. Constable B arrested Mr. Johnson and sought to have him charged with assault, but the Crown Counsel Office in Prince George declined to approve any charges.

A complaint was made concerning Mr. Johnson's conduct to the Law Society of British Columbia.

A three-member hearing panel of its discipline committee unanimously found that Mr. Johnson's use of profanity constituted professional misconduct as it was "a marked departure from the conduct the Law Society expects of its members". However, the panel members were divided in their reasoning.

The majority held that provocation can never be used as a defence to uttering profanities in anger in a courthouse, as lawyers are expected to rise above such situations. The minority was of the view that while Constable B's behaviour did not excuse Mr. Johnson's conduct in this case, the use of profanities can, in some circumstances, be excused.

On appeal, the Review Board applied a correctness standard of review, which was its internal standard, to the facts and the majority held that provocation is not a defence, but only one of many possible factors to be considered on a case-by-case basis in determining whether professional misconduct has occurred. While the majority did not set out a test for what level of provocation is required to prevent a finding of professional misconduct, they deferred to the hearing panel's finding that Constable

B's words were insufficiently provocative to excuse a finding of professional misconduct.

The majority emphasized: "*No doubt such comments sting, but to excuse [Mr. Johnson's] reply to these provocative words in the circumstances of this case would send a message that it is permissible for counsel to trade an 'insult for an insult'. This cannot be countenanced.*" They added, quoting with approval from the minority of the hearing panel, that Mr. Johnson should have "*bitten his lip and walked away*."

The dissenting review board member found that Mr. Johnson's conduct, although wrongful, was excusable.

The Decision

Mr. Johnson appealed the Review Board's decision to the British Columbia Court of Appeal on two grounds: (1) the majority of the Review Board erred in applying an incorrect standard of review as it did not conduct its own correctness assessment of the facts; and (2) the decision of the majority was unreasonable.

The Court of Appeal dismissed the first argument, finding that the majority of the panel applied the internally required correctness standard based on its independent assessment of the facts found by the hearing panel.

With respect to Mr. Johnson's second argument, the Court of Appeal, applying the reasonableness standard of review, concluded that the Review Board's decision fell within a range of reasonable outcomes. The Board had taken into account all of the circumstances, including the effect of the police officer's inappropriate behaviour, that the police officer was a potential witness in the trial, and that the incident occurred in the hallway of a courthouse.

Further, the Court of Appeal stressed that benchers of the Law Society are in the best position to determine issues of misconduct and incompetence, and that courts should "*give deference to a professional body's interpretation of its own professional standards so long as it is justified, transparent and intelligible*."

Takeaways

1. Provocation will rarely be a defence to allegations of professional misconduct.

2. The courts will defer to a professional body's determination as to what constitutes professional misconduct in its profession as long as that determination falls within a range of reasonable outcomes.

Christopher Wirth, Partner
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— KC —

Delay Short of an Abuse of Process which does not Cause Substantial Prejudice to a Member does not permit a Hearing Panel to Reduce the Penalty

The Supreme Court of Canada has recently denied leave to appeal from the decision of the Ontario Court of Appeal in *Abbott v. The Law Society of Upper Canada*, 2017 ONCA 525 (C.A.), and in so doing, has confirmed that delay in the prosecution of a professional discipline matter, which falls short of an abuse of process and which does not cause substantial prejudice to the member, does not permit a hearing panel to reduce a penalty in circumstances where the presumptive penalty is that of licence revocation.

Background

John Paul Abbott ("Mr. Abbott"), an Ontario lawyer, was found guilty of professional misconduct by a panel of the Hearing Division of the Law Society of Upper Canada (the "Law Society"), in that he was found to have knowingly participated in multiple instances of mortgage fraud. The Hearing Panel imposed a penalty of revocation of his licence to practice law.

A complaint to the Law Society with respect to his conduct had been made in February of 2007, an investigation was authorized in March, 2007 and, in April, 2007, a Law Society investigator acquired production from Mr. Abbott of his client files and client trust ledgers. Over the ensuing years, other investigators asked for information, which Mr. Abbott provided.

Ultimately, an investigation report was finally issued on November 6, 2012, more than five and a half years after the investigation had been initially authorized. Six months later, a disciplinary Notice of Application was issued in April, 2013 and ultimately the hearing before the Law Society's Discipline Panel took place in August, 2014. Accordingly, it took the Law Society over seven years from when it first received the complaint, to have the matter heard.

Mr. Abbott also brought a motion for an order staying or dismissing the hearing for delay. The Hearing Panel's decision dismissing this motion was released along with its decision on the merits of the hearing on October 10, 2014.

Mr. Abbott appealed the Hearing Panel's decision to the Appeal Division of the Law Society Tribunal. One of his arguments on appeal was that as a result of delay, the penalty of license revocation should be modified.

A majority of the Law Society's Appeal Division accepted this argument and, substituted revocation with a two year suspension as a result of what they viewed to be the Law Society's inordinate and unacceptable delay in investigating and prosecuting Mr. Abbott.

The Law Society appealed the Appeal Division's decision to the Divisional Court which upheld it. The Law Society then further appealed to the Court of Appeal.

Decision

The Court of Appeal overturned the Divisional Court's decision and reinstated the Hearing Division's penalty of revocation.

In so doing, the Court of Appeal followed the decision of the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (S.C.C.), which had held that delay in the prosecution of an administrative law proceeding can only give rise to a remedy if the delay has caused significant prejudice or could amount to an abuse of process even where the fairness of the hearing had not been compromised.

In the latter circumstances, the delay must be clearly unacceptable and such that it would bring the administrative law proceedings into disrepute. This would occur only in the clearest of cases.

In applying these principles, the Court of Appeal found that while in cases where the presumptive penalty is something lesser than revocation, there may be some room to argue that significant delay may be a mitigating circumstance leading to a lesser penalty, where the presumptive penalty is that of license revocation (as it would be in

the case of mortgage fraud by a lawyer), in order to obtain a lesser penalty, a member must show that the delay was so egregious and caused him or her such personal prejudice that revoking his or her license to practice law would bring the regulatory system for lawyers into disrepute.

As such, the penalty should only be reduced where the member could show that the delay was the cause of substantial prejudice.

As a result, the Court of Appeal overturned the Divisional Court decision and reinstated the Hearing Division's decision revoking Mr. Abbott's licence and, as noted above, the Supreme Court of Canada has now denied leave to appeal.

Takeaways

1. In professional discipline matters, where the presumptive penalty for the misconduct in question is licence revocation, a hearing panel is only justified in reducing the penalty from revocation to a lesser penalty where the delay is so egregious as to cause the member such personal prejudice that revoking the member's licence would bring the regulatory system into disrepute. This will be a high burden to meet.

2. The circumstances will be rare when delay will permit a discipline panel to reduce the penalty where the presumptive penalty is revocation.

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— KC —

Failure to Grant an Adjournment Leads to Overturning of Decision to Revoke Licence

In *Spence v Ontario College of Teachers* (2018 ONSC 3335), the Divisional Court overturned a decision to revoke a teacher's license and remitted the matter back to the Discipline Committee for a new hearing, holding that the Member had been denied procedural unfairness by the refusal of his second adjournment request, despite medical evidence which reflected his serious mental health diagnosis.

Background

Christopher Michael Spence ("Mr. Spence"), was a member of the Ontario College of Teachers (the "College") and had been employed as the Director of Education by the Toronto District School Board (the "TDSB"). Disciplinary proceedings were brought against Mr. Spence by the College, alleging that he had plagiarized published and oral work from 2002 to 2013. The College and Mr. Spence exchanged numerous emails and letters addressing upcoming hearing dates and Mr. Spence's inability to attend the proceedings. A medical note from Mr. Spence's family doctor was provided to the College and the Discipline Committee. It indicated that Mr. Spence was in a state of precarious mental health and was unable to attend the hearing as a result.

The note also indicated that Mr. Spence would be undergoing a psychiatric assessment. Mr. Spence also wrote College counsel advising that a medical report would be provided following his psychiatric assessment and asking for an adjournment of the hearing.

On August 24, 2016, the Discipline Committee met and granted a short adjournment on condition that Mr. Spence provide, by October 19, 2016, the report from the physician conducting the psychiatric assessment, consent allowing the

College to communicate directly with that physician, and that the hearing reconvene no later than October 31, 2016.

Mr. Spence met the first two conditions. The psychiatric report diagnosed Mr. Spence as having a major depressive disorder which had significantly impacted his functionality.

The hearing was then scheduled to reconvene on October 21, 2016, however, Mr. Spence asked for a second adjournment of the hearing stating he was unable to participate in it due to his mental health.

Despite having received Mr. Spence's consent, the College did not contact the physician who had conducted his psychiatric assessment. Instead, an internet search was conducted by a law clerk on behalf of the College's counsel which found that Mr. Spence was working as a Director of Youth Engagement for an organization in Chicago. However, the search provided no information regarding his role. The results of this search were not provided to Mr. Spence so that he could respond to it.

The Discipline Committee rejected Mr. Spence's request for a second adjournment, on the basis that the adjournment was not supported by his medical issues and evidence, that it would unduly prejudice the College, and that it was in the public interest to have the hearing conducted in a timely manner. The hearing then proceeded despite Mr. Spence not being present. The Discipline Committee ultimately found Mr. Spence guilty of professional misconduct and revoked his teaching license.

Mr. Spence appealed the Discipline Committee decision to the Divisional Court, arguing that he was denied procedural fairness as: (1) the Discipline Committee failed to recognize his medical evidence; (2) the Discipline Committee came to a conclusion which lacked supporting medical evidence; and (3) the Discipline Committee had failed to provide him with the internet search evidence so that he could respond to it.

Decision

In order to determine the requisite level of procedural fairness and whether it had been met, the Court considered the following factors: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choice of procedure selected by the tribunal.

The Court held that while the Discipline Committee has a broad discretion to decide whether to adjourn its proceedings, it is limited by the rules of procedural fairness. In this case, the Discipline Committee failed to consider the entirety of the medical evidence and incorrectly dismissed the medical report which demonstrated why Mr. Spence was unable to participate in the hearings. If the College was skeptical of this medical evidence or needed further clarification, it could have requested additional information from Mr. Spence's doctor as it had been granted permission to do so.

The Court also rejected the evidence of the internet search concerning Mr. Spence's potential current employment. The Court found that the Discipline Committee had minimal information regarding Mr. Spence's employment and improperly relied on information from a basic internet search despite the medical evidence, to support its conclusion that Mr. Spence was able to attend the hearing.

Additionally, the College's failure to disclose the internet search results to Mr. Spence so that he could respond to it was found to be procedurally unfair.

The Court also commented that if the adjournment had been granted, as Mr. Spence was no longer employed by the TDSB, he posed no risk to his school community.

As a result, the Court found that the second adjournment should have been granted and that Mr. Spence had not been afforded procedural fairness given the significance the discipline proceedings had for him - specifically the potential revocation of his teaching licence. The Court set aside the Discipline Committee's decision and remitted the matter back to it for a re-hearing.

Takeaways

1. Tribunals must remember that while they have a broad discretion to decide whether to grant an adjournment, that discretion is subject to the rules of procedural fairness.

2. A medical report indicating that a person suffers from a serious mental health condition is evidence that should not be taken lightly and should be considered in its entirety, especially when deciding to proceed with or to adjourn a disciplinary hearing.

3. Evidence which a tribunal intends to rely upon in reaching its decision must be disclosed to the member so that the member has an opportunity to respond to it.

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Professional Misconduct Allegations Dismissed Over Regulator's Failure to Accommodate

In *Law Society of Ontario v. Burtt* (2018 ONLSTH 63), the Law Society Tribunal (the "Tribunal") held that the Law Society of Ontario (the "LSO") had failed to accommodate a lawyer's disability "to the point of undue hardship" and accordingly, dismissed allegations of professional misconduct against him.

Background

Jeffrey Burtt ("Mr. Burtt"), a practising lawyer since 1990, was involved for the second time in disciplinary matters for failing to cooperate with an investigation commenced by the LSO. The LSO Rules stipulate that a lawyer must promptly and completely respond to an investigator.

In both matters, Mr. Burtt underwent psychological assessments which provided evidence that his mental health condition hindered his capability to effectively respond to the requests of the LSO.

The medical report further indicated that the complaints made against Mr. Burtt and the regulatory requests to comply with the investigation caused him to "freeze". The investigators made many efforts to obtain the information and documentation required to complete the investigation, such as providing Mr. Burtt with extensions of time and their willingness to accept a response from Mr. Burtt below the regulatory standards.

Mr. Burtt argued that he suffered from a disability within the meaning of the *Human Rights Code*, which interfered with his ability to comply with his obligations to the LSO.

He further claimed that the LSO could have provided him with accommodation by requesting documentation and information in an alternative manner.

The LSO contended that Mr. Burtt's failure to co-operate with the investigation amounted to professional misconduct which could not be saved by a defence of mental illness. The LSO also argued that the investigators were aware of Mr. Burtt's condition and reasonably accommodated him throughout the investigation by giving him extra time and by permitting some deviation from the *Rules of Professional Conduct*.

Decision

The Tribunal dismissed the professional misconduct allegations against Mr. Burtt because the LSO had not reasonably accommodated his disability throughout the investigation.

The Tribunal rejected the LSO's argument that it reasonably accommodated Mr. Burtt's disability and found that the LSO had failed to meet its onus of demonstrating discussions, assessments and actions were taken to accommodate Mr. Burtt, "to the point of undue hardship." Mr. Burtt's regulatory obligation to co-operate with the LSO was to be considered in the circumstances of his medical diagnosis which hindered his ability to respond promptly and completely.

The Tribunal was satisfied on a balance of probabilities that Mr. Burtt's mental illness based on the medical assessments was the cause of his "freeze" and inability to respond to the demands of the LSO by providing a written response.

Based on these facts, the Tribunal found that although Mr. Burtt failed to follow through with his promises to provide a written response due to "freezing", he did not attempt to avoid or escape the demands of the investigation. Mr. Burtt's successfully argued that alternative approaches existed for the investigators to accommodate his disability.

Although the Tribunal acknowledged the accommodation attempts by the LSO, these efforts were not enough. The Tribunal suggested potential alternatives to accommodate Mr. Burtt in order to complete the investigation, such as conducting oral interviews which could then be reduced to writing or having investigators go to Mr. Burtt's law office to obtain the electronic client files.

The Tribunal emphasized that the LSO and its trained investigators knew or ought to have known of Mr. Burtt's medical condition, as it not only had access to the materials from Mr. Burtt's previous discipline proceedings including his psychological assessment, but also their interactions and experiences with Mr. Burtt throughout this matter ought to have been sufficient to alert them to his need for accommodation.

Takeaways

1. Regulators should be prepared to offer alternatives in order to provide reasonable accommodation to their members with existing disabilities and mental health conditions who are subject to disciplinary investigations and proceedings.

2. A disability such as a mental illness can successfully be raised as a defence against professional misconduct allegations related to fulfilling obligations to the Regulator if it and its investigators knew or

ought to have known of the disability and subsequently failed to provide accommodation for it.

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Doctor Issued Certificate of Registration Following Sexual Assault Charges Acquittal

In *AC v. College of Physicians and Surgeons of Ontario*, 2017 CanLII 44047, the Health Professions Appeal and Review Board (the "Board") overturned a decision of the Registration Committee of the College of Physicians and Surgeons (the "College") refusing to issue a certificate of registration to a doctor who had been acquitted of sexual assault charges.

Background

The doctor had been charged criminally with having drugged and sexually assaulted two women in two separate incidents. The second incident involved a co-accused doctor. Following the charges, he was placed on a paid leave of absence at McMaster University, where he was completing a plastic surgery residency program. The doctor was subsequently acquitted of all criminal charges.

The doctor applied for a new certificate of registration authorizing his postgraduate education. The College's Registration Committee (the "Committee") refused to issue the new certificate finding that the doctor's past and present conduct did not afford reasonable grounds for belief: (1) that he would practice medicine with decency, integrity and honesty and in accordance with the law; and (2) that he has sufficient knowledge, skill and judgment to engage in the kind of medical practice authorized by the certificate. The doctor appealed this decision to the Board.

Decision

The Board concluded that the Committee had exercised its powers improperly, on three grounds.

Firstly, the Board concluded that there was a reasonable apprehension of bias in that one of the members of the Committee had also sat on the College's Inquiries, Complaints and Reports Committee ("ICRC"), which had referred the matter to the Discipline Committee. This created an apprehension of bias because the Committee used the fact that the doctor had been referred to the Discipline Committee as one of the reasons that it was not satisfied that his past and present conduct afforded reasonable grounds to believe that he would practice medicine with decency, integrity and honesty.

The Board further concluded that there was a reasonable apprehension of bias in that one of the counsel for the Committee at the relevant time was also a prosecuting counsel with respect to the doctor's hearing before the Discipline Committee.

The Board concluded that this undermined the Applicant's legitimate expectation of a fair and transparent proceeding, noting that "it is a well-established principle of law that not only must justice be done, it must be seen to be done."

Secondly, the Board found that the Committee unfairly made a finding of credibility based on a written record, favouring the complainants' version of events over that of the doctor's and gave little weight to the doctor's personal references, and his psychiatric assessment report (which had stated that he did not

display attitudes that support or condone sexual violence).

The Board noted the difficulties inherent in testing the reliability of a complainant who does not testify, and found that the Committee had failed to show appropriate deference to findings of fact and credibility made by the trial judge in the criminal proceedings. Although the Board acknowledged that the standard of proof in criminal proceedings is higher, it maintained that this does not mean that a trial judge's findings are to be wholly discounted when addressing the same questions of fact. In this case, the trial judge had found that the complainant's testimony was unreliable in some aspects, particularly regarding the timing and surrounding details of the alleged sexual assaults.

The Board noted that "while the [Committee] is correct that the Applicant's acquittal does not mean that the alleged conduct did not occur, it is also true that the decision in no way establishes that the conduct *did* occur. What the Board *can* glean from the judgment, without controversy, is that the Court found reasonable grounds to doubt that the Applicant committed the criminal offences for which he was charged." The Board acknowledged that in some circumstances, a decision to not register an applicant following an acquittal at a criminal trial may be warranted – for example, where there are new allegations that raise concerns about suitability for medical practice; where there is additional evidence not available to the court that could lead to a finding of misconduct in disciplinary proceedings; or where there is persuasive evidence which may not have met the criminal burden of proof. In this case, no such scenarios applied.

Thirdly, the Board concluded that the Committee's process failed to include all relevant information in the possession of the College as the College had not disclosed to the Committee or the doctor, witness information that countered the inferences made by the Committee which had lead it to largely disregard the doctor's psychiatric assessment.

The Board also emphasized that in this case, because the doctor's entitlement to practice medicine was at stake, the Committee owed him a high degree of procedural fairness.

Accordingly, the Board overturned the Registration Committee's decision and directed the College to issue a certificate of registration to the doctor. The College did not appeal this decision.

Takeaways

1. A member of the ICRC, which makes a decision on whether to refer a matter to discipline, should not be a member of the discipline committee which makes the decision concerning the merits of the decision. Counsel prosecuting a member before one committee may risk a determination of reasonable apprehension of bias if that same lawyer acts as legal counsel to another committee with respect to the same member.

2. A registration committee should ensure that it has all relevant information in the College's possession when assessing whether to issue a certificate of registration.

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Supreme Court finds Standard of Review from Discipline Committee Decision is Reasonableness

In *Groia v Law Society of Upper Canada*, 2018 SCC 27, the Supreme Court of Canada overturned a finding by the Law Society of Upper Canada (the "LSUC" now "Law Society of Ontario") of professional misconduct based on a lawyer's conduct in court, but in so doing confirmed that the standard of review to be applied to a decision of the LSUC's Discipline Committee is that of reasonableness.

Background

The misconduct at issue in this case arose from Joe Groia ("Mr. Groia")'s in-court behaviour while defending John Felderhof, an officer and director of Bre-X Minerals Ltd., against insider trading and other charges with respect to one of the largest frauds in the history of the Canadian capital markets.

Throughout the trial, Mr. Groia repeatedly made sarcastic remarks and personal attacks toward the Ontario Securities Commission's ("OSC") prosecutors, accusing them of prosecutorial misconduct. He alleged that the OSC prosecutors were using a "conviction filter" and a "win at any costs mentality", that they were motivated by an "animus towards the defence", and that they were making it difficult for his client to receive a fair trial. These allegations resulted from ongoing disputes between Mr. Groia and the OSC about disclosure and the admissibility of documents. The disagreement was largely attributable to what was found to be Mr. Groia's honest, but mistaken understanding of the law of evidence and the role of the prosecutor.

It was not until the 57th day of the trial that the judge directed Mr. Groia to stop repeating these allegations and to instead simply state each time that he was making "the same objection". Mr. Groia mostly complied with these instructions. At one point during a hiatus in the trial, the OSC brought a judicial review application seeking the removal of the trial judge. The OSC argued that the trial judge had lost jurisdiction by committing a number of errors and creating a reasonable apprehension of bias by failing to properly deal with Mr. Groia's uncivil behaviour. The Superior Court dismissed the application, and the Ontario Court of Appeal dismissed the OSC's appeal. However, both courts expressed criticisms of Mr. Groia's behaviour, and one described Mr. Groia's submissions as "descend[ing] from legal argument to irony to sarcasm to petulant invective". At the same time, both courts also acknowledged that the OSC was not blameless for its own behaviour. The second phase of the trial resumed with new counsel appearing for the OSC. At the end of the trial, Mr. Felderhof was acquitted on all charges.

On its own motion, the LSUC initiated an investigation into Mr. Groia's conduct during the Felderhof trial, and brought disciplinary proceedings against him on the basis of alleged incivility. A LSUC hearing panel found Mr. Groia guilty of professional misconduct, ordered him to pay $247,000.00 in costs and imposed a two-month suspension on his license to practice law.

On appeal, the LSUC Appeal Panel found that the Hearing Panel had erred in relying on the Felderhof judicial review findings in coming to its decision given that Mr. Groia was not a party to the judicial review proceedings and had made no submissions in those proceedings in his own defence. The Appeal Panel considered the professional misconduct allegations against Mr. Groia *de novo*, and articulated a series

of contextual factors for assessing when a lawyer's in-court incivility amounts to professional misconduct.

These factors included what the lawyer said, the manner and frequency in which it was said, and the presiding judge's reaction. With respect to what the lawyer said, allegations that are either made in bad faith or without a reasonable basis would amount to professional misconduct. After assessing the factors, the Appeal Panel found Mr. Groia guilty of professional misconduct, but reduced his suspension to one month and decreased the costs award to $200,000.00.

Mr. Groia appealed the LSUC Appeal Panel's decision to the Divisional Court which expressed concerns that the Appeal Panel's approach did not sufficiently protect resolute advocacy, but nevertheless upheld the decision as being reasonable. Mr. Groia's further appeal to the Ontario Court of Appeal was dismissed.

Mr. Groia then appealed to the Supreme Court of Canada, which was divided both in its reasoning and with respect to the disposition of the appeal.

Decision

The majority of the Supreme Court allowed the appeal. The majority held that the reasonableness standard of review applied and that there is a presumption of deference to decisions of specialized administrative bodies interpreting their own statutes or statutes closely connected to their function. The majority did not find that presumption to be rebutted in this case.

In order to determine whether the Appeal Panel's decision was reasonable, the majority first evaluated its approach. The majority was of the view that the Appeal Panel's multifactorial contextual approach was reasonable. It recognized the importance of civility while balancing it with a lawyer's other professional obligations – specifically, the duty of resolute advocacy, which requires a lawyer to "raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case". The Appeal Panel's approach was also found to be sufficiently flexible to assess a lawyer's behaviour in a wide range of context-specific situations, while being sufficiently precise so as to guide lawyers and LSUC disciplinary tribunals in determining the boundaries of uncivil conduct. Further, the majority was of the view that the Appeal Panel's approach reasonably balanced lawyers' expressive rights with the LSUC mandate.

However, despite its view that the Appeal Panel's approach was reasonable, the majority of the Supreme Court held that the Appeal Panel's finding of professional misconduct was unreasonable. According to the majority, the Appeal Panel, contrary to its own approach, used Mr. Groia's honest but mistaken legal beliefs to reach the conclusion that his allegations, while made in good faith, lacked a reasonable basis.

Interestingly, the three dissenting judges on the Supreme Court also agreed with the majority that the reasonableness standard of review should be applied. However, they disagreed with the majority's application of the reasonableness standard, and maintained that the appeal should be dismissed.

In the view of the dissenting judges, the majority misstated the Appeal Panel's approach and re-weighed the evidence in order to reach a different result. In their view, there was no basis to interfere with the Appeal Panel's finding of professional misconduct in this case.

The dissent was concerned that the majority was really conducting a disguised correctness review which might lead to certain implications that would follow from the majority's decision. Firstly, it might immunize lawyers from professional sanctions whenever their allegations are based on honestly held legal beliefs, and the more outrageous the lawyer's legal belief is, the more justified his allegations of impropriety become.

Secondly, it may validate uncivil conduct. In the dissent's view, Mr. Groia's behaviour went far beyond the boundaries of resolute advocacy, and "it is when lawyers are tested with challenging situations that the requirements of civility become most important." Thirdly, the majority's decision will have a negative impact on the culture of the legal profession and the administration of justice. The dissenting judges were also worried that the majority's concerns with the Appeal Panel's findings stemmed in part from the severity of the penalty that was given to Mr. Groia, namely, a one-month license suspension and a $200,000.00 cost award.

Takeaways

1. The standard of review on an appeal from a decision of a discipline committee will presumptively be reasonableness when it is interpreting its own statute or one closely connected to its function.

2. Even judges of the Supreme Court of Canada can differ on the application of the reasonableness standard in certain circumstances.

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