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# Professional Regulation Newsletter

Summer 2022

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### Supreme Court of Canada Clarifies When Delay in Administrative Proceedings is an Abuse of Process

In *Law Society of Saskatchewan v. Abrametz,* 2022 SCC 29, the Supreme Court of Canada provided detailed guidance on the test for determining whether delay in an administrative proceeding amounts to an abuse of process and when it is appropriate to grant a permanent stay of the proceeding as a result of the delay.

***Background***

In the Spring 2021 issue of this newsletter we discussed the decision of the Saskatchewan Court of Appeal in this matter, in which we noted that in 2012, the Law Society of Saskatchewan (the "LSS") had commenced an investigation into one of its member lawyers (the "Member") in 2012 and commenced discipline proceedings against him in 2015. In 2018, the Member was found guilty of four charges of conduct unbecoming a lawyer, and in 2019, disbarred without a right to apply for readmission for almost two years. During the disciplinary proceedings, the Member applied for a stay of the proceedings on the basis of inordinate delay amounting to an abuse of process. His application was dismissed by the LSS Hearing Committee. The Member appealed to the Saskatchewan Court of Appeal, which dismissed the conduct part of his appeal but allowed his appeal of the stay decision. The Court of Appeal granted the stay, concluding that there had been inordinate delay which resulted in significant prejudice to the Member such that the public's sense of decency and fairness would be affected and the LSS's disciplinary process brought into disrepute. The LSS appealed to the Supreme Court of Canada.

### *The Supreme Court of Canada's Decision*

The Supreme Court of Canada began by clarifying the standard of review applicable to questions of procedural fairness and abuse of process in a statutory appeal. The Supreme Court cited its prior decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*"), where it held that when the legislature provides for a statutory appeal mechanism from an administrative decision maker to a court, this indicates that appellate standards are to apply. The Supreme Court also confirmed that appellate standards apply to questions of procedural fairness which are dealt with through a statutory appeal mechanism. The appeal in this case was a statutory appeal under *The Legal Profession Act, 1990*, S.S. 1990-91, c. L-10.1. Accordingly, the standard of review was correctness for questions of law and palpable and overriding error for questions of fact and of mixed fact and law. Whether there has been an abuse of process is a question of law, meaning the applicable standard of review is correctness.

The Supreme Court also cited its previous decision of *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 ("*Blencoe*") for the principle that, in administrative proceedings, abuse of process is a question of procedural fairness. As a corollary to their duty to act fairly, administrative decision makers have the power to assess allegedly abusive delay.

In *Blencoe*, the Supreme Court held that delay in administrative proceedings can constitute abuse of process in two ways. First, the fairness of a hearing can be compromised where delay impairs a party's ability to answer the complaint against them, such as when memories have faded, essential witnesses are unavailable, or evidence has been lost. Second, even when there is no prejudice to hearing fairness, an abuse of process may occur if significant prejudice has come about due to inordinate delay. In this case, only the second category was at issue.

The Supreme Court in *Blencoe* set out a three-part test to determine whether delay that does not affect hearing fairness nonetheless amounts to an abuse of process. First, the delay must be inordinate. Second, the delay must have directly caused significant prejudice. When these two requirements are met, courts or tribunals will proceed to a final assessment of whether the delay amounts to an abuse of process. Delay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute.

After setting out these principles, the Supreme Court briefly addressed its prior decision in *R. v. Jordan*, 2016 SCC 27 ("*Jordan*"), which dealt with delays in criminal proceedings. While recognizing that inordinate delay in administrative proceedings is contrary to the interests of society, the Supreme Court confirmed that *Jordan* does not apply to administrative proceedings, as it dealt with the right to be tried within a reasonable time under s. 11(b) of the *Canadian Charter of Rights and Freedom*s. No such *Charter* right applies to administrative proceedings and there is no constitutional right outside the criminal context to be "tried" within a reasonable time.

The Supreme Court then detailed the three-part test from *Blencoe*. For the first part of the test (whether the delay was inordinate), the Supreme Court noted that the mere fact that a process took considerable time does not in itself amount to inordinate delay. Rather, a court or tribunal should consider the following non-exhaustive contextual factors: (a) the nature and purpose of the proceedings, (b) the length and causes of the delay, and (c) the complexity of the facts and issues in the case.

For the second part of the test (whether the delay directly caused significant prejudice), the Supreme Court reiterated that delay

alone is not sufficient to lead to an abuse of process. Rather, there must be actual detriment to the individual. Further, disciplinary proceedings necessarily disrupt an individual's life. The necessary disruption created by the mere fact of a proceeding is not prejudice that can be said to have directly resulted from the delay in the proceeding. Prejudice is a question of fact. It can include things like significant psychological harm, stigma, disruption to family life, or loss of work or business opportunities. Lengthy delays in a proceeding can exacerbate such prejudice and fulfill this part of the *Blencoe* test.

The third part of the test (the court or tribunal's final assessment) is only addressed when the first two requirements have been met. To assess whether the delay amounts to an abuse of process, the court or tribunal must consider whether the delay is manifestly unfair to the party to the proceedings or in some other way brings the administration of justice into disrepute.

Next, the Supreme Court discussed the available remedies when an abuse of process is found. Remedies for abuse of process can serve several purposes, such as compensating the applicant for the prejudice caused by the delay, serving as an incentive for the decision maker to address any problems of systemic delay, or expressing the court or the tribunal's concern relating to delay in the administrative system.

A permanent stay of proceedings is the final or ultimate remedy for abuse of process. It should only be granted in the clearest of cases where the abuse falls at the high end of the spectrum of seriousness. A balance must be struck between the public's interest in ensuring that tribunals follow fair procedures and its interest in the resolution of administrative cases on their merits. The court or tribunal must ask itself whether going ahead with the proceeding would result in more harm to the public interest than if the proceedings were permanently halted. In conducting this inquiry, the court or tribunal may have regard to whether other available remedies for abuse of process, short of a stay, would adequately protect the public's interest in the proper administration of justice. Where the allegations are more serious, there will be a greater interest in adjudicating the case on its merits, and a stay will be more difficult to obtain. Other remedies for abuse of process short of a stay of proceedings may include a reduction in sanction, or costs.

The Supreme Court then applied these principles to the facts of the case and held that the Saskatchewan Court of Appeal correctly determined the standard of review, but failed to apply it properly. The Court of Appeal made findings of fact not available to it and substituted its own views when it should have afforded deference to the Hearing Committee's findings.

In applying the three-part test from *Blencoe*, the Supreme Court first found that the delay was long, but not inordinate. The Court of Appeal failed to afford deference to the Hearing Committee's findings that the delay, while lengthy, was reasonable given the complexity of the issues and the fact that part of the delay was attributable to the Member and his counsel. Instead, the Court of Appeal inappropriately made its own findings of fact by analyzing the evidence and substituting its own view regarding the scale and complexity of the investigation and proceedings.

Second, the Supreme Court found that there was no significant prejudice to the Member. The Hearing Committee made no palpable and overriding error in its conclusion that although the Member experienced some stress and reputational damage from the proceedings, there was insufficient evidence of significant prejudice directly caused by the delay in those proceedings.

Given the Supreme Court's conclusion that the Hearing Committee did not err in its finding that the first and second requirements of the *Blencoe* test were not met, there was

no need to resort to the third part of the test or to consider remedies. That being said, the Supreme Court did briefly comment on how the LSS's actions were not above reproach. The Supreme Court emphasized the importance of justice being done in a timely way and expressed its view that the LSS should make every effort to safeguard procedural fairness and that inadequate resources is not an excuse for inordinate delay.

Given the foregoing, the Supreme Court set aside the Court of Appeal's judgement and remitted the matter back to it to address the outstanding grounds of the appeal.

***Takeaways***

The Supreme Court's decision provides a useful step-by-step analysis for determining whether a delay in an administrative proceeding amounts to an abuse of process and, if so, whether a permanent stay of the proceeding is an appropriate remedy. Going forward, it will serve as a framework for administrative tribunals tasked with assessing a delay in their own proceedings. The Supreme Court's comments also emphasize that although the right to be tried in a reasonable time under s. 11(b) of the *Charter* does not apply to administrative proceedings, the timely adjudication of administrative matters is important, making it clear that administrative tribunals are responsible for upholding procedural fairness while resolving cases (in a timely fashion) on their merits in accordance with the public interest. It should also be noted that this applies to all stages of the administrative proceedings including the investigation stage.

Lastly, whether regulators are using their resources efficiently will be considered in determining whether there has been inordinate delay and having insufficient resources is not an excuse as administrative tribunals must ensure the integrity of their process by devoting sufficient resources to it.

Christopher Wirth, Partner
Alex Smith, Associate

— KC —

**The Court of Appeal Overturns Criminal Conviction Due to a Trial Judge Having a Reasonable Apprehension of Bias**

In *R. v. Cowan*, 2022 ONCA 432, although in the criminal law context, the Court of Appeal made it clear that there must be a clear personal separation between College Counsel and the members of a Discipline Panel so as not to create a reasonable apprehension of bias.

***Background***

In 2012, Andrew Cowan ("Mr. Cowan"), was charged with first degree murder.

The Crown Attorney for his case and the trial judge had met during their first appearance on it in 2012 and since then, the Crown attended social functions at the trial judge's home on seven or eight occasions and was a regular fixture at her family reunions.

The Crown disclosed this friendship to the defence as soon as he learned that the trial judge would be presiding over the trial including by raising it on the record after the trial judge's opening instructions to the jury. Based upon those representations, counsel for the defence consented to proceeding before the trial judge.

However, unbeknownst to the defence, the Crown and the trial judge had previously agreed because of their friendship, not to appear on the same case after an appeal in 2016 less than two years before the appellant's trial. Further, the Crown did not tell the appellant that he had attempted to have the case reassigned to another Crown after learning that the trial judge would preside over the trial. This information was not disclosed to the defence prior to it making the decision to consent to proceeding with the trial before the trial judge.

In 2017, following a trial by judge and jury he was convicted of second degree murder. Following this, the trial judge imposed a life sentence with a ten year period of parole ineligibility. Mr. Cowan appealed his conviction.

***The Court of Appeal Decision***

At the Court of Appeal, Mr. Cowan submitted fresh evidence concerning the relationship between the Crown and trial judge including the following circumstances which arose immediately after his conviction and prior to his sentencing:

(a) Almost immediately after the verdict and jury recommendations on sentence were completed, the judge contacted the Crown to go for a drink;

(b) Upon arriving at the lounge, the judge suggested that they move to a table by the window and they were joined by the prosecution team which included an articling student;

(c) During drinks, the judge twice commented "as long as Mr. Ducharme [defence counsel] doesn't walk in." She also reported that she had asked other judges about Mr. Ducharme before the trial began;

(d) They briefly discussed the case, including the judge and Crown agreeing that the jury was intelligent and the Crown remarking that the verdict was fair. The judge also poked fun at the Crown for not being able to control his facial expression in court. After drinks the trial judge and the Crown went to dinner together at a different restaurant;

(e) Drinks with the judge made the articling student uncomfortable, such that she immediately reported it to her principal the next morning;

(f) It was not until the first appearance in court after disclosure of the post-verdict drinks that the Crown disclosed to defence counsel that he and the judge went to dinner at the sports bar at the judge's hotel after drinks were over;

(g) Based on these events, the Crown was suspended for ten days with pay. After arbitration, his suspension was reduced to five days.

Mr. Cowan argued that the trial Crown had made inadequate disclosure to defence counsel of the nature and extent of his friendship with the trial judge which thereby prevented defence counsel from properly considering whether to object to the trial judge presiding at trial. In addition, Mr. Cowan argued that the trial judge's decision to attend a post-conviction, but pre-sentence, drinks meeting with the prosecution team at a local restaurant immediately after the verdict was announced and the trial judge's decision immediately thereafter to go to dinner with only the trial Crown, also established a reasonable apprehension of bias.

The Court of Appeal concluded that the potential for a biased trial is relevant information that can assist an accused to make full answer and defence and needs to be fully and fairly disclosed to defence counsel. In that regard, the Crown's agreement not to appear before the trial judge and his attempts to have the file reassigned indicated a real risk that the defendant was stepping onto a tilted field and that the fairness of his trial depended on him knowing this information which the Crown should have advised him of. By failing to do so, the Crown lost sight of his responsibility to the administration of justice in the process. In that regard, the explicit agreement between the Crown and the trial judge, suggested a real threat of bias and indicated the Crown's understanding that his presence before the trial judge could jeopardize Mr. Cowan's right to a fair trial. As this

information was never communicated to Mr. Cowan, he was lulled into believing that the fairness of his trial was not in doubt and accordingly, the Court of Appeal set aside Mr. Cowan's conviction as a result of a miscarriage of justice.

The Court of Appeal also considered the fact that following the conviction, the trial was not over as sentencing still needed to be determined and that within minutes of the jury's verdict, the trial judge had called the Crown to suggest they meet for a drink and did not invite anyone else. The trial judge then agreed to join the Crown, a Crown articling student and a senior police officer involved in the trial at a nearby restaurant and did not invite defence counsel.

Once inside the restaurant together, the trial judge referred to the absence of defence counsel at least twice and the trial was discussed. After the drinks meeting broke up, the Crown called the trial judge and invited her to dinner, which she accepted and they went to a different restaurant. The four persons drink meeting, in a public setting lasted about an hour whereas the two person dinner, in a public setting lasted about two hours.

As a result of these facts, in the Court of Appeal's view, this would inevitably lead a reasonable and right minded person to conclude that the trial judge might have been biased in the very serious trial that had just finished. In this regard, the Court of Appeal also commented on the evidence provided from the Crown articling student who had started working less than a month prior to the jury verdict. She had been invited to and attended the drinks meeting that night and in the Court of Appeal's view she was therefore an informed person who viewing the matter realistically and practically and having thought the matter through provided relevant evidence which included "I knew that there was something odd about the circumstances for sure because the case had not been completed. And I also knew that the trial judge would be determining the parole ineligibility of the accused. So that definitely was uncomfortable and felt wrong for me."

The Court of Appeal agreed with the articling student's sense of what was right and consequently also allowed Mr. Cowan's appeal on the basis that the trial judge had a reasonable apprehension of bias, following which it ordered a new trial.

***Takeaways***

Although this occurred in the criminal law context, this case demonstrates the importance in the professional regulation context of College Counsel fully disclosing to a member any personal relationship they may have with any members of a discipline panel so that the member can make a fully informed decision as to whether to object or consent to the hearing proceeding before that panel.

It is also clear that members of discipline panels must be cautious in their conduct and clearly refrain from any direct social engagement with the parties or their counsel prior to the conclusion of a hearing.

As a practical matter, it is best for both College Counsel and for members of a panel, not to appear together on a hearing where they have a close personal relationship as was the case here, so as to avoid any appearance of unfairness.

Christopher Wirth, Partner

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**Court of Appeal Upholds Conviction Despite Less Than Ideal Zoom Trial**

In a decision which may have implications for professional regulatory tribunals, the Ontario Court of Appeal in *R. v. Moolla,* 2022 ONCA 433 (C.A.), upheld a trial judge's decision convicting an accused of criminal conduct despite acknowledging that the manner in which his trial was conducted by Zoom from a correctional institution was far from ideal.

***Background***

The accused, Mikail Moolla ("Mr. Moolla") was charged with child luring, making sexually explicit material available to a child and a breach of his probation.

Mr. Moolla was in detention at a Correctional Institute. He elected trial by judge alone and consented to that trial proceeding virtually over Zoom rather than attending at the courthouse during the COVID-19 pandemic.

Unfortunately, the arrangements at the Correctional Institute for his Zoom trial were far from ideal as he was placed in a large room which included laundry facilities, in which Correctional employees moved about in the immediate vicinity while court was in session and while Mr. Moolla was trying to follow the proceedings or testify on his own behalf.

In addition to the traffic of correctional employees and loud noises, there were times when it was difficult for the trial judge to see or hear Mr. Moolla, which was caused in part by the seating arrangement provided for him by the correctional authorities. Specifically, he was seated on a small stool and the microphone used by him was located at a position on the equipment that made it difficult for him to be heard when sitting up straight and looking into the camera.

Despite this, counsel and the trial judge did their best to cope with these problems as they arose. However, there were interruptions and distractions which increased as the trial proceeded over three days.

At the conclusion of the trial, the trial judge found Mr. Moolla guilty of all three charges. He then appealed his convictions to the Court of Appeal.

***Court of Appeal Decision***

At the Court of Appeal, Mr. Moolla's arguments focussed on the manner in which the trial proceeded which was contended to be fundamentally unfair. He argued that the distractions and interruptions during the Zoom trial were so significant that it deprived him of the opportunity to fully participate in the trial and to fairly present his defence to the charges. As well, the circumstances under which the trial was conducted so comprised the appearance of fairness of the proceeding that it resulted in a miscarriage of justice even if those circumstances could not be said to have impaired his ability to present his defense.

The Court of Appeal acknowledged that the arrangements made for Mr. Moolla's participation in his Zoom trial left much to be desired, but it was not satisfied that he had established that those failings impaired his ability to present his defence or otherwise resulted in any unfairness to him.

In that regard, Mr. Moolla was represented at trial by competent counsel who, on his behalf, had agreed to proceed by way of a Zoom trial. When problems developed during the trial, he did not retreat from that position, request an adjournment or mistrial, or submit that Mr. Moolla's right to a fair trial was in jeopardy. At no time did Mr. Moolla's defense counsel suggest that the difficulties which were being encountered during the conduct of the trial were of such a magnitude as to compromise his ability to present his defence or the appearance of fairness in the proceedings. The Court of Appeal noted that the complaints about these issues only emerged on the appeal after Mr. Moolla had been found guilty.

The Court of Appeal also noted that the trial judge was aware of the unsatisfactory nature of some of the arrangements which had been made by the correctional facility, and when issues arose, the trial judge was careful to afford Mr. Moolla a full opportunity to present his evidence and even took a somewhat active role in questioning him to ensure that he fully appreciated the defence evidence and the position being advanced. The Court of Appeal also indicated that it was not

satisfied that Mr. Moolla's ability to provide his own evidence or conduct his defence was in any way prejudiced and the trial judge's reasons for decision demonstrated a full appreciation of Mr. Moolla's defence, such that any difficulties created by circumstances did not render the trial unfair or prevent him from fully advancing his defence.

Lastly, the Court of Appeal considered the issue of whether the appearance of fairness of the trial had been so compromised as to result in a miscarriage of justice regardless of its impact on Mr. Moolla, however, it concluded that viewing what occurred from a position of a reasonable well-informed observer, that observer would conclude that although aspects of Mr. Moolla's trial were unsatisfactory, they did not reach a point at which the appearance of fairness of the trial was lost. As a result, the Court of Appeal dismissed the appeal.

***Takeaways***

In the professional regulation context, when conducting hearings by video conference, care must be taken to ensure that the arrangements for the hearing are made in a way such that the member can fairly present his or her defence and that when difficulties arise, full efforts are made to attempt to address them. There is always, however, the risk that if the issues encountered become so significant, that to continue the hearing could potentially impair the defence or be seen to be so fundamentally unfair as to result in a miscarriage of justice.

It is also important that if such significant difficulties develop, the member and/or the member's counsel raise any concerns at the time they occur and if significant enough, object to the continuation of the hearing.

Christopher Wirth, Partner

— KC —

**Court of Appeal Clarifies Use in Civil Proceedings of Evidence Prepared in Regulatory Proceedings**

In *K.K. v. M.M.*, 2022 ONCA 72 (C.A.), the Ontario Court of Appeal clarified the extent to which evidence prepared in the course of regulatory proceedings conducted pursuant to the *Regulated Health Professions Act* ("*RHPA*") can be used in civil proceedings.

***Background***

In the context of high conflict family law civil proceedings, the father sought to enter into evidence a doctor's reports and letters and to have the trial judge consider the parenting recommendations contained therein. The mother objected to the admissibility of this evidence due to findings which the College of Physicians and Surgeons of Ontario ("CPSO") had made concerning the doctor arising from complaints that she had made against him. In order to support her objection, she sought to admit several items into evidence including a copy of the Inquiries, Complaints and Reports Committee ("ICRC") report, copies of documents put together before the ICRC and a printout of the CPSO's online Public Register indicating the doctor's member status and the undertakings he had given to the CPSO. In that regard, the reasons of the ICRC revealed that it had serious concerns about the doctor's approach to the assessment in the present case and concluded that he would benefit from remediation. In addition, the public undertakings which he had given to the CPSO restricted his practice such that he undertook not to conduct any new assessments of individuals that he believed have been subject to or had engaged in parental alienation and to terminate any ongoing practice related to parental alienation. The doctor also undertook not to provide opinion evidence about parental alienation to any third party whether orally or in writing in regards to individuals he had assessed or treated, except as required by law in which case he was to advise the relevant parties, in advance of providing

such opinion evidence, to consult the CPSO's Public Register.

In response, the father objected to the admissibility of the CPSO documents in part because of the statutory prohibition found in Section 36(3) of the *RHPA* which renders inadmissible in a civil proceeding a record of a proceeding under the *RHPA*, or a report, document or thing prepared for or statement given at such a proceeding. However, the trial judge noted that the statutory prohibition did not render inadmissible the fact that a complaint had been made and did not capture the website information referring to the undertakings given by the doctor.

The trial judge also considered whether a family law proceeding was a civil proceeding for the purposes of Section 36(3) of the *RHPA* and concluded that there were distinctions between judicial civil proceedings and family law litigation as the interests at play and remedies available in each are different, and that to consider the case a civil proceeding would yield an absurd result contrary to the legislature's intention. As a result, the trial judge held that admitting the CPSO materials in the case would not undermine the objectives of Section 36(3) of the *RHPA*, concluded that it did not apply and determined that, in any event, the doctor's public undertakings were not information captured by it and also proceeded to admit the ICRC's decision. Given that the ICRC's findings that the doctor's assessment reports were conducted in a substandard manner, the judge proceeded to give the doctor's written recommendations no weight and concluded in the alternative, that even had she not admitted the ICRC's decision, she still would have not relied on the doctor's opinions unless he had been produced for cross-examination which the moving party was unable to do. The father appealed this decision to the Court of Appeal.

***Court of Appeal Decision***

The Court of Appeal noted that it had previously explained in *F. (M.) v. Sutherland* (2000), 188 D.L.R. (4th) 296 (Ont. C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 531, at para. 29 that:

> "The purpose of s. 36(3) is to encourage the reporting of complaints of professional misconduct against members of a health profession, and to ensure that those complaints are fully investigated and fairly decided without any participant in the proceedings – a health professional, a patient, a complainant, a witness or a College employee – fearing that a document prepared for College proceedings can be used in a civil action."

As a result, the broad objective of Section 36(3) of the *RHPA* is to keep College proceedings and civil proceedings separate.

The Court of Appeal considered among other matters, the question of whether Section 36(3) of the *RHPA* applies to family law proceedings.

In that regard, the Court of Appeal ultimately concluded that the trial judge had erred and that Section 36(3) of the *RHPA* does apply to family law proceedings involving children. However, despite the prohibitions on the use of evidence from College proceedings contained in the *RHPA*, the Court of Appeal left open the ability of the court to receive into evidence the fact that a complaint had been made with respect to the doctor, the fact that an investigation had been conducted and a decision given and the fact of and the content of the public undertakings which the doctor had given to the CPSO as a result of that complaint. Based upon that admissible evidence, there was a sufficient basis to support the decision of the trial judge to give the doctor's opinions no weight, and as a result, the Court of Appeal determined not to give effect to that ground of appeal and dismissed the appeal.

***Takeaways***

Section 36(3) of the *RHPA* contains clear prohibitions over the use in evidence in civil proceedings of documents prepared in regulatory proceedings under the *RHPA*, including in civil proceedings which include family law proceedings where the best interests of the children are being determined. In that regard, on a plain reading of Section 36(3) of the *RHPA*, it is clear that the record of a proceeding, a report, a document or thing prepared for or statement given, or an order or decision made in a proceeding subject to the *RHPA*, is prohibited from being admitted into evidence in a civil proceeding. However, anything not specifically mentioned in Section 36(3) is fair game and can be admitted into evidence including the fact that a complaint was made and the publicly available website information related to the member available on a College's website including any undertakings given by the professional in response to a complaint and the proceedings taken against them. Further, the fact that a complaint was launched, an investigation held and a decision rendered by the ICRC are not covered by Section 36(3) of the *RHPA* and may be provable in court as long as it is done without reference to the prohibited documents. As well, a member's undertakings publicly available, although they may have been given in response to a decision covered by Section 36(3), are not themselves a decision captured by that section and as a result, there is no prohibition against them being admitted into evidence in civil proceedings.

Christopher Wirth, Partner

— KC —

**Court Refuses to Admit Evidence from a Party's Discipline Proceedings**

In *Hewitt v. Doyle*, 2021 ONSC 6655 (S.C.J.), in the context of a family law trial, the court refused to permit the mother to enter into evidence facts from the father's *Police Services Act* disciplinary proceedings.

***Background***

After seven years of marriage, two police officers separated. Shortly after the separation, the respondent police officer was suspended from duty following complaints of misconduct. On the last day of the hearings of his disciplinary proceedings pursuant to the *Police Services Act*, he pled guilty to all the charges and subsequently resigned from the police service bringing his disciplinary process to an end.

The mother had in the meantime commenced an application under the *Divorce Act* to resolve issues involving a parenting schedule, decision-making over the children and a request to relocate them. At the trial of the divorce action, the mother took the position that evidence of the respondent father's misconduct and his *Police Services Act* charges ought to be admissible in evidence as they provided evidence about his character and judgment which was relevant to his abilities as a parent. The respondent father objected to the admission of that evidence arguing that sections s.83(7), s.83(8) and s.95 (a) of Part V of the *Police Services Act*, which are similar, although not identical, to provisions in the *Regulated Health Professions Act*, 1991 ("RHPA") provide that no one can be compelled to testifying in a civil proceeding with regard to information obtained from a hearing under that Part of the *Police Services Act*, that documents prepared as a result of a complaint were inadmissible in a civil proceeding, and that certain parties were required to maintain secrecy with respect to all information obtained in the course of their duties under this Part and not communicate them to anyone else, such that these provisions precluded the admissibility of this evidence in the family law civil proceeding of this evidence.

***Superior Court Decision***

The court ultimately dismissed the wife's motion to admit this evidence holding that neither the respondent husband nor any other person involved in his police disciplinary hearing could be compelled to testify as to the nature of the charges, his guilty plea or the penalty sought in that proceeding and that any charging documents from it would also not be admissible in evidence.

The Court concluded that these provisions in the *Police Services Act* were designed to deliver a balance so as to encourage reporting of complaints of professional misconduct and to ensure that complaints were fully investigated and fairly decided without any participant in the proceeding fearing that evidence in the disciplinary proceedings could otherwise be used in the civil action.

However, the court also concluded that the wife was still permitted to question the father and otherwise lead evidence about his conduct and the circumstances leading to the complaints against him but could not elicit in evidence the admissions he made at his police disciplinary hearing.

***Takeaways***

As the provisions in the *Police Services Act* are similar to the provisions in the RHPA, this decision provides further guidance as to what information and evidence from professional disciplinary hearings can be elicited in civil proceedings.

Christopher Wirth, Partner

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News

Christopher Wirth will be serving as the Vice-Chair of the Ontario Bar Association's Administrative Law Section Executive for 2022/2023.

Patricia Harper will be the Communications Office for the Canadian Bar Association's Administrative Law Section Executive for 2022/2023 and a Member-at-Large of the Ontario Bar Association's Administrative Law Section Executive for 2022/2023.

Kimberley Ishmael will be the CPD Liaison for the Ontario Bar Association's Education Law Section Executive for 2022/2023.

Alex Smith will be the Secretary for the Ontario Bar Association's Education Law Section Executive for 2022/2023.

More information about all of the lawyers at Keel Cottrelle can be found on our firm's website - www.keelcottrelle.com. During this unprecedented pandemic period, rest assured that Keel Cottrelle LLP remains open and available to meet your legal needs.

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# Professional Regulation Newsletter

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