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Professional Regulation Newsletter

Winter 2019

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Divisional Court Upholds University Tribunal's Decision to Cancel Degree and Expel Student: Finds Decision to Deny Request for an Adjournment was Reasonable

In our July, 2018 newsletter, we commented on the decision of the Divisional Court in *Spence v. Ontario College of Teachers* (2018) ONSC 3335, which overturned a decision of the Ontario College of Teachers (the "College") revoking Christopher Spence's ("Mr. Spence") teacher's license, holding that he had been improperly denied an adjournment of his hearing.

In contrast, in the recent decision of *Spence v. University of Toronto*, 2019 ONSC 1085, the Divisional Court upheld a decision of the University of Toronto Tribunal (the "University Tribunal"), which had rejected

an adjournment request by Mr. Spence, held a discipline hearing in his absence, concluded that he had knowingly committed plagiarism and recommended that his degree be cancelled and that he be expelled from the University of Toronto (the "University").

Background

Mr. Spence had been employed as the Director of Education for the Toronto District School Board ("TDSB"), was a member of the Ontario College of Teachers (the "College"), and had also obtained a doctorate degree from the University.

He was subsequently terminated from his employment by the TDSB and disciplinary proceedings were brought against him by the College alleging that he had plagiarised published and oral works between 2002-2013.

University proceedings were also brought against Mr. Spence before the University's Tribunal alleging that he had knowingly committed plagiarism with respect to his thesis which had led to the granting of his degree.

As noted in our previous article, Mr. Spence's teaching certificate was revoked by the College after it rejected his request for an adjournment and proceeded with his disciplinary hearing in his absence. On appeal, the Divisional Court quashed the decision of the College and remitted the case back for a fresh hearing before its Discipline Committee.

Before the University Tribunal, Mr. Spence also sought an adjournment of his hearing. The adjournment was denied leading to the hearing proceeding in his absence.

At the conclusion of the hearing, the University Tribunal found that Mr. Spence had knowingly committed plagiarism, determined that he should receive a final grade of zero in his thesis course and recommended to the President of the University that his degree be cancelled and recalled and that he be expelled from the University.

Mr. Spence appealed the University Tribunal's decision to the University's Discipline Appeals Board, which dismissed his appeal. He then sought judicial review of the matter to the Divisional Court, arguing that the University Tribunal should not have denied his request for an adjournment and proceeded in his absence.

Divisional Court Decision

The Divisional Court rejected Mr. Spence's application for judicial review and upheld the decisions of the University's Discipline Appeals Board and Tribunal.

Despite having found in a separate decision that the College had inappropriately denied Mr. Spence an adjournment, in this case, the Divisional Court found that the University Tribunal had committed no such error in also denying Mr. Spence an adjournment.

Before the College, Mr. Spence had asked for an adjournment on the basis that his current state of mental health did not allow him to participate in the discipline hearing. In response, prosecuting counsel had conducted internet searches showing that Mr. Spence was in fact employed and working in Chicago, but this information was not disclosed to Mr. Spence in advance and was used before the Discipline Committee to argue against his request for an adjournment.

The Divisional Court found that this failure to disclose this information in advance and then relying upon the information to refuse

an adjournment request, meant that the Discipline Committee of the College had proceeded unfairly.

Further, the College's Discipline Committee had also received a note from Mr. Spence's family physician describing his current mental health as precarious and advising that he not participate in any discipline hearings at the time. The Discipline Committee had concluded that despite this, there was no evidence of illness justifying an adjournment. The Divisional Court also found the Discipline Committee's conclusion that there was no evidence of illness justifying an adjournment was improper.

In the case involving the University, Mr. Spence made similar arguments, but they were rejected by the Divisional Court because the circumstances in the two cases were very different, despite the fact they involved the same person, much of the same medical evidence and an overlapping time period.

The University Tribunal did not rely on any information that had not been disclosed to Mr. Spence. It also had evidence before it which contradicted Mr. Spence's evidence concerning his mental condition. Most significantly, the Divisional Court concluded that the Tribunal had shown great patience "to the point of leniency" by giving Mr. Spence some 17 adjournments over the history of the matter. Accordingly, the Divisional Court was satisfied that the University Tribunal, based upon the evidence before it, was well within its discretion to deny Mr. Spence's request for an adjournment.

It is also apparent from the Divisional Court's decision that it believed that Mr. Spence had been treated fairly by the University Tribunal.

The University Tribunal had bent over backwards in granting earlier adjournments, and that when combined with him having had four different counsel, having made unfounded allegations of bias against the University Tribunal and brought unmeritous motions to remove counsel of the University, the Discipline Committee concluded that "the overall picture is of a respondent who is doing everything he can to avoid the evil day when he must face judgment. But these proceedings must take place eventually, and the results of this application are a direct result of Mr. Spence's unwillingness to face that reality."

Takeaways

Extraordinary patience must sometimes be shown by a tribunal in dealing with requests for adjournment in order to ensure that the tribunal only proceeds when it is fair for it to do so. There will be some circumstances where the respondent is using tactics to avoid the hearing. Despite this, a tribunal must continue to have patience to ensure that it considers all proper procedures in determining whether to grant an adjournment so that its decision to ultimately proceed is unassailable.

Christopher Wirth, Partner

— KC —

Divisional Court Sets Aside Decision Made Without Parties' Consent

In *Barry v. Certified Equipment Sales Services and Rentals LTD.*, 2019 ONSC 473, the Divisional Court set aside a decision of a Deputy Judge of the Small Claims Court who proceeded to deliver a decision without the parties' consent, and in so doing, provides a cautionary tale to the courts and, by analogy, to administrative tribunals as to how to correspond with

parties in an effective manner before taking further steps in a proceeding.

Background

Certified Equipment Sales Services and Rentals Ltd. ("Certified") and one of its former employees, Angela Barry ("Ms. Barry"), brought actions against each other in the Ontario Small Claims Court. These actions were tried together over four days between April 27 and October 4, 2016, however, following the completion of the trials and before rendering a final decision on them, the presiding Deputy Judge became seriously ill.

In August, 2017, the Local Administrative Judge for the Small Claims Court for the Toronto Region sent a letter to counsel for the parties advising them that the trial Judge was unable to give a decision in the matter for health reasons and further advising the parties that he would preside over any motion for a rehearing of the trials, but that if all parties consented to a rehearing based primarily on the transcript of the evidence taken at the original hearing, he was prepared to dispense with the need to bring a motion for a rehearing and to immediately assign a judge to issue a written judgment.

The Local Administrative Judge also asked the parties to respond in writing to his attention by September 8, 2017, failing which a motion would be required to request a rehearing of the trials.

Ms. Barry provided her consent, however, Certified's counsel never responded to the Local Administrative Judge's letter.

Subsequently, on November 13, 2017, Deputy Judge Mongeon, released a decision for the two trials and in so doing advised that he was doing so with the consent of the parties to the rehearing and that he was relying on the pleadings, the exhibits, a partial transcript and a recording of the evidence heard on April 27, 2016.

Unhappy with this decision, Certified appealed it to the Divisional Court.

The Divisional Court Decision

The Divisional Court set aside Deputy Judge Mongeon's decision and ordered that the two actions be retried before a different Deputy Judge along with ordering that the Local Administrative Judge provide directions as to how that rehearing would be conducted.

In so doing, the Divisional Court held that a party who ignores a letter from a judge of the Superior Court requesting its position with respect to a particular issue can expect that its silence may well lead to a conclusion that is adverse to its interest.

However, in this particular case, the express wording of the August, 2017 letter from the Local Administrative Judge advised that a failure to respond to it would mean that a motion to request a rehearing would be required.

Consequently, there was no jurisdiction for the Court to proceed without a motion first being heard as to how the matter would be retried, or the express consent of the parties to the rehearing. Given that Certified had not consented to the rehearing as proposed by the Local Administrative Judge, nor had there been a motion for a rehearing, the Court did not have jurisdiction to decide the case.

Takeaways

In communicating with parties, administrative tribunals should be clear as to what they expect from the parties with respect to a response, a deadline by which

that response must be received and the consequences of a failure to respond by that deadline.

Should a party fail to respond, it is also important that the tribunal then proceed to dispose of the matter expressly in the manner that was set out in the correspondence as to what would transpire if a response was not received from a party.

This will ensure that the tribunal's decision will not be subsequently vulnerable to challenge.

Christopher Wirth, Partner

— KC —

Divisional Court Finds Disclosure of Third Party Mental Health Records in Disciplinary Proceedings Essential in the Interests of Justice

The Divisional Court recently heard two applications pursuant to s. 35(9) of the *Mental Health Act*, R.S.O. 1990, c. M.7 (the "*MHA*"). These applications were heard on the same day and involved requests for disclosure of third party mental health records in disciplinary proceedings before the College of Physicians and Surgeons of Ontario ("CPSO").

Background

In *Fikry v. College of Physicians and Surgeons of Ontario*, 2018 ONSC 7744 ("*Fikry*"), a complainant, S.J., alleged that Dr. Sameh Adly Fikry ("Dr. Fikry"), had sexually abused her while he was her family physician between September of 2010 and July of 2015. She alleged that Dr. Fikry offered to prescribe her narcotics as well as provided her with money for these narcotics in exchange for sexual favours.

In his response to the complaint, Dr. Fikry denied the allegations and noted that the complainant had worsening addictions and behaviours during the time he had been treating her.

Dr. Fikry further noted that the complainant requested that he falsify a report to state that she did not have ongoing issues with substance abuse, which Dr. Fikry refused to do.

In July of 2017, Dr. Fikry received a 12 page document from CAMH regarding S.J., which was sent in error to him as he was no longer S.J.'s acting physician at that time.

The document was a summary noting that S.J. had been admitted to CAMH, had "partial judgment", was suffering from the sequelae of a stroke, had been prescribed a Fentanyl patch years earlier by another physician and had suffered sexual trauma by her stepfather when she was a child. The summary did not mention any sexual abuse involving Dr. Fikry.

On September 25, 2017, Dr. Fikry gave notice to CPSO of his intention to bring a motion seeking the production of S.J.'s health records from 2010 onwards. The CPSO brought a motion to strike references to some of the materials filed including the discharge summary Dr. Fikry received from CAMH, on the basis that they violated s. 35(9) of the *MHA*.

The Discipline Committee of the CPSO heard the motion and concluded that Dr. Fikry could not make reference to the discharge summary without receiving a determination on an application for production of these records from the Divisional Court, pursuant to s. 35(9)(c) of the *MHA*.

Dr. Fikry then proceeded to make an application to the Divisional Court for an order for production of the records.

In *Balasuriya v. College of Physicians and Surgeons of Ontario*, 2018 ONSC 7743 (“*Balasuriya*”), Dr. Rajiv Balasuriya (“Dr. Balasuriya”) sought disclosure of psychiatric records of his former patient, K.S., in relation to allegations of sexual abuse she had made against him.

Dr. Balasuriya was K.S.’s family physician from March of 2012 until December of 2015. K.S. was admitted to the hospital in June 2016 and disclosed to a hospital psychiatrist that she had been sexually abused by Dr. Balasuriya. K.S.’s allegations of abuse included a sexual encounter at Dr. Balasuriya’s home when K.S. was working as an escort and dispatched to his residence, as well as performing oral sex in Dr. Balasuriya’s office in exchange for a prescription of a controlled medication and other benefits. The psychiatrist reported K.S.’s allegations to the CPSO.

In his defence to these allegations, Dr. Balasuriya admitted that he used escort services; however, he alleged that he did not know that K.S. worked for one of the escort services and did not engage in sexual encounters with her when she was dispatched to this home. He alleged that that K.S. began requesting favours with respect to prescriptions for narcotics and letters regarding her parenting ability, which he refused to provide.

Dr. Balasuriya also alleged that K.S. attempted to kiss and touch him in his office and he had to ask her to leave. Dr. Balasuriya wrote a letter to her shortly thereafter, in October of 2015, stating that he was terminating his relationship with her as her treating physician.

Dr. Balasuriya later received clinical records for K.S. pertaining to psychiatric treatment she received from 2013-2015 and also in 2016 when she was no longer Dr. Balasuriya’s patient.

The records were sent in error by a hospital to Dr. Balasuriya without K.S.’s consent. The records contained sensitive information regarding K.S.’s mental health, including that she was diagnosed with Borderline Personality Disorder when she was a patient of Dr. Balasuriya, had a history of childhood abuse, including sexual abuse, and experienced situations where she had impulsive anger.

Dr. Balasuriya sought to rely on these records in conjunction with an expert opinion on the impact of Borderline Personality Disorder, in making his defence against the allegations brought against him.

Dr. Balasuriya brought an application to the Divisional Court for a declaration permitting him to use certain parts of these records pursuant to s. 35(9) of the *MHA*.

In *Fikry*, in response to the application, the CPSO argued that the *MHA* “*provides a more onerous regime*” regarding sensitive information collected and used for patients in psychiatric medical facilities and that they should only be disclosed in circumstances which are “*essential in the interests of justice*”. The CPSO argued that Dr. Fikry did not require these records since he already had a substantive amount of evidence available to him to make a full defence.

The CPSO referred to s. 42.2(1) of the *Health Professions Procedural Code*, Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, which describes that where a member seeks

an order for disclosure of records related to a hearing against him/her involving sexual allegations, assertions made by the member, such as how the records relate to the credibility of the complainant, are not sufficient on their own to establish that the record is likely relevant to an issue in the hearing.

The CPSO argued that this statutory provision demonstrated that greater weight should be placed on the patient's privacy interests with respect to their confidential health information in regulatory proceedings, compared to criminal proceedings. The CPSO further argued that procedures and factors under the *Criminal Code,* R.S.C. 1985, c. C-46 ("*Criminal Code*") and criminal jurisprudence should be applied to the analysis.

The CPSO made similar arguments against the application brought by Dr. Balasuriya as it did in *Fikry*, arguing that the disclosure of K.S.'s personal health records were not essential in the interests of justice and constituted a significant invasion of K.S.'s privacy.

Divisional Court Decision

The Divisional Court stated that the *MHA* governs the process for production and disclosure of patient medical records in the possession of a psychiatric facility. The Court further explained that s. 35(9) of the *MHA* requires the Court to determine whether disclosure in a proceeding is necessary in situations where a patient does not consent to the disclosure of protected information.

The Court noted that on an application under s. 35(9) of the *MHA* it must consider the following:

(1) relevance of the records to the proceedings;

(2) the need to protect the right of the party about whom the complaints are brought to make full answer and defence while not permitting a fishing expedition;

(3) the need to consider the privacy interests of the complainant or witness, and

(4) limiting the use of highly sensitive and confidential records to only certain circumstances.

In *Fikry*, the Divisional Court did not accept the CPSO's arguments that factors under the *Criminal Code* or criminal law jurisprudence should be adopted in making a determination in a regulatory proceeding, noting that while Dr. Fikry faced serious consequences, he was not facing criminal prosecution. The Divisional Court therefore carried out its analysis under the *MHA*, noting that in order for disclosure of S.J.'s health records to be permitted, they had to be both relevant and important to Dr. Fikry's defence.

The Divisional Court acknowledged that it had the task of balancing various considerations including the privacy interest of S.J. against the fact that the records may affect Dr. Fikry's right to make a full defence.

The Court accepted Dr. Fikry's argument that S.J.'s health records were to be used to test the credibility of S.J. and that accordingly, they were relevant to him making full answer and defence to the allegations brought against him. On the issue of their importance, the Divisional Court reiterated that the key consideration

was whether disclosure of the records was "*essential in the interest of justice*". The Court reasoned that the records could have a significant impact on the credibility of S.J., making it important for Dr. Fikry to rely on them in making his defence against the allegations which were very serious in nature and could result in grave consequences for him, such as the loss of his livelihood.

The Court further noted that the records were important to critical and not collateral issues in the proceeding and were not being utilized for a fishing expedition.

The Court therefore ordered the disclosure of the records and noted that the privacy interests of the complainant could be protected by a publication ban and other procedures available to the Discipline Committee.

In *Balasuriya*, the Divisional Court engaged in a similar analysis. Under its analysis of s.35(9) of the *MHA*, the Divisional Court concluded that disclosure of both the 2013-2015 records as well as the 2016 health records of K.S. would be relevant to the issues before the Discipline Committee and to Dr. Balasuriya's ability to make a full defence. The Court noted that the information in the records, specifically with respect to K.S.'s diagnosis of Borderline Personality Disorder, could affect a central issue in the proceeding and were relevant to the expert opinion that Dr. Balasuriya had sought.

The Court further noted that while disclosure of these records constituted a significant invasion of K.S.'s privacy, it considered the context of the allegations against Dr. Balasuriya, when and how they were made, the subject matter and seriousness of the proceeding and the potential consequences for Dr. Balasuriya.

In light of these considerations, the Court concluded that the disclosure of K.S.'s records was in the interests of justice. The Court further noted that a publication ban could be ordered by the Discipline Committee to protect K.S.'s identity.

Takeaways

These cases demonstrate that even in situations where confidential information of a third party is highly sensitive in nature, such as with mental health records, a Court may, nonetheless, pursuant to statutory authority, permit disclosure of this information to ensure that a member can make a full defence in a regulatory proceeding, particularly when the allegations against him/her are serious in nature.

Jasmeet Kala, Associate

— KC —

Supreme Court of Canada Convicts Teacher of Voyeurism: Finds Students Had a Reasonable Expectation of Privacy When Teacher Surreptitiously Filmed Them While at School

In *R. v. Jarvis*, 2019 SCC 10, the Supreme Court of Canada convicted a teacher, Ryan Jarvis ("Mr. Jarvis"), of voyeurism under s. 162(1)(c) of the *Criminal Code* and, in so doing, overturned the decisions of the Ontario Court of Appeal and the trial judge acquitting him. In convicting Mr. Jarvis, the Court held that in the circumstances of the case, the students recorded by Mr. Jarvis had a reasonable expectation of privacy.

Background

Mr. Jarvis was an English teacher at a high school. He used a camera concealed inside a pen to make surreptitious video recordings

of female students at his school while they were engaged in ordinary school related activities in the school's common areas. Most of these videos focused on the faces, upper bodies and breasts of female students. They were not aware that they were being recorded, nor did they consent to the recordings.

Further, the school board policy in effect at the time prohibited this type of conduct.

Mr. Jarvis was charged with voyeurism under s. 162(1)(c) of the *Criminal Code*. Voyeurism is committed where a person surreptitiously observes or makes a visual recording of another person who is in circumstances that give rise to reasonable expectation of privacy if the observation or recording is done for a sexual purpose.

While Mr. Jarvis admitted he made the recordings, the trial judge acquitted him on the basis that the recordings were not made for a sexual purpose although the trial judge did find that the students in the circumstances had a reasonable expectation of privacy.

On appeal to the Ontario Court of Appeal, the Court of Appeal upheld the acquittal, but in so doing found that the trial judge had erred in finding that the recordings were not made for a sexual purpose. Nonetheless, the Court of Appeal upheld the acquittal on the basis that the students who had been filmed did not have a reasonable expectation of privacy. The Crown appealed the case to the Supreme Court of Canada.

Supreme Court of Canada Decision

In a unanimous decision, the Supreme Court of Canada overturned the lower court's decision and convicted Mr. Jarvis of voyeurism.

In so doing, the Court held that for the purposes of the criminal charge of voyeurism, a person has a reasonable expectation of privacy in circumstances where they would expect not to be the subject of the observation or recording that in fact occurred. In order to make that determination, a Court must consider the entire context in which the observation or recording took place including the following factors:

(a) the location where the observation or recording occurred;

(b) the nature of the impugned conduct that is, whether it consisted of observation or recording;

(c) the awareness or consent of the person who was observed or recorded;

(d) the manner in which the observation or recording was done;

(e) the subject matter or content of the observation or recording;

(f) any rules, regulations or policies that governed the observation or recording in question;

(g) the relationship between the parties;

(h) the purpose for which the observation or recording was done; and

(i) the personal attributes of the person who was observed or recorded.

In the Supreme Court of Canada's view, there was no doubt that the students recorded by Mr. Jarvis would have reasonably expected not to be the subject of videos which predominantly focused on

their bodies, particularly their breasts, and that they would not be the subject of such videos recorded for a sexual purpose by one of their teachers.

As a result, the Court concluded that the students had been recorded by Mr. Jarvis in circumstances that gave rise to a reasonable expectation of privacy and thereby allowed the appeal and convicted Mr. Jarvis of voyeurism.

In so doing, the Court also commented that it would likely have reached the same conclusion even if the recordings had been made by a stranger on a public street rather than by a teacher at a school in breach of a school policy.

Mr. Jarvis is also the subject of ongoing discipline proceedings before the Ontario College of Teachers which were being held in abeyance pending the outcome of this case.

Now that Mr. Jarvis has been convicted of voyeurism, no doubt those professional discipline proceedings will resume. We will report on their conclusion in a subsequent issue of this newsletter.

Takeaways

Although the Court made its findings with respect to how a reasonable expectation of privacy is to be arrived at, in the context of the offence of voyeurism under the *Criminal Code*, the factors which the Court identified, will no doubt be instructive in the professional discipline context in determining whether or not a member's conduct violated an individual's reasonable expectation of privacy.

Christopher Wirth, Partner

— KC —

Law Society Tribunal Sets Out Principles to be Applied in Costs Orders

In *Law Society of Ontario v. Perrelli*, 2018 ONLSTH 80, the Hearing Division of the Law Society Tribunal set out in detail the principles to be considered in making costs orders.

Background

Mr. Perrelli was a paralegal who admitted to engaging in various acts of professional misconduct. The Hearing Division of the Law Society Tribunal (the "Panel") found that he had engaged in misconduct based upon an agreed statement of facts and ordered a four month suspension based on a joint submission on penalty.

The main issue between the parties was the cost award. The Law Society's Bill of Costs was $26,017.50 and it claimed $15,000.00 for costs.

Mr. Perrelli provided evidence claiming he had limited assets and submitted that the award of costs should be reduced to $3,500.00 due to his inability to pay.

Law Society Decision

The Panel recognized that the Law Society's power to award costs is set out in s. 49.28 of the *Law Society Act.* As well, under Rule 25.01(2) of the Tribunal's *Rules of Practice and Procedure,* costs may be awarded against a member who either had an adverse determination made against them or if the member caused unreasonable delay.

The Panel then reviewed which considerations are relevant to costs awards. Firstly, the profession as a whole should not be responsible for bearing the costs to prosecute licensees for misconduct.

Consequently, costs are not a penalty, but rather defray the amounts paid by licensees through their fees.

The Panel then looked at the factors set out in the jurisprudence which are used to determine cost awards, which include:

- the complexity, importance and duration of the hearing;
- the conduct of the parties to shorten or lengthen the proceedings;
- whether any step was "improper, vexatious or unnecessary, or taken through mistake or excessive caution";
- the member's ability to pay;
- the reasonable expectations of the parties;
- the costs awarded in other cases;
- proportionality; and
- the circumstances of the proceeding.

The Panel also recognized that costs awards must be discretionary in order to take into account the circumstances of the individual parties. However, this discretion must also be exercised consistently.

The Panel then noted there are some common patterns that emerge from the jurisprudence and proceeded to set out the following test:

"1) Find an appropriate general range, considering key litigation steps including pre-hearings, the length of the hearing and the work product of Law Society representative(s).

2) Determine a place within the range by taking into account:

a. the complexity of the case;

b. any conduct of the parties during the Tribunal process that lengthened the proceedings;

c. any financial hardship that affects the ability of the licensee to pay; and

d. any other factors particular to the case."

Applying this test, the Panel reviewed a number of cases and determined the appropriate starting point to be $7,500.00. Specifically, the Panel noted that the case was not complex and neither party acted to lengthen the procedure.

The Panel then considered Mr. Perrelli's financial circumstances and concluded that given his low annual income, and that he is supporting his three children, there should be a reduction for this but that Mr. Perrelli's investment activities were a personal choice that should not reduce the award.

The Panel however, reduced the cost award to $6,000.00 and gave Mr. Perrelli increased time of two years to pay it.

Takeaways

This decision attempts to refine the approach to costs awards by setting out the principle factors that should be followed to hopefully lead to more consistent results. As this is a decision of a hearing panel, it will be interesting to see if this framework is adopted by the Law Society's Appellate Panel or by a Court on judicial review.

Christopher Wirth, Partner
Alana Spira, Articling Student

— KC —

Divisional Court Upholds Decision to Deny an Adjournment: Concludes Reasons for Decision Sufficient

In *Todorov v. Ontario Securities Commission,* 2018 ONSC 4503, the Divisional Court upheld a decision of the Ontario Securities Commission denying an adjournment and in so doing, also upheld the sufficiency of the Hearing Panel's reasons for decision.

Background

Evgueni Todorov ("Todorov") and Sophia Nikolov ("Nikolov") were husband and wife.

A Hearing Panel (the "Panel") of the Ontario Securities Commission ("OSC") found that they had engaged in a number of offences including: lying to investors, issuing fictitious trading statements, and using a Ponzi scheme to pay off complaining clients.

Prior to the hearing, Todorov and Nikolov were given an opportunity to file written submissions but chose not to. On the day of the hearing, they asked for an adjournment, but this request was refused by the Panel.

The hearing then proceeded in their absence. Todorov was found to have committed investor fraud of traded securities without being registered and without a prospectus.

Nikolov had registered a sole-proprietorship called Setenterprice and was the sole signing authority for it. She was found to have "permitted, authorized or acquiesced in Setenterprice's noncompliance with the Act". She was also found to have benefitted from Todorov's scheme as the money he earned was used to pay some of her expenses. The Panel found Setenterprice played a key role in Todorov's scheme.

The Panel imposed a lifetime trading ban on Todorov along with an administrative penalty of $300,000.00 and costs of $228,496.25. Nikolov was banned for 10 years from trading and received an administrative penalty of $25,000.00 and costs of $15,000.00.

Todorov and Nikolov appealed this decision to the Divisional Court arguing that:

1. They were denied procedural fairness; and

2. The reasons for penalty were insufficient.

Divisional Court Decision

Todorov and Nikolov argued that it was unfair for the Panel to refuse to grant their request for an adjournment. The Divisional Court noted that there had been four preliminary hearings that Todorov and Nikolov participated in and at no point did they request an adjournment. In fact, they confirmed that they had retained counsel in a preliminary hearing held in September, 2015, more than four months before the hearing date of January 11, 2016.

Further, on the day of the hearing, Mr. Hosseini, Todorov and Nikolov's agent, appeared to request an adjournment and informed the Panel that they were in Vancouver. He provided no explanation as to why he had not been retained earlier. The Panel denied the request for an adjournment and determined that it was in the public interest to proceed.

The Court noted that the Panel's decision to deny the adjournment is a discretionary power which is accorded deference and reviewed on a reasonableness standard.

The Court found that the Panel exercised its discretion reasonably. Todorov and Nikolov knew about the hearing date for several months. The Court noted that "appropriate factors were considered by the Hearing Panel including the public interest in a timely decision, the number of attendances prior to the hearing, the Appellants' knowledge long in advance of the hearing date and failure to take any action to seek an adjournment or explain the request, and their failure to even attend the hearing".

As a result, the Court rejected this ground of appeal.

Todorov and Nikolov also argued that the Hearing Panel's reasons for decision were insufficient.

The Court analyzed the law on sufficiency of reasons and noted that "reasons must be read holistically and in context" and that "reasons are sufficient if they allow the public and reviewing court to know whether the applicable legal principles and evidence were properly considered".

The Court first looked at the merits decision and found the reasons sufficient as the decision clearly indicated that Todorov committed fraud, explained why Todorov was more implicated than Nikolov and explained other relevant details such as why the fines were imposed. The Court also found the disgorgement and cost reasons sufficient as the Panel considered the relevant factors.

Consequently, the Court dismissed the Appeal and ordered Todorov and Nikolov to pay $15,000.00 in costs.

Takeaways

This decision demonstrates that:

1. Courts will give deference to the decision of a Tribunal on whether to grant an adjournment provided that the Tribunal considered the appropriate factors.

2. Reasons for decision do not need to refer to every piece of evidence or submission to be sufficient. They will be sufficient if the public and the reviewing Court can be satisfied that the Tribunal properly considered the applicable legal principles and the evidence.

Christopher Wirth, Partner
Alana Spira, Articling Student

— KC —

Teacher's Off Duty Conduct Subject to Professional Discipline: Issuance of A Caution Held to be Reasonable.

In *Bouragba v. Ontario College of Teachers*, 2018 ONSC 6935 and *Bouragba v. Ontario College of Teachers*, 2018 ONSC 6940, the Divisional Court confirmed that teachers may be subject to discipline for conduct that occurs outside the classroom and in so doing, upheld a caution to a member as being reasonable.

Background

Mr. Bouragba was a teacher. His son attended a different school where Ms. Lamoureux was the principal. Ms. Lamoureux suspended Mr. Bouragba's son from school. Mr. Bouragba responded to this by being allegedly offensive, degrading and threatening in his comments with Ms. Lamoureux who then made a complaint against Mr. Bouragba to the Ontario College of Teachers (the "College").

The Investigation Committee of the College ("the Committee") dismissed the complaint but issued Mr. Bouragba a written caution pursuant to Section 26(5)(d) of the *Ontario College of Teachers Act* (the "*Act*"). Mr. Bouragba brought an application for judicial review of this decision to the Divisional Court.

In addition, Mr. Bouragba also made complaints to the College against Ms. Lamoureux and two other administrators which the Committee decided not to refer to discipline. Mr. Bouragba also sought judicial review of this decision.

Divisional Court Decision

Mr. Bouragba argued he was denied procedural fairness and also alleged that the Committee was unreasonable in imposing a caution on him as he was a parent acting in his child's best interest.

The Court rejected Mr. Bouragba's argument that he was denied procedural fairness. The Court found the Committee followed the requirements as set out in the *Act*, that Mr. Bouragba knew the allegations against him, and that he was given the opportunity to respond to those allegations.

The Court noted that Mr. Bouragba's behaviour "as a parent, not a teacher" could still properly be the subject of a complaint under the *Act* which allows for discipline of off-duty conduct.

The Court confirmed that a caution is not disciplinary in nature and is not made public nor is it based on any finding of wrongdoing, but rather is "meant to express the Committee's concern about conduct and to provide guidance for the future".

The Court also held that the standard of review from the Committee's decision to issue a caution is reasonableness and that its role is to determine if "the Committee's decision falls within a range of possible, acceptable outcomes, based on the facts and the law". If so, deference was owed to the decision.

The Court determined that the written caution fell within a range of reasonable outcomes and dismissed the application.

In the related proceeding, the Committee had refused to refer Mr. Bouragba's complaints against Ms. Lamoureux and the other administrators to discipline.

Before the Divisional Court, Ms. Lamoureux and the other administrators whom Mr. Bouragba had complained about, intervened on the application. The Court ruled that Mr. Bouragba could only raise procedural fairness issues and that he did not have standing to challenge the decision on its merits.

Mr. Bouragba alleged the Committee had been improperly constituted, had a conflict of interest, and a reasonable apprehension of bias that should have resulted in a third party investigator being appointed. Mr. Bouragba's allegations were based on the fact that one of the Committee's members, Ms. Chartrand, had once written a letter of support for the intervenors' lawyer and former Independent Legal Counsel at the College.

The Court concluded there was no denial of procedural fairness as the Committee was properly constituted and there was no basis for the allegation of reasonable apprehension of bias against one of the Committee members, Ms. Chartrand.

Specifically, the Court rejected the suggestion that the fact that Ms. Chartrand, by once having wrote a letter supporting the

lawyer for the intervenors, caused the Committee to have a reasonable apprehension of bias. The Court clarified that possibly knowing one of the complainants is not enough to lead to a reasonable apprehension of bias as it did not suggest any partiality or bias against Mr. Bouragba, nor did the intervenors' counsel participate in the Committee's process.

Takeaways

These decisions confirm that:

1. Conduct outside of the classroom can be subject to professional discipline.

2. Decisions by the College to issue a caution are entitled to deference as the Courts will not intervene unless the decision is not within the range of reasonable outcomes.

3. Merely having written a letter of support on behalf of a party's counsel is not sufficient grounds to demonstrate a reasonable apprehension of bias.

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— KC —

Law Society Hearing Panel Reconstitutes Itself to Include Indigenous Panel Member

In *Law Society of British Columbia v. Coutlee*, 2018 LSBC 33, a hearing panel of the Law Society of British Columbia (the "Hearing Panel") granted an Indigenous member's application to have it reconstitute itself in order to include an Indigenous panel member.

Background

Mr. Coutlee is an Indigenous member of the Law Society of British Columbia. In a previous proceeding, a Hearing Panel had restricted his practice to exclusively criminal defence and personal injury matters. Mr. Coutlee was alleged to have practiced family law in contravention of this previous decision.

Mr. Coutlee claimed that his client in the matter had submitted a statement that so clearly exonerated him that the only explanation for the discipline proceeding being authorized was that the investigation must have been clouded by his being Indigenous.

He brought an application seeking to have the Hearing Panel reconstitute itself to include an Indigenous panel member which would also require granting an adjournment of the hearing. Mr. Coutlee argued that he would be more confident that a Hearing Panel, reconstituted with an Indigenous panel member, would be non-discriminatory and weigh the evidence fairly.

Mr. Coutlee raised his objection to the constitution of the Hearing Panel on July 30, 2018 and was advised to make a written application as soon as possible.

Despite this, his written application was only filed one day before the scheduled hearing on August 13, 2018. Mr. Coutlee did not provide any reason for the delay in filing the application.

Decision of the Hearing Panel

The Hearing Panel concluded that in this case, the application should be granted and that it should reconstitute itself to include an Indigenous panel member.

The Hearing Panel was satisfied that the absence of an Indigenous member on the Panel raised a reasonable apprehension of institutional bias in the specific circumstances of the case.

In order to grant Mr. Coutlee's request, the Hearing Panel was also required to grant an adjournment. The Hearing Panel held that when determining if an adjournment was appropriate, the following factors should be considered:

(a) the purpose for the adjournment;

(b) has the participant seeking the adjournment acted in good faith and reasonably in attempting to avoid the necessity of an adjournment;

(c) the position of the other participants and the reasonableness of their actions;

(d) the seriousness of the harm resulting if the adjournment is not granted;

(e) the seriousness of the harm resulting if the adjournment is granted;

(f) is there any way to compensate for any harm identified; and

(g) how many adjournments has the participant seeking the adjournment been granted in the past.

The Hearing Panel stated that no factor was determinative and rather all relevant factors should be weighed. It noted that while this was the first adjournment, Mr. Coutlee had not taken any steps to make a prompt application and gave no explanation for the delay.

The Hearing Panel also recognized that the adjournment would be costly and that in many cases, this would weigh against granting an adjournment. However, in this case, greater weight was given to the purpose of the adjournment and the seriousness for potential harm if the adjournment was not granted.

The Hearing Panel found the adjournment was necessary because "the absence of an Indigenous member on the Panel raises an apprehension of institutional bias in the circumstances of this case." The Hearing Panel highlighted that if the panel was not reconstituted, this would be inconsistent with Law Society's values and objectives and the Law Society's commitment to its Truth and Reconciliation Advisory Committee Report.

The Hearing Panel clarified that Mr. Coutlee did not assert any actual bias on the part of the Hearing Panel, but did "raise his personal concern that, as an Indigenous person, this citation reflects a biased institutional process that strikes at the dignity of a Status Indian."

The Hearing Panel stated that it was guided by the challenges identified by the Truth and Reconciliation Committee Report which are "some of the most important and critical issues facing the country and the legal system." The Hearing Panel also mentioned that the Benchers of the Law Society took action by adopting a Truth and Reconciliation Action plan to address the "unique needs of Indigenous people within the Law Society's regulatory processes."

Accordingly, the Hearing Panel concluded that the importance of ensuring a lack of bias outweighed any detriment by adjourning the hearing.

Takeaways

This decision illustrates that in certain circumstances, a tribunal may consider whether an Indigenous member, assuming that there is one on the tribunal, is required on a hearing panel in order to ensure that the member is afforded an unbiased hearing.

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— KC —

Alberta Court Finds Regulator's Disciplinary Fines Not Released by Member's Bankruptcy but that Costs Awards Are

In *Chartered Professional Accountants of Alberta v. Neilson,* 2018 ABQB 170, the Court of Queen's Bench of Alberta (the "Court") found that fines imposed by the Chartered Professional Accountants of Alberta ("CPAA") against a member after the member had made an assignment into bankruptcy were not subject to the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 (the "*BIA*") and thereby survived the member's bankruptcy. However, its cost orders, made after the date of bankruptcy, were subject to the *BIA* and only recoverable against the bankrupt member's estate.

Background

Mr. Neilson, a certified general accountant, was the subject of a complaint involving two alleged incidents of professional misconduct. He was informed of the complaint through a letter sent by the CPAA delivered on February 2, 2015. On February 12, 2015, Mr. Neilson assigned himself into bankruptcy. A third allegation of misconduct was later added due to Mr. Neilson's failure to cooperate with the CPAA's investigation into the complaint.

The Complaint was investigated and on March 8, 2016 the CPAA's Complaints Inquiry Committee referred the allegations to a professional misconduct hearing. On August 8, 2016, Mr. Neilson signed a Sanction Agreement with the CPAA admitting to the allegations made against him and agreeing to three separate fines for each allegation, among a number of other penalties. In addition, Mr. Neilson was to pay $15,579.84 in costs to the CPAA.

On October 25, 2016, the CPAA requested payment of the fines and the costs award under the Sanction agreement. Mr. Neilson refused to pay them and claimed that both the fines and the costs were discharged by his bankruptcy and only recoverable as provable claims against his bankrupt estate under the *BIA*. The CPAA applied to the Court to enforce the fines and costs agreed upon in the Sanction Agreement.

Decision of The Queen's Bench of Alberta

The Court found that the disciplinary fines imposed by the CPAA were too remote and speculative at the date of bankruptcy for them to be considered provable claims under the *BIA*. The Court noted imposing fines is a discretionary process and that discipline tribunals must take into account the relevant facts and ensure proportionality when deciding on the appropriate penalty.

In this case, important information for determining whether a fine was appropriate, such as Mr. Neilson's cooperation or an early and meaningful guilty plea, was not known at the date of the bankruptcy. Therefore, at the date of bankruptcy, the disciplinary fines were too remote and speculative to be considered provable claims in his bankruptcy and as a result, they survived his bankruptcy and he remained liable to pay them.

However, the Court found that the costs awards for the first two allegations against Mr. Neilson were so closely related to the professional misconduct which had occurred prior to the bankruptcy, that they should be considered obligations that arose prior to the date of bankruptcy and were thereby provable claims in the bankruptcy and did not survive it.

In coming to its decision, the Court noted that costs provisions are a cost recovery mechanism and that the CPAA invariably imposed costs in disciplinary decisions and settlements. Consequently, the cost awards were not too remote and speculative. However, for the cost award that related to the third allegation, the Court found that it was too remote and speculative because the impugned conduct did not occur until after the date of bankruptcy. As a result, the portion of the costs related to the third allegation survived the member's bankruptcy.

The Court noted that determining whether a regulators imposition of costs or fines is too remote or speculative to be recoverable in a bankruptcy is “a factual assessment of the practices and policies of the regulator concerned and the context of the proceeding.”

Takeaways

Fines and costs orders made by regulators can potentially be discharged by a member's bankruptcy, however, it will depend on what stage the disciplinary proceedings were at on the date the member became bankruptcy along with an assessment of the regulator's practices and policies and the context of the proceeding.

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Law Society of Ontario finds Lawyer Guilty of Professional Misconduct for Assaulting Mourners

In *Law Society of Ontario v Dougan*, 2018 ONLSTH 162, the Law Society Tribunal (the “Tribunal”) found that a licensee committed professional misconduct and suspended his licence to practice law for four months as a result of his having had an altercation with mourners in a funeral procession.

Background

In 2013, Mr. Dougan, a black lawyer, attempted to drive through a four-car funeral procession after getting frustrated with being blocked by it. Mr. Langlois, who was attending his father’s funeral, was upset by Mr. Dougan’s actions and began directing insults, including racial slurs, at Mr. Dougan. Mr. Dougan responded with his own insults and mentioned that he was a lawyer. The dispute quickly escalated into a physical fight where Mr. Dougan bit off Mr. Langlois’s ear lobe.

As a result of his altercation with Mr. Langlois, Mr. Dougan pled guilty to two counts of assault and received a six-month suspended sentence in 2015. Mr. Dougan did not report his criminal conviction to the Law Society of Ontario. However, the Law Society of Ontario eventually learned of it and brought discipline proceedings against Mr. Dougan.

Law Society Tribunal Decision

The Tribunal found that Mr. Dougan’s conduct discredited the legal profession and raised questions about his ability to practice law. The Tribunal noted that Mr. Dougan had shown a shocking disrespect for the solemnity of funerals and to those close to

the deceased, and also determined that Mr. Dougan's conduct was even more serious because he had identified himself as a lawyer during the fighting.

The consequences of the 2013 altercation were very serious for Mr. Dougan. Mr. Dougan lost his law practice, he experienced anxiety and panic attacks, his wife left him, and finally he declared bankruptcy in 2017.

Mr. Dougan admitted that he engaged in professional misconduct and there was a joint submission on the penalty. The Tribunal order that Mr. Dougan's licence be suspended for four months.

Takeaways

Identifying themselves as a professional during a private incident, can increase the consequences to members flowing from their conduct.

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— KC —

British Columbia Supreme Court Finds Principles From *R. v. Jordan* Also Apply to Administrative Proceedings

In *Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner),* 2018 BCSC 1642, the British Columbia Supreme Court (the "Court") quashed a decision of the Police Complaint Commissioner (the "PCC") to order a second public hearing for an incident as the delay in the proceedings amounted to an abuse of process that would bring the disciplinary hearing procedures into disrepute.

Background

Mr. Diaz-Rodriguez is a member of the South Coast British Columbia Transportation Authority Police Service. On August 10, 2011, he and a fellow officer, Mr. Hughes, were involved in an incident with Mr. Riby-Williams. Mr. Riby-Williams had attempted to evade arrest but was caught and subdued after being hit by batons for several seconds by Mr. Diaz-Rodriguez and Mr. Hughes. The entire incident was recorded on video.

The PCC's investigation into the incident and the resulting disciplinary proceedings lasted over seven years without a final decision on the matter. The process involved three separate investigations and decisions by three discipline authorities regarding the same incident. The delay was primarily due to the actions taken by the PCC. Ultimately, the PCC made a decision to hold a hearing into the matter.

Mr. Diaz-Rodriguez brought an application for judicial review to challenge this decision to hold a hearing as it was made approximately six years after the initial incident, taking the position that the delay was unreasonable and amounted to an abuse of process.

Decision of the British Columbia Supreme Court

In *R. v. Jordan*, 2016 SCC 27, the Supreme Court of Canada established presumptive ceilings by when criminal matters have to be heard. The Court acknowledged that these presumptive ceilings do not apply to administrative proceedings, however, the Court did find that the principles expressed in *R. v. Jordan* were applicable.

The Court found that the delay had been inordinate, noting that although the matter did not involve complex legal or factual issues, it had moved at a "snail's pace." However, the Court found the delay did not cause prejudice to the fairness of the public

hearing. In coming to its decision the Court noted that the incident was video recorded and the witnesses had been interviewed soon after the incident.

Despite this, the Court did find that the delay caused another form of prejudice such that the delay amounted to an abuse of process. The Court noted that this form of prejudice can arise whether or not the fairness of the hearing had been compromised.

The Court did not presume prejudice due to the delay alone. The Court found prejudice because the public hearing had been expanded to include other allegations previously unknown to Mr. Diaz-Rodriguez, caused him to be on administrative leave for nearly five years, had caused him to suffer from anxiety and depression due to the allegations and the delay had exacerbated these symptoms beyond what was reasonable.

The Court decided that the continuation of the proceedings would amount to an abuse of process that would bring the *Police Act* disciplinary hearing procedures into disrepute. Accordingly, it quashed the decision to hold a hearing.

Takeaways

1. The principles set out in *R. v. Jordan* can potentially be applicable to administrative proceedings.

2. Even though delay has not prejudiced the fairness of a proceeding, it still can prejudice the member and amount to an abuse of process.

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