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Professional Regulation Newsletter

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Court of Appeal Upholds Finding That Judge's Discussions With a Justice of the Peace Did Not Warrant a Mistrial

In *R. v. M.M.*, 2022 ONCA 63, the Ontario Court of Appeal upheld a decision of a trial judge who had refused to declare a mistrial, finding that his discussions with a justice of the peace did not create a reasonable apprehension of bias warranting one.

Background

An accused was convicted of sexual interference and sexual assault of a 14-year-old complainant and sentenced to 14 months in custody.

The complainant was a friend of the accused's daughter. During a recess in the trial, the trial judge was approached by a sitting justice of the peace. As a justice of the peace she had access to the area behind the courtroom reserved for judges and court staff and approached the trial judge there. No one witnessed the exchange between the trial judge and the justice of the peace, but the justice of the peace had advised the trial crown of her intention to approach the trial judge.

Apparently the justice of the peace was the mother of the accused's ex-spouse and the grandmother of the accused's three children. She sought the trial judge's blessing to attend the trial and was told by the trial judge

that anyone is free to observe the trial in the courtroom. Subsequently, the justice of the peace returned to tell the trial judge that he could carry on without her because the accused did not want her watching his trial.

When the trial resumed, the trial judge immediately advised the parties of this encounter and that he had been caught off-guard by it and had never been approached in that way during a trial in his years on the bench. He also stated that in hindsight, counsel for the crown should have advised the justice of the peace not to speak with him in the middle of the trial.

The trial judge also conceded that although the justice of the peace had the right to do so, he should have advised her that it would be unwise for her to attend the trial given her position and relationship with the accused.

The accused then brought an application for a mistrial arguing that the encounter between the trial judge and the justice of the peace had created a reasonable apprehension of bias. The trial judge dismissed this motion and ultimately convicted the accused of sexual interference and sexual assault, sentencing him to 14 months in custody.

The accused appealed his conviction to the Court of Appeal and argued that the trial judge had erred in failing to declare a mistrial.

Decision of the Court of Appeal

The Court of Appeal upheld the trial judge's decision that his encounter with the justice of the peace did not lead to a reasonable apprehension of bias which warranted a mistrial. In so concluding, the Court of Appeal acknowledged that there may be circumstances where the mere fact of *ex parte* communications may alone create an apprehension of bias and where, as occurred here, a judicial officer approaches a judge in order to make the judge aware of her personal interest in the case, the appearance of impartiality may be in doubt, depending on how the trial judge responds to the circumstances.

As a result, had the conduct of the justice of the peace stood alone, her actions may well have given rise to an appearance of bias given that her comments to the trial judge revealed both that she had a vested interest in the case as the grandmother of the accused's children, and an acrimonious relationship with the accused. Consequently, it is possible for a reasonable person to see how this communication could sway the trial judge to disfavour the accused in a case where credibility would be a significant issue.

However, the Court of Appeal was satisfied that while the third party's conduct may have been relevant to the analysis, the focus of the inquiry into a reasonable apprehension of bias is the conduct of the judge and had the trial judge done nothing more but acknowledge this encounter, it is possible that a reasonable apprehension of bias may have remained.

However, the trial judge took proactive action to mitigate the appearance of unfairness that this unwelcome encounter may have caused by doing the following:

(a) he put his recollection of the two encounters with the justice of the peace on the record within minutes of the second encounter;

(b) he heard and considered submissions from counsel on whether the encounters justified a mistrial; and

(c) he explained in his reasons why he believed he could remain impartial notwithstanding the encounters.

In that regard, the trial judge had reasoned that although the encounter may mean that the accused might not receive a perfect trial, it would not mean, when viewed from the perspective of a reasonable observer, that the accused would not receive a fair trial.

Accordingly, the Court of Appeal was satisfied that the trial judge's actions in mitigating the appearance of unfairness were sufficient to overcome any suggestion of there being a reasonable apprehension of bias and as a result, upheld the trial judge's decision not to declare a mistrial and dismissed the appeal.

Takeaways

Members of tribunals have a role which is akin to being "administrative law judges" and as such must be careful not to place themselves in circumstances which could lead to their conduct creating a reasonable apprehension of bias.

This case demonstrates the importance of panel members in a hearing ensuring that they do not have any external contact with anyone who may be in any way connected with the case so that there cannot be any suggestion that there may be a reasonable apprehension of bias on their part.

Further, in unfortunate circumstances such as those in this particular case, where the approach was made by another to the judge, it is important that proactive action be immediately taken to mitigate the appearance of unfairness that any such interaction may cause. In that regard, it is imperative that immediate disclosure to the parties of the circumstances be made and that advice be obtained from independent legal counsel as to how best to proceed in the circumstances, which will likely include in addition to disclosure to the parties of those circumstances, hearing and considering submissions from the parties on whether the circumstances warrant a mistrial or the panel member recusing themselves from the panel.

Christopher Wirth, Partner

— KC —

Alberta Court of Appeal Orders New Hearing After Solitaire Playing Judge on Panel Recuses Herself

In *ENMAX Energy Corporation v. TransAlta Generation Partnership*, 2021 ABCA 366, the remaining two judges of a panel of the Court of Appeal decided to order a new hearing after the third judge on the panel recused herself after having been observed playing solitaire during the hearing of the appeal.

Background

ENMAX and TransAlta had a dispute which was adjudicated by an arbitration tribunal. ENMAX then appealed the outcome of the arbitration to the Alberta Court of Queen's Bench which upheld the decision. ENMAX further appealed to the Alberta Court of Appeal which heard the appeal in the summer of 2021.

Unfortunately, during the hearing of the appeal, those observing it were, due to a reflection in a window, able to see that one of the three judges on the Court of Appeal panel was playing multiple rounds of solitaire during the hearing.

As a result, ENMAX filed a request for a new hearing before a new three member panel of the Court of Appeal. Following this, the judge who had been observed playing solitaire advised that she was recusing herself from the panel. ENMAX then asked the two remaining judges of the Court of Appeal panel to step aside arguing that an oral hearing is conducted in front of a panel of judges who appear as a single panel and that the appropriate remedy was that the matter be reheard before a new panel. TransAlta opposed this, arguing that there was no reason to reargue the appeal before a new panel as the two remaining members of the panel of the Court of Appeal could render the decision.

Decision of the Court of Appeal

The two remaining members of the Court of Appeal concluded that the fact that one member of the panel had to recuse herself after having been seen playing solitaire during the hearing of the appeal did not preclude the two remaining members of the panel from deciding the matter and they were not required to recuse themselves. In that regard, the court held that neither of them had been aware of their colleagues actions and inattention during the hearing of the appeal.

However, despite concluding that they were not required to recuse themselves, they decided that since they disagreed on the outcome of the appeal, and were not unanimous, the only recourse available in the circumstances was that the matter be heard by a new panel of the Court of Appeal.

Takeaways

Although this matter involved judges of the Court of Appeal it applies with equal force to members of an administrative law tribunal.

It is clear that the parties are entitled to the undivided attention of a member of a panel hearing a matter and that members of a panel should not engage in other activities including, but not limited to, playing games on their computer, while hearing a matter.

In circumstances, however, where one member of the panel may have to recuse themselves, it is important that they not have done anything through their conduct to impair the ability of the remaining members to continue on with the matter. In this case, the other members of the Court of Appeal were unaware that their colleague had been playing solitaire during the argument of the appeal and accordingly their colleague's conduct did not by itself preclude them from deciding the appeal. Rather, it was only the fact that the two remaining justices could not make a unanimous decision that precluded the possibility of making a determination on the appeal.

Christopher Wirth, Partner

— KC —

Panel of Law Society Tribunal Refuses to Have Member Recuse Himself Holding That His Conduct Did Not Create a Reasonable Apprehension of Bias

In the *Law Society of Ontario v. Diamond*, 2021 ONLSTH 157, a panel of the Law Society Tribunal Hearing Division (the "Panel), rejected a request that one of its members recuse himself on the basis of a reasonable apprehension of bias.

Background

Jeremy Dov Diamond ("Mr. Diamond"), a licensee of the Law Society of Ontario was found to have engaged in professional misconduct by the Panel based upon an agreed statement of facts, affidavit evidence and Mr. Diamond's admissions. The professional misconduct to which Mr. Diamond admitted involved the marketing of his practice on websites, online advertisements and the provision of legal services which had involved referring potential clients to other licensees for a fee, holding himself out as an expert in personal injury litigation, and marketing his services with damages awards which did not genuinely reflect the legal performance or the quality of legal services provided.

Following the finding of professional misconduct, the hearing proceeded to the penalty phase in which the parties jointly submitted that the penalty should be a reprimand. After considering the matter, however, the Panel indicated to the parties that it was concerned as to whether this joint penalty submission should be accepted and invited the parties to make further submissions with respect to this.

Prior to receiving those further submissions on penalty, and therefore prior to the Panel deciding whether or not to accept the joint submission on penalty, Mr. Diamond brought a motion seeking to have the Chair of the panel recuse himself on the basis that there was a reasonable apprehension of bias arising from:

(i) his having preconceived views of the business of the respondent's law firm arising from his previous policy work which was said to have been demonstrated in a question he asked counsel in the course of penalty submissions;

(ii) his previously having tweeted links to a newspaper article and law firm video which were said to have been derisive of the respondent's firm; and

(iii) his having sent information about his background and caselaw concerning bias to the parties prior to argument of the recusal motion.

Decision of the Law Society Tribunal

Ultimately, the Panel rejected Mr. Diamond's request that the Chair recuse himself holding that:

(a) a reasonably informed person would not conclude that the Chair would not decide the matter fairly, in that:

(i) the question concerned a different topic than that addressed in the Chair's previous policy work and properly arose on the evidence before the panel which included the respondent's admissions of professional misconduct;

(ii) tweets of media stories relating to the policy issue that the Chair was working on would not reasonably be perceived as endorsing negative views concerning the respondent's firm; and

(iii) providing relevant caselaw so that the parties have a chance to assist the panel in its submissions, and relevant background information given the disclosure obligations when bias is alleged, would not be seen as demonstrating bias.

In addition, the panel also found that Mr. Diamond, in waiting to raise the allegations of bias until after the Panel had indicated its concerns about the parties joint submission on penalty, did not raise the issue at the earliest practical opportunity and was therefore deemed to have waved the objection to the panel member's presence on the Panel.

Takeaways

If there is a concern that a member of a panel may have a reasonable apprehension of bias, a request that the panel member recuse themselves should be brought at the first instance and should not be left to be brought only if a party perceives it to be in their interest later in the proceeding.

In addition, although the Panel in this case concluded that the panel member did not have a reasonable apprehension of bias, it is clear that his past conduct did touch on and comment on issues not unlike those on which the panel was adjudicating. Accordingly, members of administrative law tribunals need to ensure that their conduct particularly, that online, stays away as much as possible from issues which are likely to arise before them on matters which they will be hearing so as to minimize the prospect that any party will allege that they have a reasonable apprehension of bias.

In this regard, although Mr. Diamond was unsuccessful on his motion seeking to have the Panel member recuse himself, it did require a day for this motion to be heard.

Although at this time it is unknown whether this decision will be appealed, if it is, there is always the risk that if the appeal is successful, the whole matter will have to be reheard thereby causing all parties to incur further delay and expense.

Christopher Wirth, Partner

— KC —

Law Society Tribunal Rejects Joint Submission on Penalty

Introduction

In *Law Society of Ontario v. Diamond*, 2022 ONLSTH 28, a Panel of the Hearing Division of the Law Society Tribunal after having previously concluded that one of its Panel members did not have a reasonable apprehension of bias, went on to reject a joint submission on penalty which provided that the only penalty would be a reprimand.

Background

As indicated in the previous article, Jeremy Dov Diamond ("Mr. Diamond") a member of the Law Society of Ontario ("LSO"), admitted to allegations of professional misconduct, agreeing to an Agreed Statement of Facts and Admitted Document Book. Based upon those admissions the Agreed Statement of Facts and the Admitted Document Book, the Panel of the LSO's Hearing Division Tribunal ("the Panel") found Mr. Diamond to have committed professional misconduct with respect to his firm's advertising and marketing, and in that regard concluded that he had intentionally misrepresented his practice and expertise. Following that finding, the parties then submitted a joint submission on penalty to the Panel which only provided for reprimand.

During the course of submissions with respect to the joint submission on penalty, the Panel indicated that it had concerns as to whether the joint submission on penalty was appropriate and whether it should be rejected. Mr. Diamond then brought a motion seeking to have one member of the Panel disqualified on the basis of a reasonable apprehension of bias. As discussed in the previous article, the Panel rejected that motion and then proceeded to decide the issue of penalty.

Panel Decision

In its findings with respect to misconduct, the Panel noted two of those findings which were particularly relevant to its decision on penalty, namely:

(a) Mr. Diamond improperly marketed the provision of legal services, as a personal injury litigation lawyer, that he did not provide;

(b) Mr. Diamond improperly marketing himself as an expert personal injury litigation lawyer when in fact he did not represent, or provide legal services to, retained clients and his experience did not include conducting trials in personal injury litigation cases.

The Panel also accepted the LSO's position and found that Mr. Diamond's misconduct involved substantial advertising and marketing that intentionally misrepresented his practice and expertise.

In that regard, the Panel found that Mr. Diamond had only practiced for one year in Florida as a personal injury litigation lawyer. He worked for his uncle's firm for approximately six years, ending in early 2013 doing client intake. All clients were referred out to other firms for referral fees. From 2013 onward, he continued to do client intake as well as marketing and management, but he did not have carriage of any cases, and he did not do any trials. While he apparently had some involvement in individual cases, the Panel concluded that the evidence did not demonstrate that he had substantial involvement.

The Panel further concluded that: "Mr. Diamond was not an expert personal injury litigation lawyer. He did not practise as a personal injury litigation lawyer. However, he extensively marketed himself as such from 2013 to 2017." As a result, the Panel concluded that this was a long term, widespread, intentional misrepresentation for financial advantage.

Given its findings, after advising the parties of its concerns with respect to the joint submission on penalty and hearing their submissions with respect to it, the Panel decided to reject the joint submission on penalty. In so doing, the Panel concluded that it should not be accepted as the proposed penalty would bring the administration of justice disrepute or otherwise be contrary to the public interest. In reaching this conclusion, the Panel concluded that the reprimand proposed by the joint submission on penalty was so unhinged from the circumstances of the case that it must be rejected, concluding that a reprimand would bring self regulation of the legal profession into disrepute and was otherwise contrary to the public interest.

In that regard, the Panel accepted the test and procedures adopted by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43, which sets out the principals relating to when a joint submission on penalty can be rejected, namely that "Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest."

The Panel also noted that as set out in the *Anthony-Cook* case, rejection of a joint submission requires that it be unhinged from the circumstances of the misconduct and the legal profession such that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances including the importance of promoting certainty and resolution discussions, to believe the proper functioning of the regulation of the legal profession had broken down. The Panel also noted the importance of providing certainty in settlement discussions. The Panel also noted, however, that a reprimand is the most lenient penalty order that can be made and has no effect on the professional's licence and no other consequence, financial or otherwise.

As a result, the LSO's Panel concluded that a "reprimand is so unhinged from the circumstances of the misconduct in this case and the circumstances of Mr. Diamond, that the acceptance of the joint submission would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the regulation of the legal professions had broken down."

In reaching this conclusion, the Panel noted that in its opinion:

- "A reprimand is so lenient, in the context of failures of honesty and integrity in communications to very large numbers of potential clients over a lengthy period of time, that a reasonable and informed person would be concerned that the regulation of legal professions does not take honesty and integrity seriously;

- A reprimand is so lenient that a reasonable and informed person would be concerned that regulation of legal professions effectively countenances failures of honesty and integrity in communications by legal professionals to potential clients, and that failures of honesty and integrity are effectively countenanced in the marketing context which would not be countenanced in other aspects of professional practice;

- A reprimand is so lenient, in the context of the extraordinary success

of the marketing program of which this misconduct was an important part, that a reasonable and informed person would see the proposed penalty as utterly disproportionate to the advantage enjoyed from improper marketing with a corresponding serious detrimental effect on confidence in legal services regulation and on deterrence of future misconduct;

- A reprimand is so lenient, in the context of prior caution and assurances by counsel as to Mr. Diamond's appreciation of, and commitment to complying with, his professional obligations, that a reasonable and informed person would be concerned that cautions by and assurances to the regulator of the legal professions are not of real importance."

Consequently, the Panel found that the acceptance of the joint submission would bring the regulation of the legal profession by the LSO and adjudication by the tribunal into disrepute and otherwise would not be in the public interest because doing so would:

- "compromise public confidence in the trust and integrity of the legal professions and thereby compromise public confidence in the administration of justice and the legal system;

- compromise the ability of the public, and particularly vulnerable persons, to effectively and confidently rely on marketing communications of legal professionals; and

- fail to reasonably ensure that new and innovative ways of providing legal services are being taken with necessary professionalism and do not fall victim to commercial self-interest."

Having rejected the joint submission on penalty, the Panel will next hear a motion brough by Mr. Diamond to withdraw his admissions of professional misconduct.

Takeaways

While the test established by the Supreme Court of Canada in *Anthony-Cook* to reject a joint submission on penalty is a high bar to meet, where circumstances warrant it, a tribunal can be justified in doing so.

Christopher Wirth, Partner

— KC —

Supreme Court of Canada Denies Leave to Appeal From Decision Upholding Sexual Abuse Revocation Provisions in Section 51 of the Health Professions Procedural Code

In our Fall 2021 Newsletter, we reviewed the Ontario Court of Appeal's decision in *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482 which involved a member of the College of Dental Hygienists of Ontario (the "College") whose certificate of registration was revoked under the sexual abuse provisions in section 51 of the *Health Professions Procedural Code* (the "*Code*"), which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, after he entered into a consensual sexual relationship with a woman he was treating, whom he eventually married and continued to treat after their marriage.

The College's Discipline Committee found that the sexual abuse provisions of the *Code* function as "bright-line rule" prohibiting sexual relationships between members and their patients, even if the relationship is consensual. After the member's application for judicial review was dismissed by the Ontario Divisional Court, he appealed to the Ontario Court of Appeal, which similarly dismissed the appeal and upheld the *Code*'s strict prohibition on sexual relationships between members and patients. The Court

also found that the mandatory penalty of revocation was constitutional, as there is no constitutional right to practice a profession and the interest affected by the penalty of mandatory revocation of a health professional's certificate of registration is an economic one, which is not protected by the *Canadian Charter of Rights and Freedoms*.

On February 24, 2022, the member's application for leave to appeal to the Supreme Court of Canada was dismissed, thereby bringing the matter to a close as there is no further avenue of appeal. The dismissal of the leave application confirms the strict nature and application of the sexual abuse provisions of the *Code* and serves as a reminder of the importance of maintaining professional boundaries between regulated health professional and their patients, as the penalty imposed by section 51 of the *Code* is extremely serious and has only limited exceptions, which may vary depending on the spousal exception rules adopted by a given College.

Alex Smith, Associate

— KC —

Divisional Court Holds That Time Period for Application for Reinstatement Runs From Date of Revocation

In *Lemieux c. Ontario College of Teachers,* 2021 ONSC 8164, the Ontario Divisional Court interpreted the retroactive revocation provisions of the *Ontario College of Teachers Act, 1996*, S.O. 1996, c. 12 ("the *Act*"), finding that the 5-year time period which must pass before a member can apply after revocation for reinstatement begins on the date on which the member was originally found guilty of professional misconduct, rather than the date on which the retroactive revocation came into effect.

Background

In our Spring 2021 Newsletter, we discussed the amendments to the *Act* which came into effect on December 8, 2020. Those amendments in Bill 229 retroactively revoked a member's certificate of qualification and registration if the member was previously found guilty of an act of professional misconduct consisting of or including sexual abuse of a student or a prohibited act involving child pornography. As well, for certain acts of sexual abuse of a student, such as sexual intercourse or touching, and for prohibited acts involving child pornography, the member is not entitled to apply for reinstatement. However, for some sexual misconduct, including sexual abuse consisting of behaviour or remarks of a sexual nature by a member towards a student, the member is permitted under section 33(4.1) of the *Act* to apply for reinstatement after 5 years have passed "from the date of the order".

In this case, the Applicant was a former member of the Ontario College of Teachers (the "College") who had previously pleaded no contest to allegations that he engaged in sexual abuse consisting of behaviour or remarks of a sexual nature towards a student. He was found guilty of professional misconduct on April 16, 2015 and served an 18-month suspension, after which he returned to his teaching duties and was not involved in any further disciplinary issues. When the Bill 229 amendments came into effect on December 8, 2020, the Applicant's certificate was automatically retroactively revoked.

The Applicant applied for reinstatement shortly thereafter, and made submissions to the Registrar of the College that he was able to do so because 5 years had passed since he had originally been found guilty of professional misconduct. However, the Registrar interpreted the reinstatement provisions of the *Act* as requiring 5 years to have passed from the date on which the retroactive revocation provisions came into force (i.e. December 8, 2020), meaning the Applicant would not be permitted to apply for reinstatement until December 8, 2025. The Registrar therefore decided that the

application was premature and should not be referred to the Discipline Committee (the "DC") for its consideration. The Applicant applied for judicial review of the Registrar's decision to the Ontario Divisional Court.

The Majority's Decision

The Court confirmed that the standard of review is reasonableness for a matter of statutory interpretation under judicial review. The Court cited the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*") for the relevant principles, and in particular the principle that the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of that provision.

With respect to the text of the relevant provisions, the majority found that the Registrar erred by completely ignoring the use of the word "order" in section 33(4.1), which requires 5 years to have passed "from the date of the order" before an application for reinstatement can be made. The majority emphasized that section 30.3 provides that a member's certificate is "deemed to be revoked" on December 8, 2020 "if, before that day, an order was made by the Discipline Committee under subsection 30 (4) or (5)" finding the member guilty of professional misconduct. The majority found that section 30.3 does not impose a new penalty on December 8, 2020, but rather retroactively changes the penalty from the original order, which in this case was dated April 16, 2015.

In relation to the context, the majority noted that a different provision, section 33(4.3) of the *Act*, which deals with applications for reinstatement after a conviction under the *Criminal Code* is subsequently overturned on appeal or pardoned, uses different language. Rather than setting a time period based on "the date of the order" as section 33(4.1) does, section 33(4.3) bases its time period on the date "of the revocation". The majority found that this difference in wording demonstrates that where the legislature intended to impose a fixed timeline from the time of the deemed revocation, it explicitly stated so. The majority also noted the presumption in statutory interpretation that where a different expression is used, a different meaning is intended.

With respect to the purpose, the majority accepted the College's arguments that the deemed revocation provisions were intended to demonstrate that sexual abuse of students will not be tolerated and to keep students safe, and that professional discipline legislation is to be interpreted in a way that protects the public interest.

The majority, however, found that the Applicant's interpretation of the 5-year period did not compromise the College's public interest mandate or the legislative purpose of keeping students safe, as the Registrar had concluded. Even on the Applicant's interpretation of when a member can apply for reinstatement, the provisions still achieve their purpose by revoking the member's certificate and requiring the member to apply for reinstatement. The majority emphasized that such an application is not automatically granted. A member applying for reinstatement still needs to convince the DC that the public will be adequately protected by the issuance of a new certificate, and Section 33(6) of the *Act* grants the DC broad powers to refuse the application for reinstatement, or to grant it with conditions and limitations.

Additionally, the 5-year period following the April 16, 2015 order, during which time the Applicant continued to teach, served as a reference period for the DC to evaluate the Applicant's conduct, ensure that he had been rehabilitated, and determine whether reinstatement would pose any danger to students or the public interest. The majority found that the Registrar failed to consider the DC's role in the reinstatement process and how it served the College's public interest

mandate and the legislative purpose of the retroactive revocation provisions.

The majority also found that interpreting the 5-year period as beginning on December 8, 2020, as the Registrar did, would lead to absurd and unfair results. According to the Registrar's interpretation, an individual found guilty of professional misconduct on December 8, 2020 could apply for reinstatement 5 years after his order, while the Applicant would have to wait more than 10 years after his order, despite having already served an 18-month suspension. The majority found that if the Legislature had intended to impose an additional 5-year penalty under section 33(4.1), it would have done so expressly, given the punitive and arbitrary effects.

The majority held that the Registrar's decision was unreasonable, as it failed to consider the text, context, and purpose of the legislative provisions and set aside the Registrar's decision declining to remit the matter back to the Registrar, as there was only one reasonable interpretation of the commencement of the 5-year period under section 33(4.1). The majority therefore made an order rescinding the Registrar's order, and directing the Registrar to refer the Applicant's application for reinstatement to the DC.

Dissent

In dissent, Justice Ramsay emphasized that the retroactive operation of section 30.3 and the 5-year waiting period in section 33(4.1) indicate that the Legislature considered the sanctions imposed in the past to be inadequate for the protection of students and found that there was nothing in the *Act* to cast doubt on the Registrar's interpretation of the words "from the date of the order" in section 33(4.1) as referring to the date on which the deemed revocation took effect, meaning December 8, 2020. The provisions in question were focused on the revocation of a member's certificate, not the original order finding a member guilty of professional misconduct, which is dealt with elsewhere in the *Act*.

Justice Ramsay acknowledged that retroactive legislation may sometimes subvert well-established expectations and may be perceived as unfair, but found that despite its adverse effects on the Applicant, the provisions in question are more preventative than punitive. The provisions are expressly retroactive while also applying prospectively by preventing the perpetrator of sexual misconduct from teaching in the future. As a result, Justice Ramsay concluded that the Registrar's decision was reasonable, and he would have dismissed the application for judicial review.

Takeaways

This decision provides important guidance on the retroactive revocation provisions of the *Act*, which went into effect on December 8, 2020 and resulted in the deemed revocation of the certificates of Ontario College of Teachers members who had previously been found guilty of professional misconduct consisting of prescribed sexual acts or prohibited acts involving child pornography. For members who are entitled to apply for reinstatement after 5 years under section 33(4.1) of the *Act*, the majority's decision confirms that the 5-year period begins on the date of the original order in which they were found guilty of professional misconduct. The decision also provides broader guidance for professional regulatory bodies and other administrative decision-makers on the application of retroactive legislation and the principles of statutory interpretation.

Alex Smith, Associate

— KC —

News

Keel Cottrelle LLP is pleased to announce that effective January 1, 2022, Kimberley Ishmael is now a partner in the firm.
On February 15, 2022 Patricia Harper chaired the Ontario Bar Association's program on Culturally Responsive Advocacy: A Toolkit to Support Equity, Diversity & Inclusion in your Administrative Practice.

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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