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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

CO-EDITORS: ANDREA GONSALVES & JUSTIN SAFAYENI ISSUE 5 • JUNE 2016

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Standard of Proof in Police Discipline Proceedings: *Jacobs v Ottawa (Police Service)*, 2016 ONCA 345

FACTS: J is a police officer employed by OPS. Following an arrest, J was charged and found guilty of misconduct (excessive use of authority) under the *Police Services Act*[1] and its associated regulation. The Ontario Civilian Police Commission affirmed the hearing officer's finding of guilt. J's application for judicial review was dismissed by the Divisional Court. J appealed to the Court of Appeal on the ground that the Divisional Court erred in finding that the Commission applied the correct standard of proof (balance of probabilities) for a finding of police misconduct under the *PSA*.

DECISION: Appeal allowed. Subsection 84(1) of the *PSA* provides that "misconduct" as defined in the Act "is proved on clear and convincing evidence". The applicable standard of proof in *PSA* hearings is that of clear and convincing evidence, which is higher than a balance of probabilities.

In reaching its conclusion that the standard of proof in police discipline hearings is a balance of probabilities, the Divisional Court held it was bound by *FH v McDougall*,[2] which rejected the existence of an intermediate standard of proof. The Divisional Court declined to follow *Penner v Niagara (Regional Police Services Board)*[3] because in that case the Supreme Court did not undertake any analysis of whether a higher standard of proof applied to disciplinary proceedings under the PSA. The Court of Appeal held that the Divisional Court erred in relying on *McDougall* and distinguishing *Penner*.

McDougall did not purport to establish a universal standard that applies to statutory standards of proof. A legislature has authority to create a standard of proof specific to a particular statute.

In *Penner*, the Supreme Court addressed the different standards of proof in civil actions and in *PSA* hearings. The court noted that the *PSA* requires that misconduct be "proved on clear and convincing evidence" and that a finding of misconduct might properly preclude relitigation of liability in a civil action where the balance of probabilities – a lower standard of proof – would apply. The finding on the standard of proof was

[1] RSO 1990, c P.15

[2] [2008] 3 SCR 53

[3] [2013] 2 SCR 125

central to the court's analysis in *Penner* and the decision was binding on the Divisional Court.

COMMENTARY: When the Divisional Court's decision was released in 2015, this Newsletter commented that the decision sought to address the inconsistency between *McDougall* and *Penner* on what "clear and convincing evidence" requires as a standard of proof. We noted that the inconsistency has been the subject of much confusion and criticism by lawyers practicing in the area of professional discipline. The Divisional Court had momentarily settled the debate in favour of *McDougall*.

With the Court of Appeal's decision, the confusion and criticism that followed *Penner* is likely to re-emerge. Though the decision states unequivocally that the standard of proof in *PSA* hearings is a higher standard of clear and convincing evidence, it does not provide any guidance on the content of that standard. It is within the authority of a legislature to specify a particular standard of proof in a statute, but neither the Court of Appeal here nor the Supreme Court in *Penner* conducted any statutory interpretation exercise to determine whether the legislature did so in this case – or whether "clear and convincing evidence" in s 84(1) of the *PSA* was simply intended to refer to the quality of evidence that will satisfy the standard of proof on a balance of probabilities, as many lawyers had previously understood.

It remains to be seen whether *Penner* and now *Jacobs* will be restricted to *PSA* hearings, or whether similar intermediate standards of proof will become more common, reverting to the very situation *McDougall* sought to address.

Jurisdiction to Revoke a Resigned Certificate of Registration: *College of Nurses of Ontario v Mark Dumchin*, 2016 ONSC 626 (Div Ct)

FACTS: D held a certificate of registration with the College of Nurses of Ontario until 2013 when he resigned his certificate while under investigation by the College for professional misconduct.

Subsequently, a panel of the College's Discipline Committee found D guilty of professional misconduct. The panel considered that the appropriate penalty for the misconduct was revocation of D's certificate of registration, but concluded that it had no jurisdiction to revoke the certificate of a member who had resigned. The panel ordered a reprimand. The College appealed the panel's decision as to penalty.

DECISION: Appeal allowed. The Discipline Committee's decision was unreasonable.

Under the *Regulated Health Professions Act, 1991*[4] and other applicable legislation, the College has a mandate to maintain public confidence in nurses and in the profession's ability to regulate itself. Discipline Committee panels may conduct adjudicative hearings in respect of complaints and reports of allegations of professional misconduct make findings of professional misconduct, and impose penalties.

The Discipline Committee has jurisdiction to make findings of professional misconduct against both members and former members, so long as the alleged misconduct occurred while the person was a member (*RHPA*, s 14). The *Health Professions Procedural Code*[5] authorises the Discipline Committee to make orders respecting penalties and costs (s 51(2)).

The *RHPA* and the *Code* must be given a broad and purposive interpretation in keeping with the College's duty to act in the public interest.

The panel's decision failed to give effect to the College's continuing jurisdiction to impose sanctions on a member who has resigned. The panel reasoned that once a member resigns his certificate becomes "non-existent" and a panel cannot suspend or revoke a "non-existent" certificate of registration. That interpretation is inconsistent with s 14 and the purpose of the

[4] SO 1991 c.18
[5] Schedule 2 to the *RHPA*

College's continuing disciplinary jurisdiction. Section 14 makes a former member subject to all stages of the College's investigation and discipline process, including all of the sanctions available under s 51(2).

In the context of professional regulation, a "certificate of registration" does not mean a piece of paper confirming one's member in the profession; it means the entitlement to practise in a regulated profession.

The purpose of s 14 is to ensure that a member cannot frustrate the disciplinary process by resigning unilaterally. The panel's interpretation would encourage members to resign to avoid the consequences of their misconduct. This result is antithetical to the public protection purposes of the *RHPA*'s disciplinary regime.

COMMENTARY: The Divisional Court's decision provides clarity to all the colleges that regulate health professions in Ontario under the *RHPA*. For many years the discipline committees of different colleges and different panels of those committees had taken inconsistent views on the issue of whether they had jurisdiction to suspend or revoke the certificate of registration of a former member. Those discipline committees now have assurance that the full set of sanctions set out in s 51(2) are available upon a finding of misconduct by a former member.

While this decision may be welcomed for the clarity it provides, the Divisional Court's approach to reasonableness review in this decision is problematic. This decision may be seen as an example of "disguised correctness". The Divisional Court took no account of the Discipline Committee's greater expertise in the *RHPA* regime or the reasons the panel gave to support its interpretation. One would have expected those to feature more prominently on deferential review concerning the interpretation of an ambiguous legislative provision.

Factors to determine whether a decision is subject to judicial review: *Asa v University Health Network*, 2016 ONSC 439 (Div Ct)

FACTS: The Applicants, Drs A and E, were engaged in clinical practice and medical research at University Health Network. UHN is a multi-site public hospital that exists pursuant to the *University Health Network Act, 1997*.[6] It is subject to the provisions of the *Public Hospitals Act*[7] and receives funding from, among others, the Ministry of Health and Long-Term Care. UHN has a Research Policy that includes a description of what constitutes research misconduct.

An Investigation Committee struck by UHN concluded that Drs A and E had committed three forms of research misconduct. As a result of the Committee's conclusions, UHN's VP Research and VP Medical Affairs issued a Sanction Decision suspending the Applicants' research activities on a temporary basis while the Investigation Committee looked into further allegations of misconduct.

In accordance with the procedure set out in the Research Policy, Drs A and E appealed these decisions to UHN's President and CEO, Dr P, who dismissed their appeal.

Drs A and E then sought judicial review of Dr P's decision. UHN argued Dr P's decision was not subject to judicial review and, if it was, it was both reasonable and made in procedurally fair manner.

DECISION: Application allowed in part.

Dr P's decision was subject to judicial review. As held in *Setia v Appleby College*[8] the Court's jurisdiction under s 2(1)1 of the *Judicial Review Procedures Act*[9] turns on whether a decision "is the kind of decision reached by public law and therefore a decision to which a public law remedy

[6] SO 1997, c 45
[7] RSO 1990, c P.40
[8] 2013 ONCA 753 at para 32
[9] RSO 1990, c J.1

can be applied." The factors relevant to whether a matter falls within the purview of public law include the character of the matter for which review is sought; the nature of the decision-maker and its responsibilities; the body's relationship to other statutory schemes or other parts of government; and where the conduct has attained a serious public dimension.

A number of factors brought Dr P's decision within the purview of public law. First, the decision concerned the Applicant's ability to continue performing cancer research that affects medical protocols used in the treatment of patients in Ontario. Second, the competing interests at stake in Dr P's decision included the "need for a strong public pronouncement by the UHN regarding its commitment to excellence and rigour in research." Third, the UHN is a corporation established under the *UHN Act* whose objects include establishing and operating research facilities and maintaining and operating priority programs for cancer research. Fourth, UHN is a public hospital governed by the *Public Hospitals Act*. Fifth, the Research Policy was mandated by a group of three government agencies that regularly fund research in Canada. These factors, taken together, made the decision one that comes within the purview of public law and, thus, one subject to judicial review.

While the Applicants were awarded the procedural fairness to which they were entitled throughout the UHN process, Dr P's decision and that of the Investigation Committee were unreasonable in part. The Court remitted the Sanction Decision to UHN's VP Research and VP Medical Affairs for reconsideration in light of the Court's conclusions on falsification and fabrication.

COMMENTARY: This case presents an interesting example of a decision found to be of a sufficiently public law nature to attract judicial review remedies. Of particular note is the extent to which the Court focuses on the relevant factor of "conduct attaining a serious public dimension" in assessing whether a decision will be subject to review. The Federal Court of Appeal has defined this consideration as "where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public."[10]

As it did in *West Toronto United Football Club v Ontario Soccer Assn*,[11], the Divisional Court here attached particular importance to the impact the administrative decision could have on a broader population – here, the people of Ontario who are receiving cancer treatment, who might be impacted by the Applicants' inability to continue performing cancer research. Although one among several considered by the Court, the emphasis on this factor in its analysis suggests that in different circumstances, a decision under the Research Policy might not fall within the purview of public law, depending on its potential impact (or lack thereof) on the larger public.

Adequacy of Reasons and Judicial Notice of Professional Standards: *Novick v Ontario College of Teachers*, 2016 ONSC 508 (Div Ct)

FACTS: Two teachers, N and M, accompanied students on a field trip to Boston organized by N. A group of four students violently sexually assaulted a 16 year old male student before midnight on the third night of the trip. The victim reported the incident to M, who spent an hour with him and encouraged him to call his parents, which he declined to do. M then confronted the perpetrators, confirmed that an assault had taken place, and seized a cell phone that contained the video of the assault. The teachers immediately made arrangements to send two of the perpetrators back to Ontario. The incident was not reported to police or the victim's parents that night.

M went to see the victim at 7 am the next morning and arranged for him to call his parents. The matter was later reported to police, and the main

[10] *Air Canada v Toronto Port Authority*, 2011 FCA 347 at para 60

[11] 2014 ONSC 5881

perpetrators were criminally charged and convicted in Boston.

M and N faced discipline proceedings for, among other things, failing to report the incident to the victim's parents in a timely way. The Discipline Committee of the Ontario College of Teachers (the "Committee") found that the teachers committed professional misconduct by failing to immediately report the abuse to the parents of the victim. They failed to maintain the standards of their profession and acted in a manner that could reasonably be regarded as unprofessional. The teachers were given a reprimand, which was to remain on the public record for one year. They appealed against the finding of professional misconduct.

DECISION: The appeal was allowed, the decision below was quashed, and the Court ruled there was no professional misconduct.

The Court was harshly critical of the Committee's reasons, describing them in part as "grossly unfair" and "wrong in virtually every respect".

The Committee's reasons were 239 pages long. The Divisional Court described them as "poorly organized and difficult to follow" and "virtually incomprehensible". While the adequacy of reasons is usually a matter that arises where a decision maker has provided sparse reasons, Molloy J. observed that overly long reasons could create similar problems. The complexity of the reasons stymied court review and undermined the respondents' ability to understand why they were being disciplined.

The Court took issue with the Committee's finding that the teachers had breached any standards of the profession. The Committee failed to clearly identify what standard had been breached, other than to say that it was "notorious" that the parents of a victim of sexual abuse should be notified immediately. The Court held that the standard could not require "immediate" reporting (before even the perpetrators had been confronted) and the Committee had failed to identify the principle underlying this supposed standard.

Moreover, the Committee erred in taking judicial notice of the existence of such a standard in the absence of expert evidence. The Committee relied on the fact that the standard was supposedly "notorious" and "widely known" when finding that such a standard existed. The Court held that judicial notice (available under s 16(a) of the *Statutory Powers Procedure Act*[12]) is a narrow rule confined to uncontroversial facts and cannot be used to identify a standard of professional conduct. The Court did acknowledge that there was an open question as to whether standards of professional conduct are "opinions" or "information" within the "specialized knowledge" of the Committee (which could thus be properly invoked under s 16(b) of the *SPPA*). It may be appropriate to take notice under s 16(b) of professional standards in an obvious case (*e.g.* assault of a student). But in this case there was no evidence of any kind, whether of guidelines, policies, or case law, that supported the Committee's view of a teacher's obligations.

With respect to the finding of unprofessionalism, the Committee had made virtually no reference to the issue of professionalism beyond a "bald conclusory statement" that the teachers had acted unprofessionally. This finding was flawed for a number of reasons. It was based on a consideration of irrelevant matters (such as an improper analogy to the notification of the parents of a sick student). It rested on an improperly drawn adverse inference and a flawed credibility analysis of N. The Committee failed to consider relevant evidence and dismissed a College policy on professional misconduct related to sexual assault and a Ministry of Education document on Police/School relations as mere "guidelines". Equally, the Committee failed to take into account relevant considerations, including the rights of a 16 year old victim to decide when and how to report abuse to his parents or police. Taken together, the errors rendered the decision unreasonable.

COMMENTARY: This decision is remarkable for the scope and the tone of the Court's criticism of the decision of the Committee. At the end of the reasons, the Court goes so far as to make a call for

[12] RSO 1990, c S.22

greater training for decision makers on administrative tribunals. This decision is a reminder that while tribunals are accorded deference on questions of law and procedure, their decisions must adhere to basic standards of fairness.

Novick provides important instructions to tribunals on how to craft reasons. Reasons should not be overly long. It seems that most of the Committee's reasons consisted of summaries of submissions and evidence, which the Court obviously did not find helpful without context or analysis. Tribunals should also be very careful when using legal jargon: the Court took issue with the misuse of the terms "duty of care" and "*in loco parentis*" by the Committee.

Novick is also a reminder of the importance of distinguishing between specific breaches of professional standards, on the one hand, and unprofessional conduct, on the other. It is important that discipline tribunals identify not only which of these grounds of misconduct is in issue, but also the specific standard or the context that gives rise to the finding of professional misconduct. ⚖

CO-EDITORS

Andrea Gonsalves
416.593.3497
andreag@stockwoods.ca

Justin Safayeni
416.593.3494
justins@stockwoods.ca

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