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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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SCC divides on circumstances justifying correctness review: *Barreau du Québec v Quebec (Attorney General)*, 2017 SCC 56

FACTS: In two proceedings before the Administrative Tribunal of Quebec, the Minister of Employment and Social Solidarity filed motions that had been prepared, drawn up, signed and filed in the Minister's name by a person who was not an advocate. The individual respondents in both proceedings brought motions to dismiss on the grounds that the Minister's written proceedings had not been prepared by an advocate who was a member of the Barreau du Québec.

At issue was the interpretation of provisions in two pieces of legislation: the *Act respecting the Barreau du Québec*[1] ("*Barreau Act*") and the *Act respecting administrative justice* ("*ARAJ*").[2]

Section 128 of the *Barreau Act* provides that preparing and drawing up motions and other written proceedings are the "exclusive prerogative" of advocates and solicitors, and that it is the exclusive prerogative of advocates to "plead or act before any tribunal", with certain exceptions, including pleading or acting before the Tribunal "to the extent that the Minister … is to be represented to plead or act in his … name".

[1] CQLR, c B-1
[2] CQLR, c J-3

Section 129 of the *Barreau Act* provides that s 128 does not limit or restrict certain rights, including "rights specifically defined and granted to any person by any public or private law".

Section 102 of the *ARAJ* grants the Minister the right to "be represented by the person of his or her choice" before the social affairs division of the Tribunal.

The Tribunal concluded that under s 102 of the *ARAJ*, a person representing the Minister who is not an advocate has the power to prepare motions. That power is not limited by s 128 of the *Barreau Act*. The Tribunal dismissed the respondents' motions to dismiss Minister's motions.

The respondents and the Barreau sought judicial review of the Tribunal's decision. The Superior Court applied the correctness standard, concluded that the Tribunal's decision was incorrect, quashed the Tribunal's decision and declared null the Minister's motions. The Court of Appeal allowed the appeal, holding that the reasonableness standard applied and that the Tribunal's decision was reasonable.

DECISION: Appeal dismissed (Côté J, dissenting).

Writing for the majority, Brown J held that the applicable standard of review is reasonableness. There is no satisfactory precedent and the central issue entails the interpretation of s 102 of the *ARAJ*, which is the Tribunal's enabling statute. As such, the reasonableness standard must be presumed to apply.

The Tribunal had to bear in mind the *Barreau Act* when interpreting s 102, but that does not remove the issue from the Tribunal's jurisdiction and expertise; to the contrary, it shows that the *Barreau Act* has a close connection to the Tribunal's function. The Tribunal has to refer to the *Barreau Act* often in performing its function and has had to interpret ss 128 and 129 in many recent decisions.

The issue raised in the case is not a question of central importance to the legal system as whole and that lies outside the Tribunal's expertise. While the Barreau's role in regulating the representation of others before a court or tribunal is of obvious importance, the Tribunal was not called upon to decide the overall scope of advocates' monopoly on the provision of legal services. It had only to decide the scope of a narrow exception concerning representation of the Minister by a person who is not an advocate in certain proceedings before the Tribunal. The interpretation of s 102 of the *ARAJ* falls squarely within the Tribunal's expertise.

The majority rejected various arguments in support of the correctness standard. First, they disagreed with Côté J that the Tribunal could render inconsistent decisions on the issue, pointing to the fact that the Tribunal's recent decisions on the issue are consistent. Further, the importance she attaches, in determining the standard of review, to the mere possibility of the Tribunal rendering conflicting decisions on this point is contrary to the Court's recent jurisprudence and does not justify a correctness standard.[3] Second, the issue in this case does not concern two statutes that are in conflict with each other. Third, applying a contextual analysis, the presumption of reasonableness is not rebutted here: the Tribunal is a sophisticated administrative tribunal with power to decide "any question of law or fact necessary for the exercise of its jurisdiction".

The majority found that the Tribunal's conclusion is reasonable. It falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law, including the principles of statutory interpretation. The majority engaged in a lengthy statutory interpretation exercise and concluded that, having regard to the grammatical and ordinary sense of its words, the broader context of the

[3] See *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, commented on in Issue No. 6 of this Case Review

legislation, the legislature's intent and the legislative history of the provision, the Minister's right under s 102 of the *ARAJ* to "be represented" before the social affairs division of the Tribunal by a person who is not an advocate includes both written and oral submissions.

Justice Côté dissented, disagreeing with the majority on both the applicable standard of review and the result.

In her view, the motions before the Tribunal were grounded in the *Barreau Act*, and to decide the motions the Tribunal had to do more than simply bear that statute in mind. Whenever a question relates to the representation of others by a person who is not an advocate, it is necessary to interpret and apply the *Barreau Act*, which establishes what acts are reserved exclusively to advocates and solicitors.

The correctness standard applies because the issue in the case is a question of central importance to the legal system as a whole and lies outside the Tribunal's specialised area of expertise. That issue is one of statutory interpretation relating to the *Barreau Act*, and it is essential that ss 128 and 129 of that statute be interpreted and applied uniformly and consistently. Likewise, the exceptions that allow litigants to be represented by persons who are not advocates must be applied uniformly and consistently – the rule of law requires that there be only "one law for all". Contrary to the majority's critique, Côté J explained that her reasoning is not that the correctness standard applies simply because the Tribunal could render inconsistent decisions; rather, the correctness standard must be applied to questions that are of central importance to the legal system because such questions require uniform and consistent answers owing to their impact on the administration of justice as a whole. The impact that an inconsistent application of ss 128 and 129 could have on the administrative of justice as a whole leads to the conclusion that only one interpretation of these provisions is possible.

Even if the presumption of reasonableness applies, Côté J would find that the presumption is rebutted on a contextual analysis. Although the Tribunal is protected by a strong privative clause, the issue before the Tribunal is one in which it has no special expertise. It is a question of law that necessarily involved the interpretation of the *Barreau Act,* which is not the Tribunal's enabling statute or one closely connection to its function. Although there has not yet been a case in which the Court has rebutted the presumption of the reasonableness standard based on contextual factors, the absence of a precedent cannot prevent the court from applying the rule.

Conducting a statutory interpretation analysis, Côté J concluded that, properly construed, only an advocate or solicitor may prepare and draw up a notice, motion, proceeding or other similar document intended for use in a case before the Tribunal's social affairs division.

COMMENTARY: The central feature of this decision is the split between the majority of eight judges, who found that the reasonableness standard of review applied, and Côté J, a lone dissenter, who would have applied the correctness standard.

In several recent cases,[4] Côté J has favoured correctness review over reasonableness review. However, in the previous cases she was joined in the dissent by other judges.[5] In *Wilson*, Côté and Brown JJ co-authored the dissenting reasons. Citing rule of law concerns, they held that "where there is lingering disagreement on a matter of statutory interpretation between administrative decision-makers, and where it is clear that the legislature could only have intended the statute to bear one meaning, correctness review is

[4] See, for example, *Wilson*, *supra*; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47; *Quebec (Attorney General) v Guérin*, 2017 SCC 42.

[5] In *Guérin*, *supra*, Brown J and Côté J wrote separate reasons. Though they both concluded that the correctness standard applied, they disagreed in the result.

appropriate."[6] It is somewhat surprising, then, that in *Barreau du Québec*, Brown J not only disagreed with Côté J on the applicable standard of review – he authored the majority reasons.

A significant point of contention between the majority and the dissent is whether Côté J's reasons would expand the reasoning of the dissent in *Wilson* such that a mere possibility of conflicting decisions – rather than a "lingering disagreement – could justify correctness review. The majority reads this expansion into Côté J's reasons. She responds that they have misunderstood her reasoning – she is not suggesting correctness review applies *because there could be conflicting decisions*, but rather because of the central importance of the issue and the resulting negative impact inconsistent decisions could have on the administrative of justice as a whole.

Given the explanation she provides (at para 53), Côté J may be right is saying that the majority have distorted her reasons, which do rest on a different rationale than the dissent in *Wilson* (though she cites similar rule of law concerns). However, her reasons do not provide a very compelling explanation of *why* the issue is one of central importance to the legal system as a whole. She asks rhetorically: "How can it be accepted … that the [Tribunal] concluded in the instant case that the Minister's representative may … prepare, draw up and sign written proceedings for use in a case before [the social affairs] division, but that it could decide in another case that only an advocate may do so … ?" It is difficult to see how this potential inconsistency raises rule of law concerns, or how it supports a conclusion that the issue is one of central importance to the legal system. Rather, it seems like the kind of inconsistency that tribunals are routinely left to sort out themselves.

A second noteworthy aspect of the decision is that although the majority purports to be conducting reasonableness review, its actual analysis reveals something much closer to correctness review. The majority engages in a lengthy, detailed statutory interpretation exercise that is identical in its quality and depth of analysis to that of Côté J (though they reach opposite conclusions) – a detailed review of the legislative history, and a careful consideration of the legislative objectives, the scheme of the Act and the grammatical and ordinary sense of the words. Totally absent is any consideration of the Tribunal's own reasons, which the Supreme Court repeatedly tells lower courts ought to be the focus on reasonableness review. In the result, one wonders why the court bothered to engage in such a debate on the standard of review, only to analyse the substantive issue in the case without paying heed to the proper operation of the reasonableness standard. The decision provides more evidence that the standard of review concept is becoming increasingly theoretical and illusory, with little practical impact on how the Court decides cases.

Charter values in the non-adjudicative context: *ET v Hamilton-Wentworth District School Board*, 2017 ONCA 893

FACTS: ET is the father of two children in primary school. He is also a member of the Greek Orthodox Church.

ET advised the Hamilton-Wentworth District School Board that his religious beliefs require him to shelter his children from "false teachings" such as "moral relativism", "instruction in sex education" and "discussions or portrayals of homosexual/bisexual conduct and relationships and/or trans-genderism as natural, healthy or acceptable". He asked for prior notice if any of those topics were being discussed in the classroom, so he could consider whether to withdraw his children.

[6] *Wilson*, *supra*, at para 89.

The Board offered to exempt ET's children from a specific aspect of the school program that involves education on human development and sexual health. However, given the nature of the program and the generality of ET's concerns, the Board determined it was not possible to give prior notification of other items on ET's list. The Board also expressed concern that ET's demands in this regard would undermine the Board's policy of providing an inclusive and non-discriminatory program.

ET brought an application seeking a declaration that the Board violated his freedom of religion under s 2(a) of the *Charter*. ET provided no evidence of any actual instance where his or his children's religious freedom had been violated.

The application judge determined that although ET's religious freedom was engaged, the Board's refusal to provide accommodation was reasonable.

DECISION: Appeal allowed (Sharpe JA, concurring).

For the majority, Lauwers and Miller JJA found that ET's religious freedom was implicated, but that there was no evidence the Board's decision substantially interfered with ET's freedom of religion. Accordingly, ET failed to meet the first stage of the framework set out in *Doré v Barreau du Québec*,[7] and his appeal must be dismissed.

The majority went on to discuss a number of "methodological problems" with applying the *Doré* framework to the non-adjudicative decisions of "line decision makers" who typically lack *Charter* expertise, such as the teachers, principals and supervisory officers who form part of the Board in this case. Those problems are:

- *Who has decided the statutory objectives are pressing and substantial?* Importing the *Doré* framework to a line decision maker effectively imports a presumption that the statutory objective on which the decision rests is always "pressing and substantial" – but that is contestable.
- *Does such a presumption work to the disadvantage of the rights claimant by requiring them to defeat the presumption, when all they want to do is challenge a specific decision?*
- *Who is called on to exercise the "justificatory muscles" of the* Doré *framework, when there is no adjudication when the initial decision is made?*
- *What sort of justification must the line decision maker offer for the decision?* Is it to be provided when the decision is made, or left to the hands of lawyers when it is challenged judicially?
- *What is the applicable standard of review?* Are line decision makers considered expert so as to justify a deferential standard of review? School board officials are experts in certain matters, but when confronted with the claim that their decision does not respect the *Charter*, will they understand how to reason from constitutional principles?

Given these considerations, the majority indicated they were "reluctant to apply a robust concept of 'reasonableness' … to a line decision maker's discretionary decision", instead preferring "a more sensitive application of the nostrum that reasonableness takes its colour from the context."

In his concurring opinion, Sharpe JA focused on the lack of any concrete evidence of interference with ET's right to religious freedom. As he found no interference with ET's freedom of religion, Sharpe JA found he did not need to consider the *Doré* framework, but he did so for the sake of completeness. He concluded that the Board's decision was reasonable and proportionate in light of its statutory mandate to promote equity and inclusive education, and constrained ET's *Charter* protections no more than necessary.

[7] 2012 SCC 12.

COMMENTARY: The majority's *obiter* comments on the application of the *Doré* framework to the non-adjudicative decisions of line decision makers highlight some interesting, difficult and unresolved questions.

The majority's preoccupation with the "pressing and substantial" objective issue, however, is somewhat puzzling. In *Doré,* Abella J recognized the difficulties of determining who bears the onus to formulate and assert that the objective of an administrative decision is pressing and substantial.[8] As a result, the *Doré* framework – for better or worse – does away with the need to show a pressing and substantial objective of a particular decision. The only question to be asked is whether the decision is proportionate in light of the decision-maker's statutory mandate. That mandate needs to be identified, but it need not be "pressing and substantial."

That being said, the majority's concern that the *Doré* framework's treatment of the statutory objective/mandate may work against rights claimants is well-founded. Most courts have interpreted the *Doré* framework as something akin to a minimal impairment test under *Oakes* (as Sharpe JA does in this case), which leaves no room for balancing the impact on the *Charter* protection against the benefits of advancing the statutory mandate. One way to mitigate the concern raised by the majority would be to introduce a clear and discrete proportionality analysis into the *Doré* framework. This step might assist lower courts in returning to *Doré*'s overall emphasis on proportionality and the intention for the framework to exercise the "same justificatory muscles" as the *Oakes* test. This would not necessarily require that the statutory mandate be justified as "pressing and substantial", but it would at least ensure that the value of meeting that mandate is weighed within the *Doré* framework.

[8] *Ibid*, para 4.

The majority's other concerns about *Doré* raise questions without easy answers.[9] It is difficult to quarrel with the proposition that the deferential posture of *Doré* is better suited to *adjudicative* discretionary administrative decisions, as opposed to those made by line decision makers who may not have any legal training (let alone any constitutional expertise). Neither *Doré* nor *Loyola*[10] involved the latter type of decision.[11]

Ultimately, the complications of applying the *Doré* framework to non-adjudicative decisions by line decision makers suggests a need for more refined guidance on these issues from the Supreme Court of Canada.

Adequacy of reasons, notice and continuation of a panel member after term expiry: *Brooks v Ontario Racing Commission*, 2017 ONCA 833*

FACTS: B was a stable-owner and Ontario Racing Commission licensee. The Commission brought misconduct proceedings against B and his stable. The principal issue was whether B had permitted his brother, a convicted fraudster, to participate in regulated racing activities during the latter's suspension from Ontario's horse racing industry.

Following the hearing of preliminary matters but before the merits hearing, the Commission panel

[9] For further a critique of *Doré* and "Charter values" as applied in judicial review of administrative decisions, see the reasons of Lauwers and Miller JJA in *Gehl v Attorney General of Canada*, 2017 ONCA 319, in which they departed from Sharpe JA on the proper approach. That decision is commented on in Issue No. 11 of this Case Review

[10] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12.

[11] *Loyola* involved the discretionary decision of a Minister.

* Stockwoods LLP was counsel to the respondents in this appeal.

chair's term of appointment expired. The panel determined that the chair retained jurisdiction pursuant to s 4.3 of the *Statutory Powers Procedure Act*[12] ("*SPPA*"). The panel did not alert parties to this issue or invite submissions.

B brought an application for judicial review in relation to three decisions of the Commission panel: (i) the issuance of a preliminary, *ex parte* order suspending the applicants and freezing certain accounts (ii) the dismissal of a preliminary motion to stay the proceedings or in the alternative for particulars and (iii) the panel's findings, after the merits hearing, of wrongdoing and its penalty order.

The Divisional Court dismissed the application. While it found the Commission's freezing order was made without jurisdiction, this did not require the merits decision to set aside. The Commission's preliminary and merits decisions were reasonable and the Appellants' procedural fairness rights were respected.

The Appellant appealed on three grounds: (i) the Commission's refusal to order particulars amounted to a breach of procedural fairness; (ii) the Commission panel lost jurisdiction by allowing the chair to continue, and breached natural justice in not permitting submissions on the issue; and (iii) the Commission made unsupported findings of fact, failed to address contradictory evidence, and produced reasons so inadequate as to amount to a breach of procedural fairness.

DECISION: Appeal dismissed.

In addressing the standard of review, the Court noted that no such analysis is necessary for an allegation of breach of procedural fairness. The adequacy reasons is not an issue of fairness but rather forms part of the reasonableness analysis. For those grounds engaging substantive review of the Commission's decision, the standard is reasonableness, as the Commission is recognized as a tribunal with specialized expertise.

The Court rejected the submission that the Commission panel's reasons were inadequate. The panel made reasonable findings of fact available to it on the evidentiary record, as is required to survive review on a standard of reasonableness. The Court noted in particular that the Appellants had called no evidence at the hearing and thus their submission amounts to nothing more than an assertion that the panel should have drawn different inferences from the evidence of prosecution witnesses.

The Court held the Appellants received adequate notice of and understood the case they had to meet. The evidence led at the hearing related directly to the particulars contained in the Notice of Proposed Order, and the wrongdoing alleged therein was connected directly to the panel's ultimate findings. None of the panel's findings should have taken the Appellants by surprise.

The Court's decision in *Piller v Assn. of Ontario Land Surveyors*[13] is dispositive of the issue of the chair's continuing jurisdiction. The panel's decision that the hearing had commenced with the preliminary motions and that this amounted to "participation" within the meaning of s 4.3 of the *SPPA* was reasonable. In the circumstances, it was not a denial of natural justice not to invite submissions on the issue: the duty of fairness is flexible and variable, and depends on the circumstances of a particular case.

COMMENTARY: There are several notable aspects to *Brooks*.

First, the decision reaffirms that adequacy of reasons is not a stand-alone ground of appeal, to be evaluated separately from the reasonableness of a decision.[14] It is also notable that the Court

[12] RSO 1990, c S.22

[13] 2002 CanLII 44996 (ON CA)

[14] The Supreme Court conclusively determined that issue in *Newfoundland and Labrador Nurses' Union v*

emphasized the Appellants' decision not to lead evidence in assessing whether the panel's findings of fact were reasonable on the evidentiary record.

Second, in reviewing the panel's decision not to order particulars, the Court appropriately addressed this ground for appeal as a question of notice. Where a party alleges inadequate particulars, the question to ask is whether it understood the case to meet. A party is entitled only to particulars sufficient to enable a full and satisfactory understanding of the issues in the proceeding.

Finally, *Brooks* provides direction for situations in which a panel member's term expires part way through a proceeding. The hearing of a preliminary motion may be sufficient for a panel member to retain jurisdiction to continue the proceeding, as it was in this case. This is a reasonable approach for those tribunals that do not appoint a separate panel to hear preliminary motions, as it minimizes hearing disruption. ⚖

Interim suspension orders must consider least restrictive measures: ***Rohringer v Royal College of Dental Surgeons of Ontario***, 2017 ONSC 6656 (Div Ct)

FACTS: R, a dentist, sought to quash an interim order of the Inquiries, Complaints and Reports Committee ("ICRC") of the Royal College of Dental Surgeons of Ontario suspending his certificate of registration with the College.

R had been criminally charged in Florida in relation to two incidents in which he had allegedly exposed himself to teenage girls ("Florida Charges"). The Florida Charges came to the attention of the College, which started an investigation. After the first stage of the investigation, the ICRC notified R that it was considering ordering an interim suspension of his certificate of registration, and invited him to make representations. His counsel mistakenly thought the representations were due at 4:00 PM, when in fact they were due at 9:00 AM. By the time R made representations, the ICRC had already met and decided to impose an interim suspension order under s 25.4 of the *Health Professions Procedural Code*[15] ("*Code*").

A new regime for interim suspension orders came into force in May, 2017. Under s 25.4 of the *Code*, the ICRC may, at any time following the receipt of a complaint, make an interim order to suspend a certificate of registration "if it is of the opinion that the conduct of the member exposes or is likely to expose the member's patients to harm or injury." Previously, the ICRC could make an interim order to suspend a certificate, but only after an allegation of professional misconduct had been referred to a discipline hearing.

In its interim suspension decision (made without the benefit of R's reprsentations), the ICRC noted the serious nature of the Florida charges and that R had confessed to the allegations while in police custody. The ICRC also expressed concerns with R's workplace behaviour, including inappropriate sexual jokes and comments, and allegedly kissing a staff member 15 years ago. The ICRC concluded that his conduct exposes or is likely to expose his patients to harm or injury, and suspended his certificate of registration.

After the initial decision was made, the ICRC reconvened to reconsider its decision in light of the representations received from R. Those representations included an expert report from a forensic psychiatrist, who opined that R did not pose a risk of harm to his patients. The

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Newfoundland and Labrador (Treasury Board), 2011 SCC 62.

[15] Schedule 2 to the *Regulated Health Professions Act, 1991*, SO 1991, c 18 ("*RHPA*").

representations also indicated that R intended to contest the Florida Charges, and that R would consent to a term that he be monitored by a dental hygienist whenever he is with a patient.

The ICRC decided to continue the suspension. The ICRC did not provide reasons. Instead, the College investigator wrote to R to inform him that the ICRC wished to obtain further information in response to R's representations, but that in the meantime the suspension would continue.

DECISION: Application allowed; interim suspension order quashed.

The Court concluded that the ICRC's decision was unreasonable. The ICRC did not have evidence from which it could conclude that R was likely to expose patients to harm. In addition, the ICRC did not provide reasons explaining why it rejected the opinion of the forensic psychiatrist presented by R that he did not pose a risk to his patients.

The test under s 25.4 requires the ICRC to conclude that R's conduct is to likely expose patients to harm. That test requires some evidence. The reasons of the ICRC suggested that R's patients were exposed to a risk of "boundary violations of a sexual nature and/or sexual abuse." A mere risk is not sufficient. A risk or possibility of harm does not equate to a finding of likely harm.

The ICRC did not give sufficient weight to R's clean 32 year disciplinary record (apart from a 1994 complaint that did not result in any action being taken against him).

Moreover, the ICRC failed to consider less restrictive alternatives, including the monitoring term proposed by R. The ICRC was required to consider whether restrictions less onerous than a suspension would remove any likely harm to patients, and was obliged to provide reasons for rejecting a proposed alternative.

COMMENTARY: This decision is the first case in which the Divisional Court has opined on the new s 25.4 of the *Code*, which governs when an interim suspension order may be made.

This decision confirms that the standard for imposing an interim suspension order remains the same. The only difference introduced by s 25.4 is with respect to the timing of an interim suspension order. Such orders can now be made before allegations of professional misconduct are referred to the Discipline Committee for a hearing.

The conclusion that a "least restrictive alternative" test forms part of the reasonableness analysis could have a wide-ranging impact for all regulatory health colleges operating under the *Code*, and potentially for other regulators with interim suspension powers. Certainly, it will impact whether and how ICRCs of *RHPA* colleges exercise their interim suspension power. The Court's analysis on this point is best understood as a reinforcement of the long-established requirement for a decision-maker to consider all relevant factors in making a decision.

This decision is also an important reminder that tribunals must grapple with expert evidence put before them. A failure to do so may lead to a finding that the decision is unreasonable. While it is well within the purview of administrative decision-makers to reject expert evidence, or to make a conclusion inconsistent with the view of an expert, they must provide cogent reasons for doing so.

Tribunals' gatekeeper function for expert evidence: *Registrar, Real Estate Business Brokers Act, 2002 v Stolberg*, 2017 ONSC 5904 (Div Ct)

FACTS: The case is an appeal from the decision of the Licence Appeal Tribunal ("LAT"), which essentially overturned the Registrar's decision to

revoke the registration of S, a real estate salesperson. The underlying facts deal with S's theft of batteries and cash from a condominium. S was in the unit for the purpose of carrying out an inspection for one of his clients. The unit had video cameras which caught S's misconduct.

On learning of the misconduct, the Registrar imposed an interim suspension and issued a Notice of Proposal to revoke S's registration as a real estate salesperson. S appealed this decision to the LAT.

Before the LAT, S admitted to the facts set out in the Notice of Proposal (except the amount stolen). A hearing was then held to determine the appropriate remedy. Ultimately, the LAT found that S's registration should not be revoked. The LAT found that there were not reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

During the appeal the LAT admitted opinion evidence from S's therapist. Despite refusing to qualify the therapist as an expert, the therapist's report on S's mental state was tendered as an exhibit. The LAT relied on that evidence in its decision.

One of the grounds for the Registrar's appeal to the Divisional Court (and the focus of this summary) was the decision to rely on that therapist's evidence. Before the Divisional Court, the Registrar argued that LAT improperly accepted and relied on opinion evidence that the therapist had not been qualified to give. The Registrar argued that this was an error of law to be assessed on a correctness standard.

DECISION: Appeal allowed.

The Court's review of the LAT's treatment of the therapist's evidence was combined with its overarching assessment of whether LAT reached an unreasonable decision on remedy. Specifically, the Court noted that its task was to consider whether the LAT's treatment of this evidence resulted in an unreasonable decision.

In applying this standard, the Court found that the LAT's treatment of the therapist's evidence resulted in an unreasonable decision. The Court began its assessment by discussing the Court of Appeal's decision in *Westerhof v Gee Estate*,[16] which drew a distinction among participant experts (such as treating physicians), non-party experts and litigation experts. The first two categories may give expert evidence without complying with the requirements of r 53.03 of the *Rules of Civil Procedure* ("*Rules*"). But the Court clarified that nothing in *Westerhof* derogated from the adjudicator's responsibility to retain its gatekeeper role – even when dealing with participant experts, such as the S's therapist.

In reaffirming that this gatekeeper role applied to the LAT, the Court found a number of problems with the LAT's treatment of the therapist's evidence. In particular, the Court expressed concern about the fact that the therapist was permitted to give evidence on the precise topic (S's mental health) on which the LAT had found he was not qualified to opine. The Court was also concerned about the significant impact this evidence had on the LAT's decision. Moreover, the Court noted that the LAT brought "minimal critical scrutiny" to bear on the expert's evidence.

Ultimately, the Court concluded that given the importance of the therapist's evidence to the LAT's decision, the LAT's decision on remedy was unreasonable on this ground of appeal alone.

COMMENTARY: This case provides a helpful gloss on the Court of Appeal's *Westerhof* decision. It clarifies that although r 53.03 may not apply to participant experts, adjudicators still need to discharge their essential gatekeeper role. They must review the proposed expert evidence and consider if and how they will rely on it.

[16] 2015 ONCA 206.

The decision suggests that rulings regarding the treatment of expert evidence generally will not be subject to the higher correctness standard, and will instead be subsumed in the analysis of whether the administrative tribunal's decision was reasonable as a whole. Still, to discharge their gatekeeper function, administrative tribunals must assess the evidence that a proposed expert provides with adequate rigour – especially as it approaches the key issues to be determined in a given case.

Judicial review of decisions of sports organizations: *Islington Rangers Soccer League v Toronto Soccer Assn*, 2017 ONSC 6229 (SCJ)

FACTS: The Islington Rangers Soccer League and a volunteer coach, P (collectively, the "Applicants"), sought judicial review on an urgent basis of decisions made by the Toronto Soccer Association ("TSA") and Ontario Soccer Association ("OSA") (collectively, the "Respondents"). These decisions had the effect of disqualifying the Rangers' U13 girls team ("U13 Team") from the league championship game, suspending P as a coach for six months, and fining the Rangers $2,500.

The sanctions were based on a finding that five 12-year-old girls were regular players on the U13 Team coached by P, which is generally comprised of girls who are 13 years old or turning 13 during the calendar year. According to league rules, younger players may play on a U13 team only if the coach has prepared written evaluations of them and the evaluations are filed with the TSA. Due to inadvertence, and through no fault of P, evaluations were completed but were not actually filed. Nonetheless, the 12 year olds played on the U13 Team for the entire season without any objections being raised about their eligibility. The team finished first in the league.

Following a game on August 14, the manager of an opposing team made inquiries about whether 12 year olds could play on the U13 Team. These inquiries ultimately led to the TSA advising the Applicants that it would hold a discipline hearing "related to the alleged use of illegal players". The notice of hearing delivered two weeks later stated these allegations "relate to games in the TDYSL GU 13 division as well as the TDYSL League Cup. These allegations relate directly to the TDYSL league rules: 6.2 [using younger "call ups"/substitutes],[17] 15.8 [registering players with their team at least one day prior to playing a Cup game]". The notice also referred to additional rules that were not explained to the Applicants.

P and the Rangers' president attended the hearing two days later, believing that the issue was a minor administrative matter relating to the fact that completed evaluations for the 12 year olds inadvertently had not been filed. However, the nature of the infraction appeared to change during the course of the hearing. There was an allegation that some of the 12 year olds played on the U12 team as well as the U13 Team, which was prohibited. The Applicants were not advised of this issue before the hearing. In addition, the TSA refused to receive evidence from the Applicants to demonstrate that it had always been P's intention to have the 12 years olds play on the U13 team.

On September 1, the TSA rendered its decision, finding the Applicants had played ineligible players, suspending P, fining the Rangers, and disqualifying the U13 Team from the league championship game. The OSA denied the Applicants leave to appeal.

The Applicants sought judicial review of the Respondents' decisions, which they alleged had been made in a procedurally-unfair manner.

[17] The Court ultimately noted this rule is different from that applicable to a younger player being a regular member of the team

DECISION: Application for judicial review allowed.

The Superior Court determined that it, rather than the Divisional Court, should hear the application, given the urgent circumstances. The Court further held that it had the jurisdiction to consider the matter in light of the factors for judicial review of sports leagues' decisions set out in *West Toronto United Football Club v Ontario Soccer Assn*.[18] The Court emphasized the following factors as particularly relevant to the conclusion that the decisions in issue were reviewable: the public nature of a decision about who can play in a sports league and the number of people affected by that decision; the importance of fairness as a principle of social order and confidence, especially in the context of children who are taught about this at a young age; the urgency of the matter; and the fact that the decisions challenged were adjudicative rather than operational in nature.

In evaluating the process leading to the decisions under review, the Court held that the Respondents had breached basic rules of fairness owed to the Appellants and the U13 Team. The Court noted that sports organizations are not to be held to court-like standards of procedural fairness, but they are required to give notice of an alleged infraction and the sanction it may attract; to hear evidence that the subject wants to adduce; and to follow their own internal rules. Here, the TSA had failed to give adequate notice to the Applicants, both in terms of timing and substance, regarding the alleged infractions and the sanctions to which they could be subjected. The TSA also refused to hear evidence the Applicants attempted to tender that was directly relevant to its concerns, denying the Applicants a fair opportunity to be heard.

The Respondents' conduct led the Court to find that this was a "rare and exceptional" case justifying a full indemnity cost award. In particular: the Respondents' failure to disclose precisely what the Applicants were charged with made the proceedings more complex for the Applicants; P had been suspended effectively for cheating though he had done nothing wrong; the TSA, contrary to its own rules, had failed to establish a body to which the Applicants' would have a right of appeal, rather than requiring them to seek leave to appeal to the OSA; the U13 Team was comprised of players from backgrounds of modest economic means; and the Respondents had failed to lift P's suspension after the Court rendered its decision on September 15.

COMMENTARY: This decision is the latest in a line of cases that have found the decisions of sports organizations to be susceptible to judicial review. The nature of the decision made by the organization (*e.g.*, operational vs. adjudicative) will be highly important in determining whether the court will entertain an application. Given the Court's emphasis on notions of fairness for youth, one could envision the principles of this decision being applied in the context of other organized activities for youth, such as dance or music competitions.

It is evident that the Court disapproved of conduct of the Respondents, who appeared to have lost sight of this matter being about a game played by children and coached by volunteers. While the Court notes that court-like standards of procedural fairness will not be imposed on sports organizations, they will be expected to comply with basic concepts of fairness, informed by the practical circumstances of volunteers like P.

At a practical level, this decision is also instructive on the potential costs consequences of resisting a judicial review application. Sports organizations in similar situations will want to consider carefully the financial consequences of opposing a judicial review application, particularly where unfairness to affected children and procedural defects in the decision-making process are evident on the face of the matter.

[18] 2014 ONSC 5881.

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