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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Regulatory jurisdiction does not extend to out-of-province online retailer: *College of Optometrists of Ontario v Essilor Group Inc*, 2019 ONCA 265

Facts: The Essilor Group Canada Inc. ("Essilor") is a British Columbia-based company that, among other things, carries on business as an online retailer of contact lenses and prescription eyeglasses through two divisions, Clearly and Coastal, and their respective websites clearly.ca and coastal.com. The online retail businesses operate in accordance with British Columbia laws and regulations.

The College of Opticians of Ontario and the College of Optometrists of Ontario (together, the "Colleges") are self-governing bodies that regulate the practice of opticianry and optometry in Ontario. In Ontario, "dispensing" prescription eyewear is a controlled act that, pursuant to the *Regulated Health Professions Act*,[1] may be performed only by registered opticians, optometrists and physicians.

The Colleges applied for an injunction pursuant to s 87 of the *Health Professions Procedural Code*,[2] prohibiting Essilor from selling prescription eyewear to residents of Ontario through their

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[1] *Regulated Health Professions Act, 1991*, SO 1991, c 18 ("***RHPA***")

[2] Schedule 2 to the *RHPA*.

websites on the basis that is Clearly and Coastal divisions were engaging in unauthorized practice by "dispensing" prescription eyewear without the direct involvement of an Ontario-registered optician, optometrist or physician.

The Superior Court of Justice granted the requested injunction and a declaration that Essilor had breached s. 27 of the *RHPA*. Essilor appealed.

Decision: Appeal allowed.

The Court began by setting out the steps in the process by which Clearly accepts and fills online orders. Where the customer who purchase prescription eyewear on Clearly's website is in Ontario, only two steps in the transaction touch upon Ontario: (i) the customer enters the order from a device in Ontario; and (ii) Clearly arranges for the delivery of the eyewear to a customer at a location in Ontario. The other steps all take place in British Columbia. Essilor operations are compliant with the regulatory scheme in British Columbia.

The Court's analysis focussed on the constitutional issue of whether the connection between Ontario and Essilor is sufficient for Essilor to be subject to Ontario's regulatory scheme for prescription eyewear. The territorial limits on the scope of Ontario's legislative authority relate to the conduct that the College's can regulate – in this case, the "controlled acts" under the *RHPA*. The nature of online, internet-based transactions (which can occur in multiple locations simultaneously) presents challenges when interpreting the legislation.

Essilor had two main arguments in the appeal: (1) merely delivering an order product to an Ontario customer does not amount to the controller act of "dispensing"; and (2) there is not a sufficient connection between its activities and Ontario to bring those activities within the ambit of s. 27 of the *RHPA*.

Virtually every action taken by Essilor in connection with the preparation and delivery of prescription eyewear occurs in British Columbia. For an Ontario customer, only the placing of the order online and the delivery of the eyewear occurs in Ontario. But placing on order through Essilor's website from a device in Ontario is not a "controlled act" under s 27 of the *RHPA* because that act is performed by the customer, not by Essilor as the supplier of the health care service. The *RHPA* does not give the Colleges authority to restrain acts taken by the consumer of health care services.

The Court next considered whether Essilor was performing the controlled act of "dispensing" prescription eyewear in Ontario by the sole act of delivering prescription eyewear to a customer at a location in Ontario. The controlled act of dispensing may be a single act or part of a continuum of activities; some activities, carried out in isolation, might not in and of themselves constitute dispensing. The delivery of prescription eyewear to a customer falls within the continuum of activities that make up "dispensing". However, all of the acts Essilor performs to fill an online order occur in British Columbia except one – delivery. The simple act of delivery of finished prescription eyewear is a commercial aspect of the dispensing process; it involves no application of professional health care skills. It is Essilor's sole connection with Ontario in the case of its online sales. Given that Essilor complies with the health care standards set by the British Columbia regulatory regime for the provision of prescription eyewear, the commercial act of the physical delivery of product ordered online to a customer in Ontario does not, without more, establish a "sufficient connection". "Dispensing" includes "delivery" of the product to the customer but the discrete act of delivery – which is the only thing that occurs in Ontario – has a commercial aspect, not a health care one. Where the supplier of prescription eyewear operates in another province and complies with that province's regulatory regime when filling an online order

placed by an Ontario customer, the final act of delivering the production to a purchaser in Ontario does not amount to performing a "controlled act" by the supplier within the meaning of the *RHPA* s. 27.

Commentary: This decision should be noted by all regulators who must grapple with the issue of whether and to what extent their regulatory authority extends to out-of-province entities by virtue of their online activities. The reach of a regulator's authority over such an entity will depend on its ability to demonstrate a substantial connection between the entity's activity and the regulator's geographic jurisdiction. *Essilor* suggests that where the connection is predominantly commercial in nature and does not involve the field of activity that lies at the core of the regulator's responsibility (in this case, health care services), the connection may not meet the requisite threshold of "substantial" to ground jurisdiction.

The two notable factors guiding the Court's conclusions appear to have been that Essilor was in compliance with the British Columbia regulatory regime (which was highly similar to Ontario's) and that the only activity that occurred in Ontario was delivery of the product. The same result might not necessarily follow in a case where the entity did not adhere to a similar regulatory regime, particularly where its activities occur outside of any Canadian jurisdiction, or where the entity has more touch-points with an in-province customer, such as on-going consultations or live Q&As online. Regulators have a responsibility to consider online activities that touch on their mandates. *Essilor* teaches that, in determining whether they can exercise their regulatory authority, regulators must focus on the substance of those activities as they relate to their geographic jurisdiction. The objective is, ultimately, to ensure the protection of the public in respect of which the regulator has authority, without indirectly creating commercial monopolies for those who are authorised to perform controlled acts. While legislative amendments would provide welcome direction, the *Essilor* decision offers some general guidelines that should be considered by other regulators dealing with similar issues.

The College is seeking leave to appeal the decision to the Supreme Court of Canada. Although the Court denied leave in a similar case back in 2017,[3] the time may now be ripe to grapple with these difficult issues and provide guidance for regulators across the country.

Regulatory jurisdiction is personal, not territorial: *Saplys v Ontario Association of Architects*, 2019 ONSC 1679 (Div Ct)

Facts: S is an architect licensed by the Ontario Association of Architects. After an eight day hearing before the Discipline Committee of the OAA, S was found to have engaged in professional misconduct by contravening provisions of the *Architects Act*[4] and associated regulations for failing to notify his prior firm that he continued to work on certain projects that he had worked on while he was at the firm, including one project in Saskatchewan. S was also found to be in contravention of the legislative requirements by offering architectural services through an entity that did not hold a certificate of practice (allegation #5).

S appealed the Discipline Committee's decision to the Divisional Court. With respect to the finding of professional misconduct relating to the Saskatchewan project, S argued that the applicable Saskatchewan legislation – and not the *Architects Act* – governed his conduct vis-à-vis that project.

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[3] *Ordre des optométrists du Québec c. Coastal Contacts Inc.*, 2016 QCCA 837 (CanLII), leave to appeal to S.C.C. refused, 2017 CanLII 442 (SCC)

[4] RSO 1990, c A.26

With respect allegation #5, S's main argument on appeal was that his work did not engage the "practice of architecture", but were rather drawings for marketing and brand approval purposes only.

Decision: Appeal dismissed, except for allegation #5, which is set aside as unreasonable.

The reasonableness standard applies in this case.

The Discipline Committee did not err in concluding that S was bound by the obligations set out in the Ontario legislation, even if the project in question was located in Saskatchewan. Nothing in the *Architects Act* supports a limitation on the OAA's jurisdiction over members to matters of professional misconduct involving building projects in Ontario. Moreover, the case law establishes that the jurisdiction of a regulatory body is a personal one without territorial limitation. Finally, there are no constitutional conflicts engaged by this approach to recognizing the reach of the *Architects Act*. The jurisdiction of the licensing body for architects in Saskatchewan can co-exist with the jurisdiction of the OAA in respect of its members to the extent they practise architecture in that province.

It is no defence to a breach of the *Architects Act* to say that S complied with the Saskatchewan legislation. At best, compliance might be a consideration at the penalty stage.

With respect to allegation #5, S argued that the definition of the "practice of architecture" governs whether this allegation is made out – and that he did not engage in the practice of architecture. In particular, S argued that the drawings he provided did not meet the definition of a "design", which requires that they be "*intended* to govern the construction, enlargement or alteration of a building or part of a building" (emphasis added).

The Court found that the Discipline Committee erred in law by applying the wrong legal test on allegation #5: it asked whether S engaged in "architectural services", a broader category than the "practice of architecture". Elsewhere in its decision, when referencing the "practice of architecture", the Discipline Committee failed to address the question of whether S's drawings constituted a "design" and made no findings that the drawings were intended to govern the construction, enlargement or alteration of the proposed building. The Discipline Committee's comment that the drawings were "typical of those offered by architects in the procession of a design of a building from initial concept to complete design" was insufficient.

The Divisional Court was not in a position to assess whether the drawings in question constitute a "design" so as to fall within the scope of the "practice of architecture". Accordingly, that issue was remitted to the Discipline Committee for determination. Any issues related to the reasonableness of the penalty must await that determination, and any resulting revision of the penalty imposed following the original decision.

Commentary: Together with *Essilor*, this case is an important example of the tricky jurisdictional questions with which regulators will increasingly be confronted as professionals engage in out-of-province conduct related to their business. The Court's conclusions on these points affirm and clarify dated jurisprudence on the jurisdictional reach of professional discipline regulation, and the fact that personal – not territorial – jurisdiction is the governing legal framework. (Before *Saplys,* the last major case in Ontario to confront the issue of a regulator's ability to regulate extra-provincial conduct was decided in 1975: *Legault v Law Society of Upper Canada.*[5])

The result and reasoning in *Saplys* ought to give comfort to regulators considering taking action in

[5] (1975), 8 OR (3d) 585.

respect of conduct by a member outside Ontario's borders. Of course, the general propositions set out by the Court could be distinguished or undermined if the governing statutory scheme provides a basis upon which to suggest that the legislature intended to have territorial limitations. The Court found no such intent here.

The Court's decision is also an important reminder that there are limits to deference. In particular, where tribunal fails to explain or address a key question – in this case, whether S's drawings constituted the "practice of architecture" given the purpose for which they were provided to the client – then that will likely result in a finding of unreasonableness.

Jurisdiction over pre-registration conduct in certain circumstances: *Ontario College of Social Workers and Social Service Workers v Kline*, 2019 ONCSWSSW 3[6]

Facts: K was facing allegations of professional misconduct before the Ontario College of Social Workers and Social Service Workers in respect of conduct that occurred before she became a member of the College. Prior to a hearing on the merits, K brought a motion for an order quashing the Notice of Hearing on the basis that the Discipline Committee lacks jurisdiction because the alleged events that form the basis for the Notice occurred before K applied for and obtained membership status with the College.

Decision: Motion dismissed. The College has jurisdiction to discipline a current member for conduct that occurred prior to registration as a member, so long as that conduct calls into question the member's current suitability to practise as a member of the College.

The key legislative provision is s. 26(2) of the *Social Work and Social Service Work Act, 1998*,[7] which sets out that a member may be found guilty of professional misconduct if "the Committee believes that *the member has engaged* in conduct that" contravenes the governing statutory scheme, contravenes an order of the Discipline Committee or is defined as professional misconduct in the regulations (emphasis added). On its face, this text is equally capable of encompassing or excluding the power to discipline a member for pre-registration conduct.

Looking beyond the text of the provision to the context and the purpose of the legislation, the better interpretation is one that allows for the Discipline Committee to have jurisdiction over pre-registration conduct of a member where such conduct indicates that the member is currently unsuitable to practise the profession as a member of the College. In particular, such jurisdiction is necessary to ensure the College is able to fulfill its duty to serve and protect the public interest. It could not have been the intention of the Legislature to prevent the College from ever exercising discipline jurisdiction over a member, no matter how serious the member's pre-registration conduct, simply because that conduct was not revealed at the time of registration.

The Divisional Court's decision in *Association of Professional Engineers of Ontario v Leung* is not binding and is of limited persuasive value.[8] There are similarities between the legislative scheme at issue in this case and the scheme at issue in *Leung*, but the two are not identical. In particular, the statutory regime at issue in *Leung* provides that the conduct under examination in that case (unauthorized practice) is a provincial offence that can be prosecuted under the provincial legislation

[6] Note that Andrea Gonsalves (a co-editor of this Case Review) was independent legal counsel in this case. She has not authored this section of the Case Review.

[7] SO 1998, c 31

[8] 2018 ONSC 4527. This case was reviewed in Issue No. 18 of the Case Review.

– an option not available in the circumstances of this case.

Commentary: This case can be added to the growing list of decisions that fall on different sides of a simple question: do professional regulators have jurisdiction over pre-registration conduct?

In October 2018, the Divisional Court released *Leung* and – by summarizing and purporting to reconcile cases on different sides of the debate – attempted to answer this question with an emphatic "no". This Case Review was critical of some of the reasoning that led to this result in *Leung*, including reference to the outmoded view that professional regulation legislation is "penal" in nature and ought to be narrowly interpreted in favour of the professional being disciplined.

The purposive approach adopted in *Kline* – one centered on the public protection objectives of the statutory scheme – is a better reflection of the legal principles governing the interpretation of professional discipline legislation. Yet the Panel's articulated reason for finding *Leung* to be of limited persuasive value had nothing to do with different approaches to statutory interpretation; instead, they focused on the fact that the conduct in *Leung* could have been prosecuted under provincial offences legislation. This rationale is difficult to understand. Reading the Panel's reasons as a whole suggests that they simply approached the interpretive exercise through a different – and arguably more appropriate – lens than did the Court in *Leung*.

If nothing else, *Kline* demonstrates that Discipline Committees outside the Professional Engineers of Ontario are willing and able to effectively ignore the result in *Leung*. This suggests that the reach of *Leung* may be limited, although it is too early to tell whether the weight of the jurisprudence at the discipline committee level will follow in the footsteps of *Kline* or *Leung*. Either way, it is inevitable that the issue will work its way up to the Divisional Court once again.

Scope of judicial review: *Canadian Judicial Council v. Girouard*, 2019 FCA 148[9]

Facts: the Canadian Judicial Council ("CJC") is a body constituted under the *Judges Act*,[10] with responsibility for recommending to the Minister of Justice that a superior court judge be removed from office. The majority of the members of the CJC are themselves superior court judges. Subsection 63(4) of the *Judges Act* states that the CJC "shall be deemed to be a superior court".

A complaint was filed with the CJC about the conduct of Justice Michel Girouard of the Quebec Superior Court. The complaint alleged that Justice Girouard had misled an Inquiry Committee of the CJC that had investigated him regarding a different complaint. After an inquiry, the CJC voted 20-3 to recommend that Justice Girouard be removed from office.

Justice Girouard commenced an application for judicial review. The CJC brought a motion to quash the application on the basis that the Federal Court lacked jurisdiction. The Federal Court dismissed the motion and the CJC appealed to the Federal Court of Appeal.

The central issue was whether the CJC is a "federal board, commission or other tribunal" and thus subject to judicial review under ss. 2 and 18 of the *Federal Courts Act*.[11]

[9] Stockwoods LLP was counsel for an intervener in this appeal.
[10] RSC 1985, c. J-1
[11] RSC 1985, c. F-7

Held: the appeal was dismissed. The Court held that a recommendation to the Minister by the CJC is subject to judicial review in Federal Court.

The Court observed that the definition of "federal board, commission or other tribunal" under the *Federal Courts Act* is very broad. Despite certain procedural peculiarities, there was no question that the functions carried out by the CJC satisfied that definition. The Court rejected an argument that the source of the CJC's authority is constitutional and not statutory. While the *Constitution Act, 1867* establishes the basic mechanism for removing a sitting superior court judge from office, the CJC itself is a 20th century creation of the *Judges Act* and its authority derives entirely from that Act.

The crux of the argument advanced by the CJC was that the deeming provision in s. 63(4) of the *Judges Act* constituted the CJC as a superior court, with the effect that it is immune from judicial review. The Court examined this provision in detail and concluded that its purpose is to provide the CJC with the rights, privileges, and immunities of a superior court for the purposes of conducting its proceedings. The Court noted that the *Judges Act* did not use language, such as that contained in the *Federal Courts Act*, that expressly constitutes the Federal Court as a superior court. Nor did the *Judges Act* use language such as that contained in the *Canada Labour Code*, which expressly states that a labour arbitrator is not a "federal board, commission or tribunal".

While the majority of its members are superior court judges appointed under s. 96 of the *Constitution Act, 1867*, some of its members (including the Chief Justice of Canada) are not s. 96 appointees but rather appointees to statutory courts. There is also provision for members of the bar to be appointed to take part in certain CJC proceedings.

The Court noted that there had been a number of judicial review proceedings before the Federal Court and Federal Court of Appeal in the past and the CJC had only raised the jurisdiction issue in one of those proceedings.

The Court also summarily rejected an argument that the CJC's recommendation was not subject to judicial review because it was merely a recommendation that did not directly affect the legal rights of a judge. The Court held that the form of the decision was less important that its substance, which in this case amounted to an authorization for the Minister of Justice to put the matter before the Houses of Parliament for a final decision.

Commentary: This decision is a helpful and authoritative statement of the law regarding proceedings to remove a judge from office.

The decision demonstrates the sheer breadth of the concept of an administrative tribunal that is subject to judicial review. The judicial review jurisdiction of the Federal Court stretches from decisions of front line customs and immigration officers through to the Governor General-in-Council, to the CJC, which is effectively a body of judges acting in a quasi-judicial capacity. This is a reminder that rules of general administrative law must be sufficiently flexible to apply to the full range of administrative decision-making bodies.

The decision also contains a strong defence of the importance of judicial review. The Court rejected the argument advanced by the CJC that judicial review by the Federal Court would compromise judicial independence by violating the principle that a judge should not be called on to give an account of his or her decisions. The Court held that, to the contrary, judicial review is essential to strengthening the independence of the judiciary. The decision by the Minister of Justice to recommend the removal of a sitting judge is such a

momentous occasion that it should be done only on the basis of a rigorous and through procedure. That includes the checks provided by a court exercising its supervisory jurisdiction to ensure procedural and substantive fairness in the CJC process.

Reasons adequate despite lack of analysis of personal information: *Barker v. Ontario (Information and Privacy Commissioner)*, 2019 ONCA 275

Facts: B is the former Medical Officer of Health and Chief Executive Officer of Algoma Public Health ("APH"). APH engaged KPMG to conduct a forensic investigation regarding potential conflicts of interest in the hiring of its former Chief Financial Officer and into the actions of the former CFO while he held that role. Although she was no longer employed at APH, B agreed to be interviewed by KPMG during its investigation on the promise of confidentiality.

Subsequent to KPMG issuing its report, APH received a request under the *Municipal Freedom of Information and Protection of Privacy Act*[12] from an online news agency for access to the report. As a party whose interests may be affected by disclosure of the report, B was given notice of she request. She provided written submissions expressing her opposition to disclosure of the report on the basis of personal privacy, which is grounds for an exemption from disclosure under s. 14 of the MFIPPA. The APH concluded that a compelling public interest in the disclosure of the KPMG Report outweighed the purpose of the section 14 exemption, and determined that the entire report should be disclosed pursuant to s. 16.

B appealed to the Commissioner, who upheld the APH's decision to grant access to the report in its entirety. B then requested a reconsideration of the Commissioner's order, which was denied. B sought judicial review.

On judicial review, the Divisional Court quashed both of the Commissioner's decisions on the basis that the Commissioner's reasons did not allow the court to conclude that his decisions fell within a range of reasonable outcomes. The Court of Appeal granted the Commissioner leave to appeal.

Decision: Appeal allowed. Divisional Court's decision quashing the Commissioner's decisions was set aside.

The Court addressed two questions: Was the Commissioner's decision in respect of the appeal from the APH's decision to release the entire report reasonable? Was his decision denying the reconsideration request reasonable?

The key issue with respect to the appeal decision was whether the Commissioner's decision was unreasonable because he had failed to identify and weigh separately each piece of personal information against the public interest override in s. 16 – the approach that the Divisional Court considered necessary in order to assess the reasonableness of the Commissioner's decision. The Court determined that this was not necessary in the circumstances, and deferred to the Commissioner's expertise.

In some cases, a piece-by-piece analysis may be required in the reasons, for instance, where different parts of a record raise different and important personal privacy interests; where certain elements of personal information are so sensitive or whose disclosure is so damaging that they must be redacted before the public interest in disclosure outweighs the purpose of the privacy interest; or where elements of personal information unrelated to the public interest should be redacted despite the s. 16 override.

[12] R.S.O. 1990, c. M.56 ["MFIPPA"]

In other instances, such as this case, the public interest in disclosure relates to the information as a whole and there was no need to identify or balance each piece of protected information separately in the Commissioner's reasons. The nuanced and contextual weighing and balancing required under s. 16 are at the heart of the Commissioner's specialized expertise and he is in the best position to make those determinations.

The Commissioner's failure to refer to specific subsections of s. 14 was also not unreasonable. Notably, B did not make reference to the contested subsections in the appeal before the Commissioner. Nonetheless, the Commissioner was apparently alive to B's concerns with respect to the possibility of pecuniary harm and the possibility of unfair damage to her reputation (ss. 14(2)(e) and (i)). The Commissioner's acknowledgement that the information was highly sensitive encompassed the concern for potential impact on B's reputation, even though reputation was not expressly mentioned in his reasons. With respect to the prospect of errors and inaccuracies under s. 14(2)(g), the Court noted that B's failure to raise this concern on the appeal before the Commissioner meant that there was no reason for the Commissioner to refer to that subsection in his reasons.

The Court also found no reason to interfere with the Commissioner's decision with respect to whether there was sufficient information already in the public domain on the issues addressed in the Report, as the Commissioner had addressed the potential overlap with existing public information and determined that the Report contained new information. The Court found that it was not unreasonable for the Commissioner to take into account APH's assessment of the public interest in disclosure, but the Court cautioned that the Commissioner should be alive to the possible benefit to the record holder when relying on the record holder's own submissions with respect to whether disclosure is warranted. In this case, APH potentially stood to benefit from disclosure of the report to the extent that it may have shifted attention away from other public concerns about the APH board.

Finally, the Court rejected B's submission that even if the report as a whole should be disclosed, the Commissioner could nevertheless have identified protected personal information in the report that was not responsive to public interest and redacted those portions before disclosure. The Commissioner specifically mentioned that he had considered whether any portions of the record ought to be withheld, despite B never having pointed to any personal information that should have been redacted notwithstanding the s. 16 override. The Court deferred to the Commissioner's conclusion that the whole report must be released.

With respect to the reconsideration denial, the Court found the Commissioner's rejection reasonable for the same reasons that the Commissioner rejected the reconsideration request: the concerns raised by B on the reconsideration did not demonstrate a fundamental defect in the adjudication process or a jurisdictional defect in the decision with respect to the analysis of the section 14 exemption.

Commentary: The override in s. 16 of the MFIPPA is exceptional and rarely applied. In this decision the Court provides some limited guidance into the application of s. 16 and its interaction with s. 14. The Court rejected the Divisional Court's approach of requiring the Commissioner to explicitly weight s. 16 against each piece of personal information in the report. But the Court stops short of expressly discarding the applicant's proposed approach, which, in effect, would add the s. 16 public interest consideration to the list of factors under s. 14 for or against disclosure. There is no single right approach to applying the public interest override.

The decision reinforces the deference owed to the Commissioner in balancing the competing interests addressed by MFIPPA: the right to access information and the protection of the privacy of individual's personal information. These considerations are at the heart of the Commissioner's expertise, and considerable deference ought to be given to the Commissioner in respect of the interpretation and application of MFIPPA, even in respect of the application of the exceptional section 16 override.

For litigants opposing disclosure of personal information, the Court's repeated emphasis on the applicant's submissions in the original appeal before the Commissioner also drives home an important lesson – lead with your best arguments at first instance, or risk limiting the available arguments on appeal.

Expansive approach to the scope of the "*Charter* values" approach: *Ontario Nurses Association v Participating Nursing Homes*, 2019 ONSC 2168

Facts: Nurses brought an sought a judicial review of a decision of the Pay Equity Hearings Tribunal (the "Tribunal"). The applicants argued that their employer, a nursing home, was not appropriately maintaining compensation standards for their nursing staff under the *Pay Equity Act* ("*PEA*"). They argued that because their workforce was predominantly female, the nursing home must continuously use an external workplace comparison method to determine what the pay should be in order to meet the *PEA*'s definition of "maintenance". The nursing home argued, and the Tribunal accepted, that in accordance with the purpose of the legislation, "maintenance" under the *PEA* does not require continuously using a external workplace comparison method to determine fair wages.

Decision: Application granted.

The court held that the Tribunal erred by failing to consider *Charter* values when interpreting the *PEA*, contrary to the approach required in *Doré v Barreau du Quebec*.[13] The Tribunal's decision engaged the values underlying section 15 of the *Charter* (equality protection), and failed to give as full effect to this value as possible given the statutory mandate to redress systemic gender discrimination in compensation.

The court relied heavily on the Ontario Court of Appeal's decision in *Taylor-Baptiste v OPSEU* to reject the Tribunal's argument that ambiguity in the legislation is the only instance where a court can use *Charter* values as an interpretive aid.[14] *Taylor-Baptiste* also rejects the proposition that the *Doré* is only applicable in the context of discretionary decisions.

The Tribunal was required to address the statutory objectives of correcting discrimination when interpreting the definition, as well as the fact that not allowing access to comparison methods does not give effect to the *Charter* value of protecting equality. Its failure to do so rendered its final decision unreasonable.

Commentary: This decision is the latest example of growing confusion amongst lower courts regarding just how expansively the *Charter* values framework established in *Doré* ought to be applied.

The language in *Doré* repeatedly references the need to apply a "*Charter* values" approach in the context of *discretionary* administrative decisions. *Doré* itself was exactly such a case, since it concerned the question of what penalty would be appropriate in a particular case of professional misconduct. The very few other cases where the Supreme Court of Canada has applied *Doré* all

[13] 2012 SCC 12.
[14] 2015 ONCA 495. This case was reviewed in Issue No. 1 of this Case Review.

involve similarly discretionary administrative decisions, such as a regulator's decision on whether or not to approve a law school (*Law Society of British Columbia v Trinity Western University*[15]).

The Supreme Court has never applied *Doré* to a situation where a tribunal is engaged in an exercise of pure statutory interpretation. Appellate courts have reached different conclusions on whether *Doré* should be extended this far. In *Taylor-Baptiste*, the Ontario Court of Appeal took the leap. More recently, in *Canada (Citizenship and Immigration) v Singh,* the Federal Court of Appeal opted not to do so.[16]

There are good reasons to think that *Singh* reflects the better approach. Indeed, the approach taken in *Taylor-Baptiste* effectively creates two different canons of statutory interpretation: one for courts (where, according to longstanding precedent, *Charter* values can only be used to clarify an ambiguity, after other principles of interpretation have been applied) and another for tribunals (where *Charter* values could always infuse the analysis through the *Doré* framework). While *Taylor-Baptiste* essentially embraces this outcome, it is hard to see any principled basis for such a distinction.

As the confusion on this issue continues to grow – and splits amongst appellate courts across the country harden – it seems inevitable that the Supreme Court will have to clarify the extent to which *Doré* applies outside of discretionary administrative decisions, if at all.

[15] 2018 SCC 32.
[16] 2016 FCA 96.

Challenge to decision not to refer to discipline dismissed as moot: *Cuhaci v College of Social Workers (Ontario)*, 2019 ONSC 1801

Facts: C is a member of the College and is qualified to perform mediations and arbitrators under the *Family Law Act*, RSO 1990, c F.3. She was appointed to act as a parenting co-ordinator, mediator and arbitrator with respect to a custody and access dispute. The dispute involved allegations that the father had alienated the daughter from her mother. The expert evidence in the case included a report prepared by a psychologist, Dr W, who recommended that the child initially live with her mother and that the parties gradually move toward a shared parenting arrangement. A second report, prepared by another psychologist, Dr L, recommended that the child be encouraged to live with her other, but not forced to do so. C issued an interim arbitration decision providing that the child was to reside primarily with her father, with monthly visits to her mother. The decision indicated that C had consulted with Dr W and Dr L and that her decision was consistent with Dr W's advice.

The child's stepfather made a complaint to the College alleging that C had mishandled the case by failing to properly consider Dr W's report and that her attitude toward him and the mother was dishonest, manipulative and arrogant. After an investigation, the complaint was referred to the College's Complaints Committee.

The Complaints Committee issued a decision directing that the complaint not be referred to the College's Discipline Committee. However, the Committee considering the complaint made comments about C's conduct, and provided advice to her about the clarity of her communications. C then applied for judicial review to quash the decision, arguing that the Committee did not follow the process mandated by its governing

legislation, that its advice fell outside of its jurisdiction, and that the Committee breached its duty of fairness.

Decision: Application dismissed.

The issues raised in the application are moot. The outcome of the Committee's consideration and investigation of the complaint is that it was not referred to the Discipline Committee. The investigation no doubt caused C considerable stress but the process is now complete and her licence is not in jeopardy or subject to any restrictions. The advice provided by the Committee was non-binding and was not meant to be public. While the complaint and decision will remain on her file, the impact that may have in the future is entirely speculative.

The court has the discretion to decide issues that arise in the case, notwithstanding that it is moot. However, this case did not warrant judicial intervention. The Committee's decision raised the important issue of whether it has the authority to investigate the conduct, outcome and wording of an arbitration decision mandated by a Family Court process. However, two factors influenced the court's decision not to exercise its power to decide the case. First, College counsel conceded that the Committee may have overstepped in this case and that the College does not have jurisdiction to investigate the decision-making process of a social worker engaged in the functions of an arbitrator in the context of family law proceedings. In any event, C's arguments were not focussed on this issue and therefore the Court did not have the benefit of full argument.

Commentary: This case applies the well-established principles of the mootness doctrine to the common scenario of professional regulatory bodies not referring complaints to discipline proceedings but instead offering "advice" to the regulated person or taking other action deemed appropriate. Some legislative schemes provide the affected person with a forum in which to challenge such non-referral decisions.[17] Where there is no statutory review mechanism, *Cuhaci* demonstrates that relief through judicial review will be highly limited. If a complaints committee's actions are non-binding, not public, and do not have a demonstrable impact on the person's rights, privileges or interests, a judicial review application challenging the non-referral decision is likely to be considered moot. From a practical perspective, the result and its rationale are sound. Scarce judicial resources generally should not be consumed hearing and deciding cases that will have no practical impact for the parties. A member dissatisfied by a decision of their regulator relating to complaint screening should be cautioned by their counsel that a judicial review application will likely be dismissed as moot, at the cost of making public a decision that would otherwise have remained non-public.

At the same time, one can sympathise with a member who believes there has been some error in the non-referral decision and related action, which will remain on their file with that regulator, potentially to be raised in the event of a future complaint or discipline proceeding.

The outcome in this case also highlights theoretical problems with the fact that – as a practical matter – few, if any, decisions by a referral body are going to be reviewable. In making decisions about

[17] For example, Ontario's *Regulated Health Professions Act, 1991*, SO 1991, c 18 allows a member who is the subject of a complaint to ask the Health Professions Appeal and Review Board to review a decision of a panel of the Inquiries, Complaints and Reports Committee of one of the colleges under that legislation unless the committee's decision was to refer an allegation of professional misconduct or incompetence to the Discipline Committee or to refer the member for incapacity proceedings.

referrals to discipline proceedings, professional regulators like the College are exercising statutory powers. All exercises of statutory power are limited by the legislation that grants such power. Judicial review allows the judicial branch to review purported exercises of statutory power and to grant a remedy where a public body has acted without or in excess of its power. In that way, judicial review maintains the rule of law. However, the combined operation of the mootness and prematurity doctrines makes it difficult to envision circumstances in which the actions and decisions of a professional regulator relating to complaints screening would be subject to court scrutiny. If the complaint is referred to discipline proceedings, judicial review of the referral decision typically would be considered premature: the member is expected to proceed through the discipline proceedings. If the proceedings go in the member's favour, then a challenge to the referral decision would probably be considered moot. If the member is unsuccessful in the discipline proceedings, the judicial review would be focussed on those proceedings and not the referral decision. If the screening committee decided not to refer the complaint but to take other action, *Cuhaci* indicates that an ensuing judicial review application would be considered moot unless the decision had some demonstrated impact on the member. The consequence is a theoretically troubling situation in which such screening decisions are effectively immune from judicial review.

Some comfort can be taken from the fact that the mootness and prematurity doctrines are discretionary. If a case demonstrated that the regulator had clearly acted beyond its authority in respect of a screening decision, then the court could certainly choose to entertain the judicial review. In all other cases, however, *Cuhaci* demonstrates that a judicial review application is likely to be dismissed on a preliminary basis.

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