STOCKWOODS barristers
Smart Litigation.

ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

CO-EDITORS: ANDREA GONSALVES & JUSTIN SAFAYENI ISSUE 10 • APRIL 2017

IN THIS ISSUE…

Judicial review of a tribunal's rules: *Green v Law Society of Manitoba*, 2017 SCC 20

FACTS: G has been a practising lawyer and member of the Law Society of Manitoba for over 60 years. The Law Society has a mandatory rule requiring all practising lawyers to complete 12 hours of continuing professional development ("CPD") ever year. During 2012 and 2013, G did not report any CPD activities. G was notified that if he did not comply with the rules within 60 days, he would be suspended. Rather than replying to this notice or applying for judicial review of the suspension decision, G challenged the validity of certain rules governing CPD requirements in the *Rules of the Law Society of Manitoba* ("*Rules*").[1]

The application judge dismissed G's application for declaratory relief, as did the Court of Appeal.

DECISION: Appeal dismissed. (Abella and Côté JJ, dissenting).

Justice Wagner (writing for the majority) held that the *Rules* should be reviewed on a standard of reasonableness, and will be set aside only if it is one no reasonable body informed by the relevant factors could have enacted. This standard is appropriate given that: (i) the *Rules* reflect the Law Society's benchers acting in a legislative capacity; (ii) courts must respect the benchers' responsibility to serve the Law Society's members; (iii) the rules were made pursuant to the Law Society's home statute, attracting a presumption of reasonableness; and (iv) the Law Society has expertise in regulating the legal profession.

Justice Wagner concluded that the impugned *Rules* are reasonable in light of the Law Society's statutory mandate, as reflected in the overall purpose, words and scheme of the *Legal Profession Act* ("*Act*")[2]. The *Act* authorizes the creation of a CPD program that can be enforced by means of a suspension. A suspension for the purpose of compliance – not punishment or professional competence – is a reasonable and effective way to ensure consistency of legal service.

---

[1] The main impugned provision of the *Rules* states: *A member who fails to comply [with CPD requirements] within 60 days is automatically suspended from practising law until such time as the requirements have been met and a reinstatement fee paid*

[2] CCSM, c L107

Finally, Wagner J found that there was no need for a hearing or a right of appeal in respect of the suspension decision. The suspension is administrative in nature, and the lawyers affected are solely in control of complying with the CPD requirements at their leisure. The CEO of the Law Society retains the discretion to ensure that the effect of the *Rules* is not overly harsh.

Writing dissenting reasons, Abella J found that the Law Society had the authority to require CPD and that it could suspend members who fail to comply with that requirement, but found the "automatic suspension" provisions in the *Rules* to be unreasonable. (The dissent did not consider the Law Society's CEO to have discretion to waive the suspension requirement.)

The dissent concluded that there is a disconnect between the impugned *Rules* and the Law Society's mandate. The latter includes reinforcing the public's perception that lawyers are behaving professionally, yet the automatic suspension provisions in the *Rules* unreasonably and unjustifiably undermine public confidence in lawyers by imposing one of the most serious possible sanctions for the least serious professional misconduct possible.

The dissent also found the lack of discretion to be fatal on procedural fairness grounds, noting that other grounds for a suspension in the *Act* involved far more robust procedural protections. The decision to automatically suspend for failure to meet CPD requirements is an arbitrary one.

COMMENTARY: The law society's exercise of its rule-making power is in the nature of a legislative decision. Given the deference accorded to law societies and legislative decisions generally, it is not surprising that the Court found reasonableness review to be appropriate in this case.

More insightful is the Court's approach to assessing the reasonableness of "rule-making" – namely, by examining the rule in light of the statutory mandate. Defining this mandate can be a critical factor in the reasonableness analysis; indeed, the split between the majority and the dissent turns, at least in part, on the dissent's view (not shared by the majority) that the Law Society's mandate includes reinforcing the public perception that lawyers are behaving professionally.

With respect to procedural fairness, the factual disagreement between the majority (who found that the CEO has the discretion to not to impose a suspension) and the dissent (who found that the CEO has no such discretion) highlights the important role discretion can play in ensuring an administrative rule survives judicial review. Even on the majority's approach, an absolute rule requiring the automatic imposition of a severe sanction such as suspension without discretion to vary or waive the penalty – even if characterized as "administrative" in nature – would certainly be more vulnerable to being found unreasonable.

Finally, the majority decision is a helpful reminder that procedural fairness arguments are more likely to be successful in the context of a specific decision, rather than a general rule. Since appropriate common law protections (determined according to the *Baker* factors) operate to fill the gaps in any legislative regime or set of rules, a rule will not offend procedural fairness unless it is clear that the rule displaces entirely those common law protections (which will rarely be the case). ⚖

Public interest standing before administrative agencies: *Lukács v Canada (Transportation Agency)*, 2016 FCA 220*

FACTS: L filed a complaint with the Canada Transportation Agency, alleging that certain practices of Delta Airlines relating to the transportation of "large (obese)" persons are discriminatory, contrary to s 111(2) of the *Air Transportation Regulations*.[3]

*Leave to appeal to the Supreme Court of Canada was granted on February 23, 2017.

3 SOR/88-58

L's complaint was not based on his own experience. Instead, he relied on an email from a Delta agent to a passenger named "Omer" regarding a fellow passenger who required additional space and therefore made Omer feel cramped. The email from Delta outlined the airline's policies relating to large persons.

The Agency dismissed L's complaint on the basis that he lacked standing. Although L was not required to be a member of the group discriminated against in order to have standing, he must have a "sufficient interest". At 6 feet tall and 175 pounds, the Agency reasoned that L has no personal and direct interest in the case. The Agency found that public interest standing was not available, since it does not extend beyond cases in which the constitutionality of legislation or the non-constitutionality of administrative action is contested.

Pursuant to s 41 of the *Canada Transportation Act* ("*Act*")[4], L appealed.

DECISION: Appeal allowed.

The only ground of appeal addressed by the Court was whether the Agency erred in dismissing L's complaint in light of s 67.2(1) of the *Act*, which provides that "on complaint in writing to the Agency by any person" (emphasis added) the Agency may suspend or disallow discriminatory terms and conditions of carriage.

Applying a reasonableness standard, the Court concluded that the Agency erred in superimposing the jurisprudence dealing with standing before courts onto the legislative scheme in the *Act*. The focus must instead be on the words in, and purpose of, the *Act*.

The phrase "any person" in s 67.2 can be contrasted with the more restrictive phrase "person adversely affected" in s 67.1. In addition, the purpose of s 67.2 requires the Agency to intervene at the earliest possible opportunity to prevent the harm and damage caused by unreasonable and unduly discriminatory terms or conditions of carriage. In light of these considerations, there is no sound reason to limit standing under the *Act* to those with a direct, personal interest in the matter.

COMMENTARY: The Court's decision turns on the specific text and purpose of the *Act*, but reflects the broader principle that legal doctrines developed before the courts cannot always be neatly transposed into the administrative or regulatory sphere.

That being said, the law of standing has not generally been an area that has seen much divergence between courts and tribunals. Apart from circumstances where their home statutes explicitly grant standing to certain individuals, tribunals have frequently relied on the same common law tests as courts when making decisions as to standing, including public interest standing. The Court's decision casts considerable doubt on the extent to which this approach is still appropriate. At the very least, tribunals will have to carefully analyze the language and purpose of their home statute to determine whether it reveals a legislative intention at odds with the common law approach. The case is also notable for its consistency with the trend toward a more flexible approach to public interest standing in court proceedings, embodied most recently in the Supreme Court's 2012 decision in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*.[5]

The rather surprising decision of the Supreme Court to grant leave in this case suggests it is one to watch. It will provide the Court with an opportunity to explicitly address the interplay between standing before courts and standing before tribunals, and the extent to which the latter influences the former. Depending on how the Court chooses to deal with that issue, the case may also provide a vehicle for the Court to clarify aspects of the test for public interest standing. .

4 SC 1996, c 10

5 2012 SCC 45

Correctness standard of review and administrative monetary penalties: *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45

FACTS: Maple Lodge Farms was assessed an administrative monetary penalty ("AMP") of $6,000 by the Canadian Agricultural Review Tribunal for conduct contrary to s 143(1)(d) of the *Health of Animals Regulations*,[6] made under the *Health of Animals Act*.[7] In particular, the Tribunal found that Maple Lodge had "transport[ed] or cause[d] to be transported…animal[s]," namely spent hens, in circumstances where "undue suffering [was] likely to be caused to the animal[s]" due to "undue exposure to the weather".

An egg farmer in New York state transferred 7,680 spent hens to Maple Lodge's meat processing facility located in Brampton, Ontario. The hens were transported in an unheated trailer with exterior temperatures ranging from minus 27 to minus 2 degrees Celsius over a sixteen hour journey. When the hens arrived at Maple Lodge, they were stored in an unheated barn for a further twelve hours. The parties agreed that this storage phase was part of the transportation process. 863 hens were found dead when the trailer was unloaded. The Canadian Food Inspection Agency investigated, issued a notice of violation, and assessed an AMP of $7,800. The penalty was reduced to $6,000 on appeal to the Tribunal.

Maple Leaf sought judicial review of the Tribunal's decision.

DECISION: Application dismissed.

Justice Stratas, writing for the Court, highlights that the regulations at issue create an absolute liability regime, with honest mistaken belief and due diligence providing no defence. Stratas JA noted that "while absolute liability provisions may have their place in ensuring compliance with regulatory legislation, they can operate in draconian ways. For this reason, courts are vigilant in ensuring that procedural and substantive standards are adhered to".

A standard of correctness review applies with respect to the Tribunal's interpretation of the regulations. Justice Stratas pointed to the fact that the provisions in question can give rise to criminal prosecution before the ordinary courts or administrative proceedings. Justice Stratas relied on Rothstein J's decision in *Rogers v SOCAN*[8] for the proposition that a standard of correctness review should apply (rather than the presumptive standard of reasonableness under *Dunsmuir*) to judicial review proceedings under the *Copyright Act* because the provisions in question were subject to the coordinate jurisdiction of the ordinary courts and the Copyright Board.

The Tribunal had erred in its interpretation of the conduct element of the prohibition contained in the regulations. The Tribunal had held that Maple Lodge was liable in respect of the transportation of the hens before the hens came into Maple Lodge's possession. This effectively turned an "absolute liability" regime into an "automatic liability" regime by eliminating the need to show a causal link between Maple Lodge's conduct and the violation.

However, the Court ultimately upheld the decision of the Tribunal on the grounds that even if Maple Lodge was not responsible for the conditions in the unheated trailer, on the facts found by the Tribunal it was responsible for the conditions in the unheated barn and was liable on that basis.

COMMENTARY: This decision is notable for its skepticism of administrative monetary penalties and the strict judicial scrutiny that it suggests will be applied to such penalties in judicial review proceedings. For instance, Stratas JA cited his previous decision in *Canada v Kabul Farms Inc*,[9] where he quashed an administrative monetary penalty issued by FINTRAC on procedural fairness grounds where the reasons supporting the AMP were sparse and appeared to be sparse and

6 CRC, c, 296
7 SC 1990, c 21
8 2012 SCC 35
9 2016 FCA 143

the quantification of the AMP was based on a secret guideline unknown to the respondent.

After *Guindon v Canada*[10], it is beyond doubt that the protections of s 11 of the *Charter* do not apply to proceedings in which AMPs may be ordered. But *Maple Lodge Farms* is an important reminder of other forms of judicial control of these penalties. Indeed, Stratas JA cited the following passage from the pre-*Guindon* case, *Doyon v Canada*:

> In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor's burden of proof. Absolute liability, arising from an *actus reus* which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him - or herself.[11]

This case is also noteworthy for its broad interpretation of the so-called *Rogers v SOCAN* exception to reasonableness review under *Dunsmuir*. In *Rogers v SOCAN*, the coordinate jurisdiction of administrative tribunals and the courts under the *Copyright Act* was said to be an unusual feature of the legislation justifying a departure from reasonableness review. But overlapping criminal and administrative sanctions are a common feature of many AMPs regimes and a literal application of the *Rogers v SOCAN* exception would mean that correctness review would often apply to the judicial review of AMPs proceedings.

It should be noted that this analysis diverges from that of the Divisional Court in *Cornish v Ontario Securities Commission*[12] where the court adopted a narrow interpretation of the *Rogers v SOCAN* exception and applied a standard of reasonableness review to a case involving AMPs under the Ontario *Securities Act*.

10 2015 SCC 41
11 2009 FCA 152
12 2013 ONSC 1310

Claim allowed to proceed for policy allegedly adopted for improper purpose: *Castrillo v Workplace Safety and Insurance Board*, 2017 ONCA 121

FACTS: C is the plaintiff in a proposed class action brought on behalf of injured workers alleged to have been denied the full benefits to which they were entitled under the *Workplace Safety and Insurance Act, 1997*.[13] The statement of claim pleads misfeasance in public office, bad faith and negligence.

C sustained a shoulder injury in a work-related accident. He applied for and received the economic loss benefits to which he was entitled under the Act. He also qualified for a non-economic loss ("NEL") award because he was found to have suffered a permanent impairment leaving him with less than a full range of motion in his shoulder. The Board determined that C was entitled to a NEL lump sum award, but then reduced the award by 50% because of a "pre-existing condition", namely osteoarthritis in the injured shoulder.

C appealed on the basis that the Board was wrong to reduce the award, as his pre-existing osteoarthritis was asymptomatic before the work-related injury and had never affected his shoulder's functionality. In other words, it was a pre-existing condition but not a pre-existing impairment. C's appeal was allowed and the full amount of the NEL award was restored.

C later learned a number of other injured workers had had their NEL awards reduced by the Board on the basis of pre-existing conditions that were not true impairments, many of which were reversed on appeal. He discovered the reductions were due to the implementation of an internal Board document which adopted a broader interpretation of the term "pre-existing impairment" to include asymptomatic pre-existing conditions, which had previously been excluded.

13 SO 1997, c 16

He commenced the proposed class proceeding. The Board brought a motion to strike the statement of claim on the basis that it disclosed no reasonable cause of action. The Board relied in part on a strong privative clause in s 118 of the Act. The motion judge struck the claim and C appealed.

DECISION: Appeal allowed.

A claim will only be struck where it is plain and obvious that it has no reasonable prospect of success.

A pleading of misfeasance in public office must alleged facts capable of establishing that: (1) the public official engaged in unlawful conduct in the exercise of public functions and (2) the public official was aware that the conduct in question was unlawful and was likely to injure the plaintiff.

The pleading alleges that the Board is a public body and its employees were public office holders. The Board is directly and vicariously liable for the bad faith acts and omissions of its employees. The pleading further alleges that the Board's decision to reduce NEL awards was the result of a "secret policy" to "aggressively reduce legitimate NEL awards". The pleading claims that the new approach in the "secret policy" was done "without legal authority" and was "illegal as being contrary to" the Act and its regulations. The pleading states that the Board's actions were motivated by a desire to reduce costs, that the Board knew it was acting illegality and that its actions would harm C and the class, and that its actions were therefore malicious. In effect, the pleading asserts that reducing costs was an improper purpose of the change in policy.

The Board conceded that it owes a general public law duty to the public and to workers to act in good faith, but it challenged the adequacy of the pleading of bad faith. That challenge falls short for two reasons: (1) many of the specific facts supporting the allegation are within the Board's knowledge; and (2) C relies in fact on known facts that are based in the legislation, the regulations, the policies and the documents. The Board also asserted that the only improper purpose alleged in the claim is "an attempt to cut costs", but s 1 of the Act expressly obliges the Board to accomplish its purposes "in a financially responsible and accountable manner". The Board argued these words permit the Board to reduce benefits to injured workers in order to save money. The Court rejected that argument as invalid on a pleadings motion.

The Board also argued that the claim was a collateral attack on the Board's decision regarding C's entitlement. However, the pleading is not linked to the specific circumstances of C's complaint; it challenges the legality of the Board's actions across a category of benefits and a class of persons. This is not a collateral attack.

The Court also rejected the Board's argument that the claim is barred by the robust privative clause in s 118 of the Act. In the *Crevier* case[14] the Supreme Court confirmed that a privative clause cannot completely insulate a statutory tribunal from court review. Although *Crevier* concerned a tribunal exercising an adjudicative function, the logic applies equally to agencies like the Board that do more that adjudicate, but also make policy and regulate. The legislature cannot completely oust the jurisdiction of the Superior Court to consider an allegation of misfeasance in public officer related to the use of statutory power for an improper purpose.

Bad faith is not a free-standing cause of action. However, C was granted leave to amend the claim to better tie the bad faith allegation to the claim of misfeasance in public office, if so advised.

The claim of negligence was sufficiently pleaded. The privative clause in s 118 of the Act does not lead to the conclusion that the claim has no reasonable prospect of success. Indeed, s 179 of the Act supports the argument that the Board is open to a negligence suit in the proper circumstances. It provides that the Board may be vicariously liability for the actionable acts and omissions of certain people undertaken in good faith

COMMENTARY: This decision is a sombre caution to administrative agencies that, even if they are

14 [1981] 2 SCR 220

protected by a strong privative clause, actions they take for an improper purpose may give rise to civil liability for negligence and misfeasance in public office. While the action is only at the pleadings stage and no findings of liability have been made the Court was satisfied on the facts alleged in the claim, the relevant legislation, and the *Crevier* principle that C had pleaded a reasonable cause of action against the Board.

Administrative agencies should take note of this case and its potential consequences. Decisions – including policy relating to matters within an agency's mandate – taken for an improper purpose and without legal authority are not merely susceptible to judicial review under administrative law principles; they may also give rise to costly civil actions. ⚖

Duty of fairness and ICRC power to order assessments: *Zaki v Ontario College of Physicians and Surgeons*, 2017 ONSC 1613 (Div Ct)

FACTS: The College received a complaint concerning the legibility of Dr Z's patient medical records. The Inquiries, Complaints and Reports Committee ("ICRC") of the College reviewed the complaint and rendered a decision with respect to the quality of Dr Z's record-keeping. The ICRC required Dr Z to complete a specified continuing education or remediation program (known as a "SCERP") consisting of a Record Keeping Course and a "reassessment" with an assessor.

The assessor appointed by the College reviewed 25 of Dr Z's patient charts. She concluded that in 22 of them Dr Z did not meet the standard of practice with respect to record keeping. She also reported on various issues of patient care and opined that, in some instances, the care Dr Z provided failed to meet the standard of practice. These reports were consistent with the terms of her appointment.

The College asked Dr Z to respond to the assessor's report. He provided a detailed response. Three months later, the assessor provided a response to Dr Z's response by way of a second report. In the second report the assessor revised her earlier opinion and withdrew a number of her criticisms. The second report from the assessor was not provided to Dr Z.

Six months later, the ICRC considered Dr Z's case. The ICRC's decision was provided to Dr Z three months later. Three months after that – and a full year after it had been provided to the College – the College sent Dr Z the assessor's second report.

The ICRC's second decision determined that a SCERP was appropriate and required the applicant to be subject to clinical supervision by a preceptor.

Dr Z applied for judicial review of the ICRC's decision, alleging a denial of procedural fairness when the ICRC failed to give him the assessor's second report and an opportunity to respond, and that the ICRC exceeded its jurisdiction in ordering a wide-ranging assessment of his practice.

DECISION: Application allowed.

On the issue of procedural fairness, the Court need not engage in a discrete standard of review analysis. Regarding the *Baker* factors, three bear specific mention in this case. First, the ICRC's decision is of considerable importance to Dr Z, as it directly affects his ability to carry on his medical practice. Second, Dr Z had a legitimate expectation that he would receive and be able to respond to the assessor's report. In particular, since he as given the first report and asked to respond to it, it should have been obvious that Dr Z had a legitimate expectation that he would receive any other reports the assessor provided. Third, the procedures adopted by the decision-maker are relevant. The College clearly intended to provide any and all of the assessor's reports to Dr Z and told the assessor that that would happen.

The College argued that Dr Z suffered no unfairness because the second report added nothing to the record and Dr Z was already aware of and had made submissions on the basic issues raised. But procedural fairness must not only be accorded to a party – it must also be seen to have

been accorded. Providing information to the ICRC that was relied upon in reaching its decision and that was not provided to Dr Z is not fair in fact or in appearance. It cannot be said that the second report was of no consequence, since on more than one occasion the assessor completely reverse her position regarding Dr Z's conduct.

On the issue of the ICRC's jurisdiction, the ICRC has no express power to appoint an assessor or investigator. Rather, under s 26(1) of the *Health Professions Procedural Code*, the ICRC has authority to "Take action it considers appropriate that is not inconsistent with the health profession Act, this Code, the regulations or by-laws." The ICRC also has express authority to require a member to complete a SCERP. An assessment is an integral part of a SCERP. It is the necessary mechanism to ensure that completion of the SCERP has the desired effect of correcting any issues with the physician's conduct. While the requirement of an assessment poses a burden on the physician, the consequences of that burden are secondary to the overarching goal of protecting the public by ensuring patient safety.

The authority of the ICRC to order an assessment must always be directly related to, and be a necessary consequence of, its decision to order a SCERP. The assessment ought to be carefully tailored. The scope of the assessment should be rationally connected to the concerns that led to the ordering of the SCERP and be only what is necessary to properly address those concerns.

COMMENTARY: The Court's brief comments that no standard of review analysis is necessary where procedural fairness is at issue belie the ongoing inconsistency in the cases on this point. While cases have traditionally held that there is no standard of review for issues of procedural fairness,[15] some recent cases have held that for procedural fairness issues the standard of review is correctness, in some cases with a "margin of deference".[16] Other cases have held simply that the correctness standard of review applies.[17] The subtle differences between these theoretical approaches are unlikely to make any practical difference in the vast majority of cases, but it would nonetheless be helpful (at least for doctrinal coherence) if the courts would clarify a single proper approach.[18]

The Court's comments on legitimate expectations are also notable. Consideration of a person's legitimate expectations has long been a feature of Canadian administrative law, particularly since *Baker* as one of the factors relevant to determining the scope of a duty of fairness. Courts consistently require a "clear, unambiguous and unqualified representation, policy or practice" relied upon by the person asserting the legitimate expectation. The Court did not discuss that requirement in this case and it is far from clear that the fact Dr Z was provided with the assessor's first report gave rise to a clear, unambiguous and unqualified representation that he would get the second report. Nonetheless, the result seems to be the right one on a fundamental level – Dr Z's right to know the case against him and be heard was breached when the ICRC received a report that was not provided to him and that he did not have the opportunity to respond to.

The Court's reasons on jurisdiction will be of interest to other health regulatory colleges in Ontario operating under the *Code*. A SCERP is a legitimate and useful regulatory tool that allows for remediation in the interest of public protection, while avoiding the stigma of disciplinary proceedings for the member. As noted by the Court, an assessment that is properly tailored to a SCERP can be essential for colleges to monitor whether a SCERP has been effective. Health regulatory colleges will likely welcome the Court's confirmation that ICRCs have the authority to order such assessments.

[15] See, for example, *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 SCR 249

[16] See, for example, *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48.

[17] See, for example, *Mission Institution v Khela*, [2014] 1 SCR 502 at para 79.

[18] In one recent case the Divisional Court noted the differing approaches but did not resolve them, concluding "how this is characterized does not impact the analysis." See *Rogers Communications Partnership v Ontario Energy Board*, 2016 ONSC 7810 at para 14.

Ensuring fairness to unrepresented parties: *Challans v Timms-Fryer*, 2017 ONSC 1300 (Div Ct)

FACTS: After a traffic stop escalated, T-F was arrested for assault police and resist arrest. T-F then made a complaint to the Office of the Independent Police Review Director ("OIPRD"). The subject officer, who is with the Amherstberg Police Service ("APS"), was accused of unlawfully arresting the public complainant, T-F, as well as using unnecessary force and engaging in discreditable conduct by using profane or abusive language. The subject officer was brought before the APS discipline tribunal after the OIPRD substantiated the allegations of misconduct and directed the matter to a hearing. All charges against the subject officer were dismissed at the hearing.

T-F appealed the Hearing Officer's decision to the Ontario Civilian Police Commission ("OCPC"). At issue on appeal before the OCPC was the extent to which T-F, who was unrepresented at the hearing, had been prevented from participating in the initial hearing. The OCPC found that the Hearing Officer had breached rules of natural justice and procedural fairness by not inviting the complainant to play a meaningful role in the proceedings.[19] Critically, public complainants enjoy full party status in police discipline matters by way of s 83(3) of the *Police Services Act*.[20]

The subject officer sought judicial review, alleging that the OCPC erred in overturning the Hearing Officer's decision on the basis T-F was precluded from participating meaningfully in the proceedings, and that it erred in dismissing a motion by the APS to admit fresh evidence regarding "off the record" events involving T-F.

DECISION: Application dismissed.

[19] See OCPC decision *Timms-Fryer and AmherstburgPolice service and Challans*, 2015 CanLII 69340

[20] RSO 1990, c P.15

Justice Nordheimer, on behalf of a unanimous panel, held that the OCPC decision was both reasonable and correct. The OCPC had properly rejected attempts by the APS to file fresh evidence in the form of affidavits from its prosecutor, the Hearing Officer and the Chief of Police regarding "off the record" events involving T-F.

More significantly, the OCPC had also been correct in finding that T-F's procedural rights as a full party to the proceedings were breached. The public complainant did not need to establish actual prejudice arising from his denial of natural justice in order to obtain a fresh hearing. The reason public complainants receive party standing in these hearings is to ensure transparency in the complaints process and to provide a member of the public whose complaint results in a hearing with the assurance that the complaint has been fully and fairly adjudicated.

The Court agreed with the OCPC that, at a minimum, to ensure meaningful participation by an unrepresented public complainant, a hearing officer must do the following on the record:

- Confirm whether the public complainant was aware that he was entitled to be represented by legal counsel at the proceedings and whether he was waiving the right to legal representation.
- Explain the roles of the parties at the proceeding and the process that would be followed. This would include the right of each party, including the public complainant, to call witnesses, introduce evidence, object to evidence adduced, cross-examine witnesses, and make submissions on all motions and at the end of the hearing.
- Explain the role of the adjudicator in the proceedings, including his role in relation to the unrepresented public complainant.
- Confirm that the public complainant understands the process and his role in it.
- Ask the public complainant, at the appropriate time, if he would like to call any witnesses.

- Ask the public complainant, at the appropriate time, if he would like to question each of the witnesses of the prosecution and the defence.
- Ask the public complainant if he would like to make submissions on all motions and at the end of the hearing

The Hearing Officer in this case failed to fulfil any of those requirements. This was a breach of natural justice and procedural fairness. The only remedy was to order a new hearing.

COMMENTARY: Participant public complainants are an essential component of a transparent and fair police discipline system. Self-represented public complainants can pose significant challenges because counsel on a matter are not properly positioned to assist them. The seven points endorsed by the Divisional Court represent the *minimum* level of assistance that a Hearing Officer should provide to an unrepresented public complainant in a police discipline matter. This case will be required reading for all police tribunal adjudicators. Indeed, the seven points serve as a useful guideline for adjudicators in any context to ensure meaningful participation by and procedural fairness to self-represented parties. In the wake of this decision, it may become prudent for police services to consider a role for pro bono duty counsel in discipline tribunals. ⚖

CO-EDITORS

Andrea Gonsalves
416.593.3497
andreag@stockwoods.ca

Justin Safayeni
416.593.3494
justins@stockwoods.ca

The Stockwoods Administrative & Regulatory Law Case Review is a bi-monthly newsletter published by lawyers at Stockwoods LLP, a leading litigation boutique practising in the areas of administrative/regulatory, civil and criminal law.

To sign up to receive this newsletter via email, contact alicec@stockwoods.ca. The newsletter can also be viewed and downloaded on the firm's website at www.stockwoods.ca.

For more information about the issues and cases covered in this edition of the newsletter, or to find out more about our firm's administrative and regulatory law practice, please contact Andrea Gonsalves, Justin Safayeni or another lawyer at the firm.

The editors extend special thanks to Edward Marrocco and Stephen Aylward of Stockwoods LLP for their valuable contributions to this issue.