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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Media access to hearing recordings: *Canadian Broadcasting Corporation v Canada (Parole Board)*, 2023 FCA 166

Facts: CBC made a request to the Parole Board of Canada for a complete copy of the audio recordings of parole hearings for three high profile violent offenders.

In support of its request, CBC—which is able to attend parole hearings and cannot be restrained by the Board in what it reports about the hearings—argued that the open court principle applied to Board hearings and that the Board could limit provision of copies of the audio recordings only in a manner consistent with s. 2(b) of the *Charter* and the *Dagenais/Mentuck* test applicable to limitations on open access to court proceedings and materials. CBC argued further that the *Privacy Act*[1] does not prohibit providing copies of the recordings since the information in the recordings is public by virtue of the open court principle and was disclosed in a hearing that was presumptively open to the public.

The Board rejected CBC's request. In its view, the open court principle applies only to bodies

[1] RSC 1985, c P-21

that act in a quasi-judicial capacity. The Board does not act in such a capacity. Its proceedings are inquisitorial, not adversarial. Observers may apply to attend parole hearings, but the hearings are not open to the public. Further, CBC had not sufficiently demonstrated the public interest in disclosure and it would not, in any event, outweigh the offender's privacy interests.

CBC applied for judicial review. The Federal Court found the Board was not a quasi-judicial tribunal and not bound to produce copies of the audio recordings under the open court principle. It found that the Board had sufficiently considered the privacy interests of the offenders, that the Board's decision did not engage the *Doré* framework, and that the decision was reasonable. CBC appealed.

Decision: Appeal allowed; matter returned to the Board for reconsideration (Pelletier, Webb and Rivoalen JJA).

The first issue raised by CBC is whether the open court principle, fortified by s. 2(b) of the *Charter*, applied to the Board. The Board decided that it does not. The standard of review applicable to the Board's decision on that issue is correctness. The reasonableness standard assumes a range of possible outcomes, all of which are defensible in law. That standard is inappropriate for this issue. Either the open court principle applied or it did not. The second issue raised in the appeal—whether CBC was otherwise entitled to production of the audio recordings—is to be reviewed on the reasonableness standard.

The Board and the Federal Court did not err in concluding that the open court principle does not apply to the Board's proceedings. It is relevant but not determinative that the Board's hearings are open to the public. The issue should also not be determined according to whether the Board is judicial or quasi-judicial in nature. That distinction, which focuses on the Board's processes and formal characteristics, is not useful on the question of whether the open court principle applies. The public interest in court proceedings does not arise from procedural characteristics but from the fact that the tribunal decides questions of rights and duties as between citizens, or as between citizens and the state.

The fact that a tribunal presides over adversarial proceedings as an adjudicative body is a reliable indicator that the tribunal is subject to the open court principle. The open court principle applies to adjudicative tribunals, but the Board is not an adjudicative tribunal. While the public has an interest in knowing about the functioning of all public bodies, the open court principle has to date been limited to those public bodies whose resemblance to courts invites the same degree of public oversight represented by the open court principle. At some point a broader foundation for the openness principle may be articulated, but the facts of this case do not justify that change.

Regarding CBC's alternative second argument, the Court explored whether apart from the open court principle CBC was entitled to access to the recordings. The restrictions on disclosing personal information in the *Privacy Act* and in the *Corrections and Conditional*

Release Act[2] are a potential obstacle to CBC's request for access. Subsection 8(1) of the *Privacy Act* prohibits disclosure of personal information under the control of a government institution except with the consent of the individual or in accordance with the provisions of s. 8(2), one of which is an exemption from s. 8 where the information is publicly available. Subsection 140(14) of the *Corrections and Conditional Release Act* provides that "If an observer has been present during a hearing … any information or documents discussed or referred to during the hearing shall not for that reason alone be considered to be publicly available for purposes of the *Access to Information Act* or the *Privacy Act*."

Board hearings are presumptively open to the public. The purpose of allowing observes to attend is to address the public's right to know. Allowing the press to access audio recordings of hearings on the same basis as the press' access to the hearings would serve exactly the same goal.

In denying CBC's request, the Board wrote that the public interest in disclosure would not clearly outweigh the privacy interests of the individuals involved and that the invasion of privacy is clear. The Board also reasoned that an offender would be at very real risk of having their reintegration as law-abiding members of society potentially compromised or derailed by the high degree of media and/or public scrutiny that could be anticipated. This reaction overstates the dangers arising from "a discretionary release of personal information" in light of the fact that the personal information in the audio recordings has already been disclosed. Moreover, the focus on the risk of derailing the offenders' reintegration sounds hollow in the context of the offenders in question whose chances of parole are remote at best. The assessment of such risk must be individualized.

Further, the Board was bound to consider the public interest in broader context than an identifiable group of persons who might have an interest, and it must be kept in mind that the press has a particular role in the dissemination of information in which members of the public have an interest. There may be various ways for the Board to approach this issue, but the focus should be on whether the disclosure of the recordings furthers the public's understanding of the functioning of the Board and its ability to engage in informed debate.

The reasons supporting the Board's refusal to provide the requested audio recordings were unreasonable. In many instances, they were incoherent, relying on risks that had already materialized affecting opportunities that were unlikely to arise in a foreseeable future. The Board's decision should be set aside and the matter returned to it for reconsideration.

Commentary: This case represents the latest in a series of efforts by media organisation to gain greater access to the proceedings and records of administrative decision makers. The open court principle, which is closely related to s. 2(b) of the *Charter* and has constitutional dimensions, has featured in several of these cases. *Toronto Star Newspapers v Ontario*

[2] SC 1992, c 20

(Attorney General)[3] was a successful challenge to provisions of Ontario's *Freedom of Information and Protection of Privacy Act*, where the Court found that insofar as those provisions apply to adjudicative records held by certain tribunals that hold adjudicative hearings, they violate the open court principle and s. 2(b) of the *Charter*. In *Canadian Broadcasting Corp v Ferrier*, the Court of Appeal for Ontario rejected the argument that the open court principle applied to a police discipline hearing that was "not a judicial or quasi-judicial proceeding".[4] However, a statutory presumption of open hearings did apply and the media's ability to attend a police services board hearing engages the protections of s. 2(b).

In each of these cases, the courts continue to fill in the contours of the open court principle — and define its limits — as it applies to statutory decision makers. *CBC v Parole Board of Canada* advances the debate by leaving behind the previous approach of determining whether the open court principle applies by whether the tribunal can be characterised as judicial or quasi-judicial. Not only are such characterisation efforts difficult and unworkable, but as the Court noted they focus on the wrong question. In its place, the Court shifts to a different question: is the decision-maker an adjudicative tribunal? While this test may be easier to apply, the Court does not satisfactorily explain why it is the determining factor. Why isn't there sufficient public importance in transparency and access to information of non-adjudicative decision makers to engage the open court principle? Given the importance of the open court principle in ensuring transparency and accountability, further consideration by the courts is necessary.

Until then, administrators and agencies that are "adjudicative tribunals" should operate on the expectation that the open court principle applies to their proceedings, hearings and materials. In the wake of this decision and *Ferrier*, even decision makers whose functions are non-adjudicative — such that the open court principle may not apply — should carefully consider their obligations to provide open access to the public and media, especially where the public interest is compelling.

High bar for finding regulations unconstitutional due to vagueness or overbreadth: *Covant v. College of Veterinarians of Ontario*, 2023 ONCA 564

Facts: C, a veterinarian, ran a sub-distribution operation whereby veterinary drugs were re-sold to human pharmacies. After a complaint by a drug distributor, a panel of the Discipline Committee of the College of Veterinarians found that C's conduct constituted professional misconduct, as it was contrary to a newly amended regulation which restricted such re-sales to "reasonably limited quantities in order to address a temporary shortage". The drugs re-sold by C were neither in "reasonably limited quantities" nor were they to address any temporary shortage. As a result of pharmaceutical companies' refusal to sell veterinary drugs to human pharmacies,

[3] 2018 ONSC 2586
[4] 2019 ONCA 1025

pharmacies were in a state of permanent—rather than temporary—shortages of these drugs.

C argued that the regulations were unconstitutional on grounds of vagueness and overbreadth under s. 7 of the *Charter*. The panel rejected this argument, explaining that the provision was not invalid because it did not include a specific quantum. Instead, whether re-selling is contrary to the regulation will depend on the particular circumstances. The panel held that C's re-selling operation, considered as a broader course of conduct, contravened the regulation. It imposed a one-month suspension, as well as awarding the College one-third of its costs.

C appealed to the Divisional Court, arguing that the Discipline Committee erred in upholding the constitutionality of the provision, erred in finding he had engaged in professional misconduct, and that its order on penalty was unreasonable. The Divisional Court dismissed the appeal.

Decision: Appeal dismissed (*per* Trotter, Benotto, and Zarnett JJ.A.).

The Divisional Court correctly held that the impugned provision was not unconstitutional.

In general, s. 7 of the *Charter* does not protect economic interests. As the Court of Appeal held in *Tanase v. College of Dental Hygienists of Ontario*[5], neither professional disciplinary proceedings, nor the sanctions that may flow from them, engage the right to liberty or security of the person under s. 7. Before the Court of Appeal, C clarified that he was no longer grounding his vagueness and overbreadth arguments in s. 7, but instead in the rule of law.

Whether C's submissions were rooted in the *Charter* or in the rule of law, the impugned provision was neither impermissibly vague, nor overbroad. The fact that a regulation requires interpretation in the context of a specific factual matrix is not sufficient to render it unconstitutionally vague. The phrases "in reasonable quantities" as a result of a "temporary shortage" inform each other's content, with the 'reasonably limited quantities' being quantities proportionate to the 'temporary shortage'.

The impugned provision was also not overbroad by virtue of capturing conduct that has not caused actual harm. The College is entitled to regulate its members to mitigate risk, rather than being required to wait for actual harm to materialize. Further, it was immaterial that in light of pharmaceutical companies' refusal to supply veterinary drugs to human pharmacies, the regulation in effect amounted to a categorical prohibition on the re-sale of drugs to pharmacies. The regulation was sufficiently tailored to its objective, regardless of how it impacted pharmacies.

The Divisional Court did not err in upholding the panel's finding of professional misconduct. The evidence before the panel clearly indicated that C's operation was not responding to "temporary shortages" but was instead filling orders without requiring any explanation, and he continued in his sub-

[5] 2021 ONCA 482

distribution business despite warnings about this conduct.

The Divisional Court similarly did not err in upholding the penalty imposed by the panel, which included a one-month suspension, public reprimand, an ethics course, and an award of approximately $94,000 in costs to the College. Nothing about the penalty imposed was clearly unreasonable or demonstrably unfit. Similarly, discipline committees command a wide discretion in crafting a costs award, and the amount ordered was reasonable in the circumstances.

Commentary: With the court declining to expressly resolve the juristic basis for its analysis, it appears to confirm that the vagueness threshold for regulations is the same, whether considered as a principle of fundamental justice under s. 7 or under more general "rule of law" principles. Accordingly, while vagueness and overbreadth challenges may still be available in situations where s. 7 is not engaged (such as the professional discipline context), litigants continue to face a very high threshold. Regulations and other subordinate legislation need not achieve absolute precision, as long as they provide sufficient guidance for legal debate. This would seem to suggest that in cases where s. 7 is available, there is minimal tactical advantage to framing vagueness arguments under one or the other.

Interestingly, despite C's vagueness and overbreadth arguments being rooted in s. 7 of the *Charter* before both the Discipline Committee and the Divisional Court, it was not until the Court of Appeal that the issue of the non-application of s. 7 in the professional discipline context was expressly raised. Rather than dismissing this ground of appeal on the basis that there was no deprivation of liberty or security of the person, the court invited supplementary submissions from the parties and allowed C to proceed with his vagueness and overbreadth submissions on a different juristic footing. Although this in some ways strays into permitting new arguments to be raised on appeal, this case should not be viewed as an invitation to do so in other cases. The court's willingness to consider both the *Charter* and rule of law arguments is likely attributable to the same legal standard applying under both, enabling the appellate court to continue to rely on the reasons below.

The court's conclusions on overbreadth also suggest a deferential approach in the regulatory context where the focus of the impugned measures is on risk mitigation. Regulations may capture conduct which does not itself cause actual harm without becoming overbroad. Further, courts will not entertain challenges to the wisdom of a regulation disguised as overbreadth arguments: the focus is not on the broader impact of the impugned provision (here, that the restriction in effect amounted to a categorical prohibition on re-sales), but instead on whether it captures conduct beyond what is required to achieve its specific purpose.

Ministerial discretion in tension with the will of the legislature: *Canada Christian College and School of Graduate Theological Studies v. Post-Secondary Education Quality Assessment Board*, 2023 ONCA 544

Facts: In 2020, the legislature passed a bill giving Canada Christian College and School of Graduate Theological Studies (CCC) the right to call itself a university and the power to grant degrees. Schedule 2 provided that the legislation would come "into force on a day to be named by proclamation of the Lieutenant Governor". The bill received Royal Assent on December 8, 2020.

Meanwhile, the Minister of Colleges and Universities asked the Postsecondary Education Quality Assessment Board provide recommendations on whether it was appropriate for CCC to become a university. The Board produced two reports concluding that CCC should not become a university based on concerns in areas of governance, administrative capacity, financial stability and academic decision-making. Based in part on the Board's analysis, the Minister then recommended to Cabinet that the legislation not be proclaimed into force at this time.

CCC sought judicial review of both the Board's and the Minister's decisions. CCC argued that the Minister's decision to seek recommendations from the Board was ultra vires; the Board's process was unfair and its findings unreasonable; and the Minister's recommendation against proclamation undermined the will of the legislature.

The Divisional Court dismissed the application, holding that the Board's recommendations were not justiciable because the Court had power to grant relief only in relation to "decisions" and that the Minister had the power to ask the Board for recommendations about CCC even though the legislature had passed a bill granting CCC the right to call itself a university. The Court pointed out that one of the purposes of the *Post-secondary Education Choice and Excellence Act, 2000*[6] (*PECE Act*), which created the process via which institutions can achieve university-status, is quality-assurance. Therefore, the Minister's request for recommendations was consistent with the purpose of the relevant legislation.

Finally, the Court held that the Minister's decision was legislative, not adjudicative in nature, Further, there is no presumption in Ontario that every enacted statute that is subject to proclamation will be proclaimed. Consequently, the Minister's recommendation against proclamation did not undermine the legislature's will.

The CCC appealed the decision in respect of the Minister's decisions.

Decision: Appeal dismissed (Roberts, Trotter and Sossin JJA)

The first issue before the Court was whether the Minister had the power to seek Board recommendations on the suitability of a specific institution becoming a university when the legislature had already granted that institution university-status. The Court ruled that the Minister's decision to refer CCC'sw application to the Board for recommendation was rooted in the authority provided by the *PECE Act*. Bearing in mind the context and purpose of the *PECE Act*, it granted the Minister a broad discretion over referrals of matters to the Board. The Minister could use this discretion to seek Board recommendations

[6] SO 2000, c 36, Sch

even when doing so was a means of effectively overriding the will of the legislature.

Secondly, the Court ruled that the Minister's recommendation against proclamation was not unreasonable and did not contradict the legislature's will. He did not reject proclamation entirely, rather he recommended that the proclamation not move forward "at this time". The Court held that the commencement provision in the *PECE Act* expressly gave the Minister the power to decide when proclamation should take place. However, the Court clarified that the Minister's discretion as to the timing of proclamation is not unfettered. It would not be open to a Minister to decide that an enacted statute will never be proclaimed. The discretion to exercise the authority conferred by the commencement provision is subject to the same constraints that apply to all exercises of ministerial discretion. The exercise of a discretion is to be based upon a weighing of considerations pertinent to the object of the statute's administration.[7]

Finally, the Court considered CCC's argument that the process was unfair. Whether the Minister's actions were part of an executive or legislative function (or both), those actions did not breach any fairness rights to which CCC was entitled. CCC was granted extensive opportunity to make submissions to the Board and the appellant's final responses were before the Board when it made its decision, in addition to summaries prepared by the Board secretariat. If there was a duty to give reasons, that duty was met by a Decision Note signed by the Minister, which clearly set out the recommendations of the Board, and grounds for the Minister's decision.

Commentary: On its face, this case appears to move in two opposing directions. Regarding the Minister's request for Board recommendations, the Court indirectly held that the Minister has the power to override the legislature's will. Yet in its ruling that the executive cannot choose to never proclaim a statute, the Court affirmed the importance of the legislature's sovereignty.

When ruling on the Minister's request for recommendations, the Court of Appeal noted that "[t]he Divisional Court rejected CCC's argument that this language did not authorize the Minister to refer matters to the Board as a means of effectively overriding the will of the legislature. I see no error in this analysis" [35-36]. The Court of Appeal seems to be holding that the Minister can lawfully overrule the will of the legislature. However, this ruling is not quite as controversial as it first appears. The Court emphasized that, "[l]ooking at the text, context and purpose", the *PECE Act* gives the Minister a discretion to seek recommendations from the Board [40]. Although not spelled out as such, the Court's decision may be understood to mean that the Minister can override the legislature's will as expressed through the legislation granting CCC university status in order to give effect to the legislature's will as expressed in the *PECE Act*.

Unfortunately, the Court did not address the fact that it was dealing with two conflicting wills of the legislature. Nor did it offer any guidance for courts, administrators and lawyers, in

[7] *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121, at 140; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29, at para 94.

situations where more than one statute may be in play, as to which one prevails in defining the scope of the executive's mandate. Perhaps the Court could have avoided this confusion altogether by reframing its analysis, since it is difficult to see how the mere act of asking for recommendations—as opposed to making the decision not to proclaim legislation—could be capable of undermining the legislature's will.

Contrastingly, the Court of Appeal firmly asserted the legislature's sovereignty in holding that a Minister cannot choose to never proclaim an enacted statute. Although it chose not to disagree with the Divisional Court's claim that "[t]here is no presumption in Ontario that every enacted statute that is subject to proclamation will be proclaimed" [68], the Court of Appeal clarified that the Divisional Court meant only that legislation may be repealed before it is proclaimed.

Overall, this judgment is a fascinating example of how difficult it can be for the courts to clearly define the balance of power between the executive and the legislature.

The limits of free expression for regulated professionals: *Peterson v College of Psychologists of Ontario*, 2023 ONSC 4685 (Div Ct)

Facts: Dr. P is a well-known public figure and author who often wades in on controversial political and social issues. He is also a psychologist and a registered member of the College of Psychologists of Ontario.

Since at least 2018, the College has received complaints about Dr. P's public statements. In March 2020, following an investigation into some of Dr. P's statements, the College's Inquiries, Complaints and Reports Committee (ICRC) expressed concern that "the manner and tone in which [Dr. P] espouses his public statements may reflect poorly on the profession of psychology". At the time, the ICRC offered Dr. P the following advice: "As a registered Member of the College, and in light of your public profile, you may wish to offer your opinions and comments in a respectful tone in order to avoid a negative perception toward the profession of psychology."

Dr. P continued making controversial public statements. In 2022, the College received numerous reports about Dr. P's conduct on social media (where Dr. P identified himself as a "clinical psychologist") and in public appearances. That conduct included:

- A tweet in which Dr. P responded to someone who expressed concern about overpopulation by saying, "You're free to leave at any point";
- A podcast in which Dr. P is identified as a clinical psychologist and spoke about a "vindictive client" whose complaint about him was a "pack of lies", as well as about air pollution and child deaths by saying, "It's just poor children, and the world has too many people on it anyways";
- A tweet in which Dr. P commented that a city councillor using they/them pronouns was an "appalling self-righteous moralizing thing";

- A tweet in which Dr. P responded to a tweet about an actor being proud to play a transgender character by saying, "Remember when pride was a sin? And Ellen Page just had her breasts removed by a criminal physician";

- A tweet in which Dr. P commented about a *Sports Illustrated* Swimsuit Edition cover with a plus-sized model, saying "Sorry. Not Beautiful. And no amount of authoritarian tolerance is going to change that".

The College Registrar appointmented an investigator to investigate professionalism concerns arising from Dr. P's conduct. An investigation report was completed and sent to a panel of the ICRC.

The ICRC wrote to Dr. P expressing concern about some of his statements, and explaining that "public statements that are demeaning, degrading and unprofessional may cause harm, both to the people they are directed at, and to the impacted and other communities more broadly." The ICRC proposed that Dr. P undertake to "reflect on these issues with a period of coaching", with a person selected by the ICRC, as a remedial step.

Dr. P rejected the ICRC's proposal, explaining that he had "already implemented a solution" in response to the ICRC's concerns, which included a "modification of the tone of my approach". He saw no need for an independent coach selected by the ICRC given that he had people who help him monitor public communications, including his editorial team and his immediate family. He also said it was appropriate for him to identify as a psychologist, given that he is still licensed and still "practising", albeit in a "diffuse and broader manner" in the public space.

The ICRC did not accept Dr. P's position. In the ICRC's view, the "recurrence risk in this case is high and the plan you have proposed in your response does not adequately remediate the risk." The ICRC recognized that Dr. P's right to free expression was engaged, but explained that Dr. P "also owes a duty to the public and to the profession to conduct himself in a way that is consistent with professional standards and ethics". The ICRC once again suggested that Dr. P agree to a period of coaching by an independent professional. Dr. P refused.

The ICRC then released its formal decision and reasons, where it found that through his conduct, Dr. P "may be engaging in degrading, demeaning and unprofessional comments" and that "looked at cumulatively, these public statements may be reasonably regarded by members of the profession as disgraceful, dishonourable and/or unprofessional". The ICRC was concerned that Dr. P's conduct "poses moderate risks of harm to the public" including by "undermining public trust in the profession of psychology, and trust in the College's ability to regulate the profession in the public interest." The ICRC reiterated that it viewed the recurrence risk as "high".

The ICRC ordered Dr. P to complete a specified continuing education or remedial program (SCERP) regarding professionalism in public statements, which required him to enter a coaching program with one of two individuals selected by the Panel "to review,

reflect on and ameliorate his professionalism in public statements." The Panel stated that a failure to comply with the SCERP "may result in an allegation of professional misconduct".

Dr. P brought an application for judicial review.

Decision: Application dismissed (*per* Backhouse, Schabas and Krawchenko JJ).

Given that *Charter* protections are engaged, the *Doré* framework is applicable here.[8] It requires the Court to ensure the administrative decision-maker proportionately balanced the impact on *Charter* rights and the statutory objectives in a way that gives effect, as fully as possible, to the *Charter* protections at stake given the particular statutory mandate. But *Doré* still requires deference. A reviewing court need not agree with the outcome, nor must a decision-maker choose the option that limits the *Charter* protection the least. The question is always whether the decision falls within a range of reasonable outcomes.

The ICRC's statutory objective is to protect the public interest and maintain professional standards. It considered the Dr. P's statements in the context of the applicable professional standards, including the *Canadian Code of Ethics for Psychologists*, which requires that College members "not engage publicly… in degrading comments about others, including demeaning jokes based on such characteristics as culture, nationality, ethnicity, colour, race, religion, sex, gender or sexual orientation." It urges members to "strive to use language that conveys respect for the dignity of persons and peoples as much as possible in all spoken, written, electronic or printed communication." Dr. P's response to the ICRC recognized that he had made errors in his public communications and claimed that he had already undertaken remediation for his actions.

The ICRC's concerns relate to the public interest in members of the College avoiding the use of degrading or demeaning language. A regulator's interpretation of the public interest, based on its expertise, is owed deference. So too is a regulator's assessment of the risk of harm to the public and to the profession in this case.

With respect to Dr. P's argument that his statements were "off duty opinions" provided outside his capacity as a clinical psychologist, there are two responses. First, Dr. P's statements were not made in private conversations, but rather publicly to broad audiences. Such "public statements" are explicitly addressed in the *Code*. Second, Dr. P presented himself as a clinical psychologist when making the impugned statements and thereafter; for example, his Twitter account states that he is a clinical psychologist, he identified himself as such on the podcast, and he argued in before the ICRC that he sees himself as a clinical psychologist in the broad public space. In any event, "off duty" statements and conduct by regulated professionals can still harm public trust and confidence in their profession.

Turning to the *Charter*, the ICRC acknowledged Dr. P's submission that his freedom of expression was implicated, but also noted that as a member of a regulated

[8] *Doré v Barreau du Québec*, 2012 SCC 12.

profession Dr. P is obligated to maintain the professional standards of the College, especially where he identifies himself as a member of the profession. It is clear from the history and context of the proceedings that the ICRC panel was well aware of the importance of the value of free expression and Dr. P's position on that issue, and appropriately balanced free expression with the College's statutory objectives. The fact that the ICRC's decision did not provide a detailed discussion of the value of free expression does not mean the ICRC did not appropriately consider it. Scrutiny of the level of detail in the ICRC's reasons must take into account that the stakes of the decision are not as high as they are before discipline panels: the ICRC is essentially a screening body that made a remedial order, rather than a disciplinary finding.

By directing a SCERP, the ICRC pursued a reasonable and proportionate option to further its objective of maintaining professional standards, which will have a minimal impact on Dr. P's freedom of expression. The ICRC's order does not prevent Dr. P from expressing himself, but rather focuses on concerns about his use of degrading and demeaning language. Dr. P's arguments that the ICRC failed to consider whether his statements are grounded in fact, or reflect honestly held opinions, miss the point: the concern arises from the nature of the language used.

Commentary: This case attracted significant public attention on account of Dr. P's involvement. The result, however, was fairly predictable given the state of the jurisprudence on "off duty" expression by regulated professionals, the modest degree of rights infringement on the facts of this case, and the applicable legal framework for assessing the reasonableness of administrative decisions limiting *Charter* rights.

When it comes to "off duty" expression, this decision highlights a key factor that will tend to bring such conduct within the purview of a professional regulator: identifying oneself as a member of a regulated profession in connection with the impugned expression. This link between an individual's status as a professional and the expression at issue can reasonably ground a regulator's concerns about harm to the reputation of the profession and, by extension, harm to the public interest. In this sense, the outcome in *Peterson* is consistent with other recent decisions from the Divisional Court. For example, where two registered nurses identified themselves as such and spoke out on social media at a public gathering against masks and vaccines during the COVID-19 pandemic, the Court upheld an ICRC direction that they be cautioned and ordered to attend remedial education through a SCERP.[9]

In assessing the ICRC decision in this case, the Court adopts a highly deferential posture towards the ICRC panel's decision, based on reading *Doré* (and its progeny) and *Vavilov* together. Such an approach is unsurprising given these authorities, and the nature of the decision at issue and its fairly limited impact on free expression. At the same time, this case perhaps epitomizes one of the main the criticisms levelled at the *Doré* framework: that

[9] *Pitter et al v College of Nurses of Ontario*, 2022 ONSC 5513.

it is insufficiently robust to actually take account of *Charter* infringements, despite the judicial ink spilled in arguing that it is substantively akin to the *Oakes* test.

Indeed, it is interesting to consider whether the outcome would be different if the Court had applied appellate standards of review, as it would at the conclusion of a disciplinary process (where the professional stakes are higher), rather than the deferential reasonableness posture applied to judicial reviews of ICRC decisions. That was the approach taken by the Saskatchewan Court of Appeal in *Strom*, a case dealing with "off-duty" public statements that led to discipline findings against a nurse.[10] Rather than apply the deferential mode of *Doré* analysis, the Court of Appeal essentially reviewed the discipline decision on a correctness basis, akin to a fresh *Oakes* analysis, and found that the findings against the nurse could not stand given the impact on her free expression rights (among other issues). Of course, one cannot discount that the facts in *Strom* are quite distinguishable from those in *Peterson*, but the different legal framework — and, in particular, the lack of deference to the initial decision-makers in *Strom* — certainly played an important role.

The Court of Appeal for Ontario has yet to weigh in on a case involving "off-duty" social media comments by regulated professionals, but that may soon change. Dr. P has announced he is seeking leave to appeal the Divisional Court's decision.

[10] *Strom v Saskatchewan Registered Nurses Association*, 2020 SKCA 112. This case was reviewed in Issue No 27 of the newsletter.

Failure to abide by statutory panel composition requirements or explain departure from them: *Law Society of Ontario v Schulz*, 2023 ONSC 3943 (Div Ct)

Facts: S was a lawyer licensed by the Law Society of Ontario ("LSO"). After S was convicted of possession of child pornography, the LSO sought to revoke his license on the basis that his actions were unbecoming of a licensee.

The registrar appointed a panel of the Law Society Discipline Tribunal to hear the matter. Under the LSO's regulations, a hearing panel must include a layperson, unless one of three specific scenario arises. In this case, the panel was made up of three LSO licensees — in other words, without a layperson — and the registrar did not advise the parties of this fact, nor did he provide any explanation for their decision. None of the parties raised an objection to the panel in the hearing.

The hearing panel suspended S's licence to practice for nine months.

The LSO appealed the panel's decision to the Law Society Appeal Division. On appeal, for the first time, the LSO argued that the hearing panel was not properly constituted and therefore the panel did not have jurisdiction. The Appeal Division panel dismissed the appeal, on the basis that the LSO had failed to make a timely objection to the composition of the hearing panel. The Appeal Division panel also opined that there was no reversible error in the Vice-Chair or Chair exercising their discretion to compose a panel without a lay

adjudicator. The LSO appealed to the Divisional Court.

Decision: Appeal allowed (*per* Nishikawa and Newton JJ; Stewart J, dissenting).

The issue of the Discipline Tribunal hearing panel's jurisdiction to hear the application, despite the lack of a lay adjudicator on the panel, is a question of law or procedural fairness. As a result, the correctness standard applies.

A majority of the Divisional Court panel found that the Appeal Panel erred in law by finding that the composition of the hearing panel did not give rise to a lack of jurisdiction, and in failing to remit the matter to a properly constituted panel. The presence of members of the public on discipline panels plays an important role in furthering public confidence in the administration of justice. Lay adjudicators legitimize the tribunal's decisions in the eyes of the public. Particularly in cases like these involving child pornography, the presence of a lay adjudicator on the panel was essential to ensure that the hearing panel included a public interest perspective regarding the profession to maintain confidence in the administration of justice. Without an impartial lay adjudicator, the public could potentially perceive the hearing panel as lacking the necessary degree of impartiality or independence. The public might otherwise be concerned that licensees could order inappropriate or more lenient penalties against other members of their profession.

Although the chair had the power to appoint a panel without a lay member, that power was limited to only three circumstances and there was no indication in the evidentiary record that the chair had made the decision to appoint this panel for any one of those three reasons. Moreover, the chair must advise the parties, in some manner, of the reason for departing from the rule that a panel must include a lay adjudicator. The burden of ensuring a panel is properly constituted is on the chair. They do not need to render a written decision or provide extensive reasons, but they do need to point to the subsection of the regulation on which they are relying to exercise their discretion either in advance, or on the record in the hearing.

With respect to the fact that LSO only raised the issue for the first time on appeal before the Appeal Division, this was appropriate because it was an issue of law, the evidentiary record was sufficient, and there was no evidence that the LSO's decision to raise it on appeal was tactical.

In dissent, Justice Stewart would have dismissed the appeal for substantially the same reasons as the Appeal Division.

Commentary: The majority's decision in this case is a useful, and indeed dramatic, reminder to regulators of their obligations to ensure panels are properly appointed in accordance with the terms of their legislation. In particular, where legislation provides discretion to depart from a presumptive set of panel composition criteria, there is an obligation — however minimal in content — on the one who exercises that discretion to explain the basis for departing from the presumptive criteria and advise the parties that it has occurred.

The majority's decision also places a lower burden on appellants to raise new issues than the dissent would have done — and a somewhat lower burden than one might typically see, at least in applications for judicial review. In making the decision to hear a new issue on appeal, the majority relied on the pre-*Vavilov* case of *Byrnes v. Law Society of Upper Canada*, where the Divisional Court suggests that an appellate court may entertain new issues on appeal if three conditions are met: (i) there is a sufficient evidentiary record to resolve the issue; (ii) the failure to raise the issue at the hearing was not due to a tactical decision; and (iii) the refusal to raise the new issue on appeal would result in a miscarriage of justice.[11] While the result is perhaps not surprising here given that the case turned on essentially a jurisdictional issue, it is noteworthy that the Court's discussion fails to consider the benefits of having the administrative decision-makers charged with hearing the case determine these issues at first instance, or the need to respect the legislative intent of having those decision-makers take the first crack at this issue. That may reflect the fact that this case was a statutory appeal, rather than an application for judicial review, although other panels of the Divisional Court have given these factors significant consideration post-*Vavilov*, even in the context of a statutory appeal.[12]

[11] 2015 ONSC 2939, at para 35.

[12] See, for example, *Planet Energy (Ontario) Corp v Ontario Energy Board*, 2020 ONSC 598 at paras 16-26.

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