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## AN OVERVIEW OF RECENT CASES FOR REGULATORY BODIES

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### INTRODUCTION

The responsibilities of professional regulatory bodies are diverse and far-reaching and often require a balancing of many disparate interests. In this paper we highlight some recent cases that may have an impact on how regulatory bodies go about their business.

### CONDUCT UNBECOMING<sup>1</sup>

Generally, the purpose of a regulatory body is to regulate a profession within the scope of its enabling legislation in the interest of the public good. Accordingly, regulatory bodies impose strict standards on their members' conduct while those members are practising their profession. Regulatory bodies usually also impose some standard of behaviour on their members' conduct while those members are "off-duty." The question of where to draw the line as to what constitutes conduct unbecoming is one that legislators and regulatory bodies continually struggle with.

Some of the issues caused by over-codifying disciplinable off-duty conduct are illustrated in the American case of *Lori Lee Brehe v. Missouri Department of Elementary & Secondary Education*<sup>2</sup>. Here a teacher had pleaded guilty of second-degree child endangerment for leaving her children in a car for 45 minutes while she gambled in a casino. The State Board of Education suspended the teacher under a section of their statute authorizing discipline where a certificate holder has pleaded or been found guilty of "a crime involving moral turpitude." The circuit court reversed the board's decision finding that the board did not have the jurisdiction to discipline the teacher. The court noted

...that the statute authorizing discipline in some instances specifies that discipline is to be required in certain other cases. The legislature drew a distinction within the statute between those offenses as to which the Board may apply discipline -- a felony, or a crime involving moral turpitude -- and those offenses as to which the Board must apply

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<sup>1</sup> We recognize that different regulatory bodies in different jurisdictions have different terminology for referring to off-duty misconduct. For example, some jurisdictions refer to dishonourable conduct or conduct likely to endanger the public while others include off-duty conduct in the general rubric of professional misconduct. For the purposes of this paper, we refer to off-duty misconduct as "conduct unbecoming" following in the definition set down in Casey's *The Regulation of Professions in Canada*:

The general distinction between "professional misconduct" and "conduct unbecoming" is that the former is generally recognized as relating to conduct while actually engaged in the practice of the profession, while the later relates to "off-duty" conduct or conduct not in the course of the practice of the profession.

<sup>2</sup> 213 S.W.3d 720; 2007 Mo. App. LEXIS 253

discipline -- dangerous felonies, first degree murder, rape, sexual assault, and other enumerated offenses.

One of the offenses for which discipline is mandated is endangering the welfare of a child in the first ... degree. Second degree endangerment, a misdemeanor, is not specifically mentioned anywhere in the statute. Thus, it is clear that the Board may discipline for second degree endangerment only if the offense "involves moral turpitude."<sup>3</sup>

The court stated that both the Education Department and the Board had merely accepted that second-degree child endangerment was a crime of moral turpitude. However, during the entire disciplinary process no one had cited any authority or proof to support that proposition. While the statute did not preclude the Department from showing any circumstances indicating that the teacher was guilty of moral turpitude, the Department did not do so. Therefore, the Court concluded that the Board had misapplied the law and reversed their decision.

On the other hand, if a regulatory body chooses to leave the standard for off-duty misconduct as less defined they must ensure they have a solid framework for analyzing that misconduct. In *Fountain v. British Columbia College of Teachers*,<sup>4</sup> the BC Supreme Court set out a framework for analysis of establishing a finding of conduct unbecoming. At issue was the conduct of a teacher, Michael William Fountain, who, after sustaining a beating in an altercation with his sons, fired a shotgun high over their heads to warn them off his property. Mr. Fountain was criminally convicted of careless use of a firearm but was acquitted on appeal. The College also investigated and ultimately found Mr. Fountain guilty of conduct unbecoming a teacher. The College's Hearing Panel accepted Mr. Fountain's evidence that he had used the gun to send a message, but concluded that a reasonable teacher would not have communicated with a shotgun in those circumstances.

In reviewing the reasonableness of the Hearing Panel's decision, Madam Justice Ross of the BC Supreme Court, cited the approach set out by Mr. Justice Iacobucci in *Law Society of New Brunswick v. Ryan*:

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.<sup>5</sup>

The court reviewed a number of cases illustrating instances of conduct unbecoming, in order to extrapolate a framework of analysis that a hearing panel making reasonable decision for conduct unbecoming should ideally follow. Madam Justice Ross set out some these principles as follows:

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<sup>3</sup> Lori Lee Brehe, *supra*.

<sup>4</sup> [2007] B.C.J. No. 1260, 2007 BCSC 830 (B.C.S.C.)

<sup>5</sup> *Law Society of New Brunswick v. Ryan*, [2003] SCR 247 at para. 54 cited in *Fountain*, *supra*, at para. 66.

- (a) some, but not all, off-duty conduct can give rise to discipline for professional misconduct or conduct unbecoming;
- (b) in considering whether the particular conduct at issue is such as to give rise to discipline, the Panel should consider whether the conduct evidences direct impairment of the ability to function in the professional capacity or impairment in the wider sense as described in the case law (essentially that it would damage the integrity or standing of the profession); and
- (c) direct evidence of impairment is not always required. In an appropriate case, impairment can be inferred. In the absence of direct evidence of impairment, the Panel will need to consider whether it is appropriate to draw on inference of impairment in the circumstances.<sup>6</sup>

The court then applied these principles in examining the actual line of analysis that the Hearing Panel followed in determining that the Mr. Fountain's actions were conduct unbecoming. The court concluded that the Panel missed an important step:

The Panel appears to have overlooked the fact that not all off duty conduct, even if it falls below the standard of the reasonable teacher, serves as a basis for discipline. The reasons do not address what it is about this conduct in the circumstances that leads the Panel to the conclusion that discipline is warranted. The reasons do not disclose, for example, if the Panel concluded that the conduct was such as to impair Mr. Fountain's ability to function as a teacher (direct impairment), or whether it constituted impairment in the wider sense described in the case law. As these questions were not addressed, it follows that no reasons for reaching the conclusion were provided. The reasons do not disclose what inferences the Panel was drawing.

... The Panel had to address the question of whether this particular off-duty conduct was such as to attract disciplinary consequences and the basis for this conclusion, the Panel stopped short, and accordingly, its verdict is unreasonable.<sup>7</sup>

In summary, in order to arrive at a reasonable finding that a professional is guilty of conduct unbecoming, a panel should consider and address the following points:

- (a) The panel must identify what the standard of proof is, and whether there is enough evidence to prove the conduct.

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<sup>6</sup> Fountain, *supra*, at para. 65.

<sup>7</sup> Fountain, *supra*, at paras. 71-72.

- (b) The panel must consider what the standard of conduct is (that of a reasonable member of the profession) and whether the conduct falls below that standard.
- (c) Even if the conduct falls below the standard of what is expected of a reasonable professional, the panel must consider whether the off-duty conduct directly or indirectly impairs the professional's ability to do his or her job and/or impairs the standing of the profession in the community at large.

Whatcott v. Saskatchewan Assn. of Licensed Practical Nurses<sup>8</sup> explores the issue of what happens when a regulatory body's ability to police a member's off-duty behaviour conflicts with other rights that the member might have, in this case, rights under the Canadian Charter of Rights and Freedoms. William Whatcott was a member of the Saskatchewan Association of Licensed Practical Nurses ("SALPN") who picketed in front of the offices of Planned Parenthood Regina while shouting defamatory and inflammatory slogans as "Planned Parenthood will give you AIDS," "This place is the world's biggest baby killer," and "Planned Parenthood corrupts young women." As a result of a complaint from Planned Parenthood Regina, the SALPN charged and found Mr. Whatcott guilty of two counts of professional misconduct (note: the SALPN's definition of "professional misconduct" includes off-duty behaviour i.e., what we, for the purposes of this paper, have been referring to as "conduct unbecoming") and fined and suspended him. Mr. Whatcott appealed on the grounds that the SALPN's Discipline Committee had not considered his Charter right of Freedom of Expression. His appeal was dismissed by the Saskatchewan Court of Queen's Bench which held that even though Mr. Whatcott was off-duty, his actions caused harm to the health care system and the individual patients using the Planned Parenthood centre, and that such harm was contrary to his ethical and legal obligations to respect and promote the physical and emotional health of patients.

The Court of Appeal stated that an administrative tribunal's decision can be challenged on the basis that the decision itself (as opposed to its enabling legislation) has infringed a Charter right. The court also stated that the issues and arguments raised in the case must be considered to determine which standard of review model – administrative or constitutional – is to be applied. The court stated that it was neither the reasonableness nor the correctness of the decision from an administrative law viewpoint that was at stake in the appeal. Rather, it was the effect of the Discipline Committee's decision on Mr. Whatcott's constitutional guarantee of freedom of expression that was at issue.

The Court of Appeal found that the purpose and effect of the Discipline Committee's decision was to infringe Mr. Whatcott's freedom of expression. The court found that his statements fell within the protection of s.2(b) of the Charter, and that the decision of the Committee infringed his right to freedom of expression. Further, the court found that such an infringement was not justified under s.1 of the Charter. The court identified the objective of the decision as being "to ensure respect for the status and standing of the licensed practical nurse" and while the court acknowledged that this was a pressing and substantial legislative objective, there was no rational connection between this objective and the decision of the Committee. There was no

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<sup>8</sup> [2008] S.J. No. 11, 2008 SKCA 6 (Sask. C.A.)

evidence that what Mr. Whatcott did in his off-duty hours affected how the public viewed licensed practical nurses, nor was there any evidence that the public would have even been aware of his professional license. Accordingly, the Court of Appeal allowed the appeal and quashed the decision of the Committee and lower court.

It is interesting to contrast the Whatcott decision with the earlier decision of *Ross v. New Brunswick School District No. 15*<sup>9</sup> which the court considered and distinguished. In *Ross* the Supreme Court of Canada upheld the finding of professional misconduct in a situation where a teacher was publishing anti-Semitic statements while off-duty. The court was able to find a direct link between *Ross*' profession and his off-duty activities, i.e., *Ross*' removal from his teaching position was necessary to ensure that he did not influence his students with his beliefs, whereas the court found Whatcott's off-duty activities to be "tangential" to his profession. This line of analysis is similar to the third point raised in *Fountain*, above, that even if the conduct falls below the standard of what is expected of a reasonable professional, the panel must consider whether the off-duty conduct directly or indirectly impairs the professional's ability to do his or her job and/or impairs the standing of the profession in the community at large in order to support a finding of conduct unbecoming.

## REGISTRATION ISSUES

The following recent decisions highlight how the courts have approached balancing registration requirements with the principles of human rights, equal access and procedural fairness. Of particular interest is how registration requirements interact with other legislation (e.g., human rights legislation) and how much deference the court is willing to give to the decisions of the regulatory bodies to set or decide on requirements.

In *Siadat v. Ontario College of Teachers*,<sup>10</sup> the appellant, Fatima Siadat, had been a teacher for 16 years in Iran. When teaching literature classes at the High School level, she made comments about the right of authors to freedom of expression. This resulted in harassment from the governing regime, particularly the Ministry of Education, leading to loss of her employment, and threats to her life. She fled Iran in advance of a "political trial" and was accepted as a Convention refugee in Canada. However, when she attempted to register with the Ontario College of Teachers, she was refused on the grounds that she was unable to produce the original documents proving her credentials in accordance with College policy. Ms. Siadat was able to produce uncertified copies and other documentation to support her credentials but her original documents were held by the Iranian Ministry of Education, which was, in effect, her prosecutor as a political dissident.

The Court, in reviewing the decision of the College's Registration Appeals Committee, found that the Committee's insistence on having the appellant produce originals or certified copies in light of the evidence she had given was prima facie discriminatory based on her country of

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<sup>9</sup> [1996] 1 S.C.R. 825 (S.C.C.)

<sup>10</sup> [2007] O.J. No. 65 (Ont. S.C.J.)

origin and in violation of the Ontario Human Rights Code.<sup>11</sup> The court found an obligation upon the Committee to provide individual accommodation unless it could prove that to do so would impose undue hardship on the College. Accordingly, the court ordered the Committee to re-hear the issue with proper consideration of the applicable human rights legislation and jurisprudence.

The Petitioner, Dr. Serguei Tchou-San-Da, in *Tchou-San-Da v. Association of Professional Engineers and Geoscientists of British Columbia*,<sup>12</sup> is an engineer trained in Russia. He applied to the Association of Professional Engineers and Geoscientists of British Columbia (“APEG”) in 2000. In August 2001, he was told he required 18 months of satisfactory supervised engineering experience in Canada or the US. In 2004 he returned and was told he had not successfully demonstrated experience with the entire project cycle and was told to gain a minimum of one additional year. In 2005 he returned and was told he did not show the progression and level of responsibility required for the Canadian environment, and had to gain a further nine months of satisfactory engineering experience. Dr. Tchou-San-Da returned one final time in September of 2006 was told he needed an additional nine months of satisfactory engineering.

It was at this point that he brought a petition against APEG seeking that the court order that the September 2006 decision be quashed and that his eligibility be reconsidered. His argument was that the Engineers and Geoscientists Act<sup>13</sup> (the “EGA”) requires that the experience to be required for membership in APEG be set out in its bylaws. He alleged that, instead of explicitly setting out the experience requirements in the bylaws, APEG had adopted a bylaw purporting to delegate back to itself the discretion to decide whether an applicant’s experience was satisfactory. He claimed that is an impermissible delegation, and therefore the bylaw in question was not properly constituted as it was beyond the power of the APEG to adopt.

The relevant section of the EPA (s. 13(1)(c)) requires APEG’s council to admit an applicant to membership where the applicant submits evidence of, among other things, “experience in engineering or geosciences work established by the bylaws has been obtained”. However, the bylaw being challenged (Bylaw 11(e)(2)) merely established a requirement of four-years, while reserving the acceptability of any experience to the discretion of the council, i.e., “4 years’ experience in engineering or geosciences satisfactory to the Council....”

The court held that as the EPA granted a power to “establish” requisite experience through the bylaws, the council could not simply pass a bylaw setting out a discretion to decide on requisite experience. This would, in effect, subject members to wide divergence of rules and opinions, ever-changing according to the individual notions of councillors, and amounted to improper sub-delegation. The bylaw was not saved by the imposition of a four-year requirement. The court found the Bylaw 11(e)(2) to be invalid by reason that it was unlawful sub-delegation of power and accordingly struck it down.

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<sup>11</sup> R.S.O. 1990, c. H-19

<sup>12</sup> [2007] B.C.J. No. 2057, 2007 BCSC 1403 (B.C.S.C.)

<sup>13</sup> RSBC 1996, c. 116

In a final ironic twist, although Dr. Tchou-San-Da succeeded in having the bylaw struck, at last report, he was still unable to seek registration until APEG passes a revised bylaw.<sup>14</sup>

The Tchou-San-Da decision is of particular interest to regulatory bodies in that when read in isolation it seems to imply that the courts might require that at least a broad outline of registration requirements be placed in the bylaws. What seemed to motivate court's decision was the council's constantly shifting requirements as to the amount and nature of experience Dr. Tchou-San-Da required for registration. While such treatment was possible because of the discretion conferred by bylaw, the court chose not to examine the exercise of the discretion but rather the insufficiency of the bylaws in setting out objective requirements.

## COMPLAINANT'S STANDING

Regulatory bodies regulate in the public interest. As such their investigation and disciplinary processes are not set up to advocate for or compensate individual complainants. Rather they are set up to ensure that the public at large is protected by ensuring that incompetent or dishonest registrants are disciplined, remediated or, in extreme cases, removed from practice. Generally, after the complaint has been received and considered made the complainant no longer has a part to play in determining the course of the proceedings as any further disciplinary or remedial action takes place between the regulatory body and the registrant. However, most regulatory bodies have a mechanism in place to allow a complainant to appeal an initial decision of a regulatory body not to investigate a complaint. For example, s.34 the Health Professions Act<sup>15</sup> provides:

### Report and review

- 34 (1) If the inquiry committee decides under section 33 (6) (a), or the registrar decides under section 32 (3) (a) or (b), to take no further action in an investigation, they must
- (a) report to the board the results of the investigation, and
  - (b) if the investigation resulted from a complaint, notify the complainant of its decision and provide to the complainant the conclusions drawn in the investigation respecting the matters alleged in the complaint.
- (2) A complainant who is dissatisfied with the decision referred to in subsection (1) may request the board to review that decision.

In *Allen v. College of Dental Surgeons of British Columbia*<sup>16</sup> the BC Court of Appeal examined a situation where no such statutory mechanism existed. The complainant, Ms. Allen, wished to

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<sup>14</sup> *Tchou-San-Da v. Assn. of Professional Engineers and Geoscientists of British Columbia*, [2007] B.C.J. No. 2681, 2007 BCSC 1815

<sup>15</sup> RSBC 1996, c 183

<sup>16</sup> [2007] B.C.J. No. 221, 2007 BCCA 75 (B.C.C.A.)

appeal the College of Dental Surgeon's decision not to investigate her complaint. The Dentists Act<sup>17</sup> does not contain a provision to allow a complainant to request a review or appeal. The College asserted that without statutory authority, the complainant had no standing to appeal the decision not proceed as she was not a party to the proceeding.

The court held that the complainant's role at the beginning the discipline process gives rise to a legitimate and enforceable expectation that the complaint will be fairly considered, which includes the right to appeal a regulatory body's decision not to investigate a complaint. However, as the complainant is not a party to subsequent stages of the disciplinary process, he or she does not have standing to challenge any later stage.

As noted above, most professions have some kind of mechanism in their enabling statute to allow for internal review of a decision not to investigate. However, Allen seems to suggest that an independent right exists, which suggests that a complainant could seek judicial review of such a decision if no internal mechanism exists or even if they are not satisfied with the results of an internal review mechanism.

#### LIABILITY OF REGULATORY BODIES

Canadian regulatory bodies have doubtless been following the Ontario government's inquiry into Pediatric Forensic Pathology. The goal of the inquiry is to restore public confidence in the use and reliability of pediatric forensic pathology evidence in Ontario's criminal proceedings, confidence that was shaken when it was discovered that Dr. Charles Smith, the head of Ontario pediatric forensic unit, prepared autopsy reports containing significant errors that may have wrongly implicated parents and other caregivers in the deaths of their children in at least 20 cases. The subsequent inquiry heard submissions on the multiple and overlapping accountability and oversight mechanisms including the Office of Chief Coroner in Ontario, the Office of the Chief Forensic Pathologist, the Ministry of Community Safety and Correctional Services and the College of Physicians and Surgeons of Ontario and submissions as to how these systems or review and accountability might have broken down in the case of Dr. Smith. Lawyers for some of those implicated by Dr. Smith's reports have alleged lack of proper supervision or review on the part of the Office of the Chief Coroner and overall systemic failures. As the inquiry wraps up and prepares its final report, a question that arises is at what stage does a supervising or regulatory body itself become liable for failing to investigate or deal with the conduct of one of its registrants.

#### Immunity Provisions

Regulatory bodies have to balance several competing in governing a profession. What is best for the public interest or the profession as a whole may not necessarily be best for the private interests of individual members of the public or even of individual members of the profession. Consequently, Canadian regulatory bodies generally have some kind of immunity provision within their enabling statute to protect them and their agents from being liable for acts or

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<sup>17</sup> R.S.B.C. 1996, c. 94

omissions that are performed in a good faith exercise of their power and discretion. For example, the College of Psychologists of British Columbia is incorporated under the Health Professions Act and is accordingly protected by s.24 of that Act:

#### Immunity for acts or omissions in good faith

- 24 (1) No action for damages lies or may be brought against a member of a board or a person acting on behalf of or under the direction of a board or college because of anything done or omitted in good faith
- (a) in the performance or intended performance of any duty under this Act, the regulations or the bylaws, or
  - (b) in the exercise or intended exercise of any power under this Act, the regulations or the bylaws.
- (2) Subsection (1) does not absolve a college from vicarious liability for an act or omission for which it would be vicariously liable if this section were not in force.

The operative term in these kinds of provisions is “good faith.” Generally, in order to prove a lack of good faith, a plaintiff would have to demonstrate that there was actual malicious intent or dishonesty on the part of the regulatory body, which, for obvious reasons, is very difficult to prove. However, some recent cases suggest that incidents of extreme negligence or recklessness might leave regulatory bodies open to liability despite their immunity provisions.

*Finney v. Barreau du Québec*<sup>18</sup> is a Québec case in which a client (Ms. Finney) of a lawyer (Mr. Belhassen) sued the Barreau du Québec (the Québec equivalent of the law society) for failing to protect the public by taking action against the lawyer. The Barreau had taken about five years to deal with Ms. Finney’s complaint resulting in serious detriment to Ms. Finney. It transpired that the Barreau had also had serious concerns about Mr. Belhassen’s professional competence over a ten year period before he acted for Ms. Finney during which they also failed to act significantly to prevent Mr. Belhassen from practising.

In their defence, the Barreau relied upon the immunity provision in Québec’s Professional Code,<sup>19</sup> which sets out the basic rules governing the organization and activities of “professional orders” in Quebec including the Barreau. Section 193 reads:

The syndics, assistant syndics, corresponding syndics, the investigators and experts of a professional inspection committee, the members of the Office, of a Bureau, of a committee on discipline, of a professional inspection committee or of a committee of inquiry established by a Bureau, and the members of a tribunal hearing an appeal from a decision by a committee on discipline or by a

<sup>18</sup> [2004] S.C.J. No. 31, [2004] 2 S.C.R. 17, 2004 SCC 36 (S.C.C.)

<sup>19</sup> R.S.Q., C-26

Bureau, shall not be prosecuted for acts done in good faith in the performance of their duties.

Ms. Finney's action failed at the trial court level as the judge stated that the "good faith" aspect of s.193 required Ms. Finney to prove intentional wrongdoing on the part of the Barreau before they could be found liable.

The case was appealed up to the Supreme Court of Canada. There, the court held that bad faith in this instance did not simply encompass intentional fault or malice. The court stated:

[a]n immunity provision such as the one set out in s. 193 of the Professional Code is intended to give professional orders the scope to act and the latitude and discretion that they need in order to perform their duties. In the case of duties relating to the management of disciplinary cases, it would be contrary to the fundamental objective of protecting the public set out in s. 23 of the Professional Code if this immunity were interpreted as requiring evidence of malice or intent to harm in order to rebut the presumption of good faith. Gross or serious carelessness is incompatible with good faith. It may therefore be concluded that, in the case of the exercise of these case management powers, the requirement that the performance or failure to perform an act have been committed in bad faith is not a bar to an action in damages against a professional order that is subject to the Professional Code.<sup>20</sup>

(Emphasis added)

In terms of what might constitute "gross or serious carelessness" to the point where it constitutes bad faith, it is instructive to look at what the court had to say about the Barreau's conduct:

...The attitude exhibited by the Barreau, in a clearly urgent situation in which a practising lawyer represented a real danger to the public, was one of such negligence and indifference that it cannot claim the immunity conferred by s. 193. The very serious carelessness it displayed amounts to bad faith, and it is liable for the results...

... Neither the need to adhere to the statutory and procedural discipline framework and act with care and caution nor the complexity inherent in any administrative process can explain the slowness and lack of diligence seen in this case. The nature of the complaints and the lawyer's professional record in fact made it plain that this was an urgent case that had to be dealt with very diligently to ensure that the Barreau carried out its mission of protecting the public in general and a clearly identified victim in particular.

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<sup>20</sup> Finney, supra, at para. 40.

... Exceptional though the case may have been, the conduct of the Barreau in this matter was not up to the standards imposed by its fundamental mandate, which is to protect the public. The virtually complete absence of the diligence called for in the situation amounted to a fault consisting of gross carelessness and serious negligence...

As a final note before turning to the issue of damages, the Supreme Court notes that even were the case decided under the common law rather than Québec civil law it is likely that liability would also have been found.

The issue of whether a court in a Canadian common law jurisdiction would find a regulatory body liable in circumstances similar to Finney was looked at in *V.M. v. Stewart*.<sup>21</sup> This case saw 19 women bringing an action against several defendants with respect to sexual assaults allegedly committed on them by the defendant Dr. Mark Stewart between 1969 and 1996 while he was working at a clinic in Campbell River. The other defendants in the action included the partners at the clinic, the clinic's administrator and its management company, most notably for the purposes of this paper, the College of Physicians and Surgeons of British Columbia. The plaintiffs pleaded that among other things the College was

...reckless and grossly negligent in failing to investigate or adequately investigate the allegations and circumstances it was aware of respecting Dr. Stewart.

At the trial court level, the College brought an application for an order to have the plaintiffs' action against it struck on the grounds that their pleadings did not disclose a cause of action. The College argued that it was plain and obvious that the plaintiffs' action as pleaded was certain to fail even if the plaintiffs were able to establish everything they alleged in their pleadings. In support, they cited a number of prior decisions where individual plaintiffs seeking damages against regulatory bodies had not succeeded and asserted that these decisions affirmed that "in no circumstances does a regulatory body such as the College owe a duty of care to individual members of the public such as the Plaintiffs."<sup>22</sup> (It should be noted that the trial decision came one year before the Finney decision). The court rejected this argument, distinguished the previous cases on their facts and found that it was possible that duty of care arose in this particular situation. Further, the College was not saved by the immunity provision contained in s.70(1) of the Medical Practitioners Act<sup>23</sup>

70 (1) No action for damages lies or may be brought because of anything done or omitted in good faith in the performance or purported performance of any duty, or in the exercise or purported exercise of any power, under this Act by the college, the registrar, a deputy registrar, the special deputy registrar, an

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<sup>21</sup> [2003] B.C.J. No. 1967, 2003 BCSC 1292 (B.C.S.C.) varied at the Court of Appeal, [2004] B.C.J. No. 1852, 2004 BCCA 458 (B.C.C.A.)

<sup>22</sup> [2003] B.C.J. No. 1967 at para. 68. Emphasis in original.

<sup>23</sup> R.S.B.C. 1996, c. 185 at para. 16.

employee of the college, a member of the council, the executive committee or a committee appointed under this Act.

as the plaintiffs had alleged bad faith (in this case gross negligence or recklessness). Accordingly, the trial court found that it was not plain and obvious that the negligence would fail and accordingly dismissed the College's application.

This aspect of the decision was affirmed at the Court of Appeal, which by then had the benefit of the Finney decision. Madam Justice Southin, writing for the Court of Appeal suggested that even though Finney was decided in Québec under the civil law system:

...there are paragraphs in [Finney] that have about them a common law ring; thus it is possible that the law of Canada on the liability or regulatory bodies is the same in the common law provinces as it is in Quebec.

It is important to note that neither BC Supreme Court nor the Court of Appeal actually found the College liable in negligence as the question before them was whether it was possible to find them liable in the circumstances alleged by the plaintiffs. Ultimately, the question of the College's liability was never decided on its merits as the case settled last year.

In the end, the effect of the Finney and V.M. v. Stewart is to posit that in certain extreme circumstances it might be possible for a client to sustain a claim against a regulatory body for negligence if that regulatory body fails to adequately investigate allegations against a registrant and subsequently fails to take reasonable steps to prevent that registrant from causing harm to that client. It is worth noting that both these cases had fairly severe fact patterns involving multiple counts of malfeasance alleged against the registrants and years (or even decades) of inaction or insufficient action alleged against the regulatory bodies. It also worth noting that both these cases relate to the investigation and discipline functions of the regulatory bodies as those are the functions in which the public interest and an individual's private interests are the most likely to coincide.

## THE STANDARD OF JUDICIAL REVIEW

Dunsmuir v. New Brunswick<sup>24</sup> is a decision of the Supreme Court of Canada that at first glance does not seem to have much to do with regulatory bodies as it deals with the judicial review of an adjudicator's decision concerning a New Brunswick civil servant who was terminated and brought a grievance against his employer. The grievance was initially denied then referred for adjudication. The adjudicator's decision was struck down on judicial review and eventually the case was appealed up to the Supreme Court of Canada. The Supreme Court upheld the initial court's decision to strike down the adjudicator's decision, but in its reasons the Supreme Court made a small but significant change to law regarding judicial review of tribunal decisions.

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<sup>24</sup> [2008] S.C.J. No. 9, 2008 SCC 9 (S.C.C.)

Prior to *Dunsmuir*, there were three standards of judicial review that courts would apply to administrative tribunals deciding on matters within their jurisdiction. These three standards were based on how much deference a court determined it was to give to a particular tribunal:

- (a) Correctness – The court will essentially review whether or not a tribunal “got it right” on the merits of the case and will overturn a tribunal decision if it comes to a different conclusion. This is the standard the court applies in situations where it determines that should give no deference to a tribunal’s decision.
- (b) Patent Unreasonableness – The court will only overturn a tribunal decision if the decision is obviously unreasonable that it cannot be rationally supported by the tribunal’s legislation. This is the most deferential of the three standards.
- (c) Reasonableness *Simpliciter* – This third standard was developed as being a middle ground between the first two standards. The court will ask not whether the tribunal’s decision is right or wrong but if it is reasonable. If the decision found to be not reasonable then the court will overturn it. This standard makes the court to show some deference to the tribunal’s decision as to the correctness of the decision but allows it to overturn a decision that is found to be not reasonable on review. In other words, the court may not overturn a decision it disagrees with unless on review it finds the decision unreasonable.

How much deference a court will accord a tribunal, and consequently which standard the court will apply in reviewing that tribunal’s decisions, depends on a variety of factors including how the tribunal’s enabling legislation is worded, whether the legislation has a privative clause and how specialized is the knowledge required to make the decision (e.g., a tribunal composed of engineers might be best suited to making a decision on an engineer’s competence).

However, the Supreme Court notes:

The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.<sup>25</sup>

The Supreme Court further notes that the court itself often has difficulty resolving the practical similarities between the patent unreasonableness and reasonableness *simpliciter* standards and that “a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory.”

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<sup>25</sup> *Dunsmuir*, *supra*, at para. 39.

This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

[T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality simpliciter will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

See D. M. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.<sup>26</sup>

For these reasons, the Supreme Court ultimately decided to conflate the two reasonableness standards into a single standard thereby reducing the total standards to two: correctness and reasonableness. The Supreme Court then went on to define how a court would determine the appropriate standard of review to apply. Generally questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while jurisdictional questions and some other legal issues attract a standard of correctness. Ultimately, the Court says, the standard of review analysis has to be contextual and dependent on a number of factors:

(1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.<sup>27</sup>

So, what does this decision mean to regulatory bodies? On the pragmatic level of day to day functions, nothing really, as tribunals and panels should make their decisions based on their own judgement, not on what a court above them may be thinking. However, on a theoretical level, it is possible that in essentially removing the patent unreasonableness standard the Supreme Court has also eroded a small area of deference toward administrative tribunals' decision making ability. It is too early to tell.

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<sup>26</sup> Dunsmuir, *supra*, at para. 42.

<sup>27</sup> Dunsmuir, *supra*, at para. 64.