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Is ADR Illegal?

By: Richard Steinecke
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Many regulators use some form of Alternate Dispute Resolution (ADR) to address conduct concerns. These can take various forms, including negotiating Undertakings with members or presenting joint submissions in written form to a disciplinary tribunal. There has been general consensus that there is no need for explicit statutory authority to enter into or enforce consensual resolutions.

However, a recent case from the British Columbia Court of Appeal casts at least some doubt on this assumption. In Salway v. Assn. of Professional Engineers and Geoscientists of BC, 2009 BCCA 350 the Court struck down a resolution negotiated between the member and the regulator.

The form of the resolution in that case was unusual. The Association had developed a protocol whereby a member of the Discipline Committee (who was not on the hearing panel) would review the file and offer the member a "stipulated order" (basically a fixed penalty). If the member accepted it, the proceedings were disposed of on the basis of that order. If the member declined, the matter would go to a full hearing with no disclosure of the offer.

The terms of the stipulated order involved a process of peer review of Mr. Salway's practice for a year and then a formal Practice Review. If the results of the peer reviews or Practice Review were not satisfactory, a member of the Discipline Committee could extend the period of peer review or impose a suspension of his licence. Problems resulted in the peer review process resulting in both an extension of the peer review (to include more recent and more onerous standards) and a brief suspension and a threat of a further suspension. Mr. Salway sought judicial review.

The Court found that the stipulated order process was without jurisdiction for two reasons:

1. It was inconsistent with the provisions in the enabling statute requiring that matters referred to discipline must go to the Discipline Committee.
2. The stipulated order in this particular case involved the imposition of discipline without following the required process.

On the first point, the Court said as follows:

> [22] The procedure laid out in the Act is comprehensive and clear. Once the Association's investigation committee has recommended that the discipline committee conduct an inquiry, s. 32(2) of the statute requires the discipline committee to "cause an inquiry to be conducted". The complaint, at that stage, is within the exclusive jurisdiction of that committee, and the Association has no authority to compromise it, or to shunt it off to some other forum. Any agreement as to penalty, or decision to discontinue the complaint should have been placed before the discipline committee.
> [23] If the Association wished to fashion an "off ramp" from the disciplinary process, it was incumbent upon it to convince the legislature to amend the legislation to allow it to do so.

In other words, the resolution should have been presented to a properly constituted panel for acceptance. The Court did not address the point that if the Association had withdrawn the allegations in return for an Undertaking, the Discipline Committee would not have had the opportunity to decide whether or not to accept the resolution. Perhaps the regulator simply chose the wrong way of achieving its goal.

Interestingly, in Ontario the Statutory Powers Procedure Act permits the tribunal to impose an order on consent without a hearing. So this jurisdictional barrier could have been avoided in that province.

In terms of the second concern, the Court said:

> [28] The Association has no power to discipline its members apart from that which it is given in statute. A person does not, by virtue of becoming a member of a

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Facsimile: 416-593-7867, E-Mail: rsteinecke@sml-law.com

> self-governing profession, grant that profession's governing body contractual rights to impose disciplinary sanctions….
> [30] The Association's disciplinary jurisdiction does not consist of private law rights, but rather of public law functions which the Legislature has entrusted to it. The Association is not entitled to bargain away or compromise its disciplinary powers in order to reach contractual bargains, nor can it use the threat of disciplinary proceedings to secure coercive powers over individuals under a purported contractual agreement.
> [31] In my view, the public law nature of the Association's powers prevents it from entering into agreements with respect to their use, except as may be expressly authorized in statute.

The Court was concerned about the power of the single member of the Discipline Committee to, without a hearing, expand the agreed upon sanctions and to impose a suspension. This was not a case of a suspension flowing from an objective event (e.g., failing to pay a fine by a certain date). Rather, this was a case of an individual exercising a broad discretion as to whether the member had performed their obligations appropriately. In fact, the provisions in the stipulated order relating to peer reviews and undergoing a Practice Review were not set aside.

On a close reading, the case does not stand for the proposition that one needs express statutory authority to enter into ADR. Rather the case suggests the following:

1. Resolutions that occur after the referral of a case to discipline (absent a withdrawal of the allegations) need to be presented to the discipline tribunal.
2. Resolutions that occur before a referral to discipline are not prohibited.
3. Any resolution should not give the regulator broad discretion to conduct an adjudication and impose a disciplinary sanction outside of the discipline process.

The Salway case can be found at: www.canlii.org.

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