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Quality not Quantity

By: Richard Steinecke
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The decision of the Ontario Court of Appeal in *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193 is relevant for regulators for a couple of reasons. It has already been the subject of comment.[1] *Neinstein* provides guidance on two recurring and difficult issues: adequacy of reasons for decision and the appearance of bias based on tribunal member misconduct outside of the hearing.

Adequacy of Reasons

The recent Supreme Court of Canada decision in *FH v. McDougall*, 2008 SCC 53, criticized courts for using the scrutiny of reasons as a means to substitute their views for that of lower tribunals. In *McDougall* the Court said that in some "he said, she said" cases adjudicators can often say little more than that they believed one party and disbelieved the other. The Court indicated that the sufficiency of reasons of adjudicators should be examined from the context of the particular case.

Like *McDougall,* the *Neinstein* case involved allegations of sexual misconduct where there was little beyond the assertions of the complainants and the denial of the member for the tribunal to consider.

The Court of Appeal acknowledged that it should be reluctant to accept appeals based principally on an attack on the adequacy of tribunal's reasons:

> I am dubious about the merits of arguments claiming that reasons for judgment are inadequate. Experience teaches that many of those arguments are, in reality, arguments about the merits of the fact finding made in those reasons. By framing the argument in terms of the adequacy of the reasons, rather than the correctness of the fact finding, an appellant presumably hopes to avoid the stringent standard of review applicable to findings of fact.

In addition, in this case, the reasons were lengthy, filling 39 typed pages. However, the reasons consisted almost entirely of a description of the allegations and a recitation of the evidence. After identifying the central issue as being one of credibility, the tribunal concluded it preferred the evidence of the complainants over that of the member, with no analysis. The reasons consisted of conclusory assertions (e.g., that her demeanour was forthright and that her inconsistencies were not material to the core allegation) with no analysis. It also treated as confirmatory a document (writing on hotel letterhead) that was not corrobative of the actual allegation. Perhaps most significantly, the tribunal did not comment on the credibility of Mr. Neinstein or his witnesses:

> There is nothing in the content of that evidence or the character of those witnesses that would make the evidence inherently unreliable and justify an outright, unexplained rejection of that evidence without any comment. It can be fairly said that Mr. Neinstein, on a reading of the Hearing Panel's reasons, would have absolutely no idea what, if anything, the Hearing Panel made of his evidence, and that of his supporting witnesses. Nor can a reviewing appellate court know what the Hearing Panel made of that evidence. Indeed, the reasons suggest that the Hearing Panel, having found C.T. credible, never engaged in any analysis of Mr. Neinstein's evidence. The Hearing Panel's silence in respect of the evidence led on behalf of Mr. Neinstein renders meaningful appellate review of the Panel's credibility assessments very difficult.

The court set aside the finding on the basis of inadequate reasons alone and referred the matter back to a new panel for determination.

It is apparent that if the reasons of the tribunal had only been five pages long, but had provided some explanation as to why it believed the complainants and disbelieved the member, the decision could well have been upheld. The

[1] **Writing Reasons: A Difficult Task Attracting More and More Scrutiny,** Bernard LeBlanc Professional Practice & Liability on the Net, 2010 - Vol 2 No 7, www.sml-law.com/publications.

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many pages of copying out the allegations and summarizing the evidence of the witnesses were actually unnecessary in this case.

Appearance of Bias

A fascinating issue arose on this appeal about one of the hearing panel members at the discipline hearing, Mr. Hunter:

> In March 2007, about three-and-a-half years after the decision of the Hearing Panel, Mr. Hunter was found guilty of professional misconduct in respect of that affair …. The misconduct, as particularized, alleged a conflict of interest created by Mr. Hunter's sexual relationship with his client…. Mr. Hunter's conduct came to light long after Mr. Neinstein's proceedings before the Hearing Panel were complete.

Mr. Neinstein argued that this created a reasonable apprehension of bias on the following theory:

> that Mr. Hunter could be disposed to deal harshly with Mr. Neinstein because he knew at the time he was presiding over Mr. Neinstein's hearing that his own sexual misconduct might come to light and become the subject matter of a professional discipline inquiry at some future point. In treating Mr. Neinstein harshly, Mr. Hunter would hope to create an image of himself at the Law Society as someone who would not tolerate sexual misconduct in a professional context.

The Court rejected this theory on the following basis:

> The scenario painted by Mr. Greenspan cannot be dismissed as an outright impossibility. It is, however, based on speculation that goes well beyond the kinds of reasonable inferences that can be made in assessing a reasonable apprehension of bias claim. Individuals who sit in courts or tribunals and are required to make independent and impartial decisions have private lives. Some may do things in those private lives that may be improper or illegal. Those misdeeds may subsequently come to light and become the subject matter of some form of inquiry. To suggest that decision-makers could reasonably be viewed as being influenced by considerations of what might best serve their interests at some unknown future date if some past impropriety should come to light and become the subject of some form of inquiry is farfetched, and stretches the concept of a reasonable apprehension of bias beyond all practical limits. In so holding, I do not exclude the possibility that in a given case there may be evidence that elevates the speculation underlying Mr. Greenspan's submissions to the level of legitimate inference. I do, however, reject the submission that the necessary link between Mr. Hunter's personal misconduct and the appearance of partiality can be made on the abstract level presented on this appeal.

In some respects, this ruling is fortunate. If the Court had reached the opposite conclusion, defence counsel would be tempted to investigate the backgrounds of the tribunal members that they appear before. Indeed, there might have then developed a duty for tribunal members to disclose their previous and current misconduct, a prospect that would likely deplete the pool of tribunal members rapidly (not because tribunal members regularly engage in misconduct, but because few would willingly put themselves under such a microscope).

Nevertheless, the admonition by the Court that in some cases tribunal member misconduct can sometimes create a reasonable apprehension of bias is sobering.

The *Neinstein* case can be found at: www.canlii.org.

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