

## A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

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### Remedial Powers

Professional regulators act in the public interest and so do the tribunals that review their actions. However, this public interest duty does not, by itself, confer jurisdiction to make remedial orders. The public interest mandate dictates why a regulator does certain things, not what it can do.

In *Board of Funeral Services v. Iler*, 2011 ONSC 2523 a complaint was made against a funeral director and the policies of his funeral home for “upselling” a client and failing to provide a price list that clearly offered a sufficient range of products. The Complaints Committee of the Board admonished the funeral director for its confusing price list and for not displaying a lower cost casket as required. The Committee recommended changes to the price list and casket offerings. The Complaints Committee felt that a referral to discipline was not warranted.

The client appealed that decision to the Licence Appeal Tribunal. The Tribunal found that the funeral director and funeral home had not engaged in upselling or other unsavoury business practices. However, the Tribunal concluded that the Complaints

Committee should have considered the complaint to be against the funeral home as well as the funeral director and that it (the Tribunal) should make recommendations to the Board about its complaints process. The Tribunal ordered the following:

1. that it, the Tribunal, admonish the funeral home;
2. ordered the funeral home to make changes to its price list and casket offerings;
3. that “the matter be referred to the Discipline Committee”; and
4. recommended that the Board conduct a review of its complaints procedures to ensure that it complies with the Act and serves the public interest.

The matter was appealed to the Divisional Court which rendered its decision last week. On the purely jurisdictional level, the Court found that the Board’s complaints process (and the Tribunal’s appellate function) did not include authority over the funeral home. The statute only gave jurisdiction over funeral directors.

More interesting, however, was the Court’s comments about the role of the Tribunal’s public interest mandate. The Tribunal had no

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more powers than the Complaints Committee whose decision it was reviewing. Neither the Tribunal nor the Complaints Committee had jurisdiction to order a member to change its conduct. Ordering changes in conduct is inherently disciplinary and can only be done, if at all, by a Discipline Committee. The Tribunal and Complaints Committee can only make recommendations to members.

In terms of an admonishment, the Court held that it implies misbehaviour of a serious nature and can damage a member's reputation. An admonishment requires a specific and serious basis of information to support it. To have educational value (which is the appropriate role for any admonishment) the admonishment must identify specific concerns that can be usefully addressed by the caution.

Respecting the referral of the matter to discipline, the Court held that it was unsupported for two reasons. First, there was no specific conduct in contemplation; the Tribunal had already concluded that the two incidents raised by the complaint were not objectionable. Second, no part of the definition of professional misconduct had been identified.

Finally, the recommendation for the Board to review its complaints processes could not stand either. First, it was based on the incorrect assumption that the Complaints Committee had jurisdiction over funeral homes. Second, the Tribunal had no jurisdiction over the Board; it only could review specific decisions of the Complaints Committee. Third, the grounds of appeal of the complainant did not seek that sort of

remedy even if it were one that was open to the Tribunal.

In short, the Court said that one cannot view a regulator's public interest mandate as conferring jurisdiction to do things that are not otherwise authorized by one's enabling legislation.

At the time of writing the *Board of Funeral Services v. Iler* case was not yet uploaded to a database.