Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
SML Steinecke Maciura LeBlanc Barristers & Solicitors

Higher Expectations on Adjudicators

by Rebecca Durcan
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Discipline hearings are, after all, hearings. Panel members should learn from the mistakes of other adjudicators or be destined to repeat them. Some recent trends in court adjudications are instructive for disciplinary panel members. Three enlightening examples from very recent Ontario Court of Appeal decisions relate to self-represented litigants, delayed reasons for decision and unprepared counsel.

Duty towards Self-Represented Parties

Courts and tribunals have been struggling with how to conduct an adversarial hearing process with self-represented litigants who do not have the knowledge and skills to participate effectively. In recent months the courts have been applying the general principles of procedural fairness to require adjudicators to not only explain their process, but also to take some steps to ensure that self-represented litigants understand the legal nature and implications of some of their choices.

For example, in *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383, a small claims court Judge misinterpreted an ambiguous statement by a self-represented party as meaning she abandoned her claim for unpaid wages. The Court of Appeal, while recognizing the good efforts the Judge had made in generally conducting a fair hearing, concluded that this error made the hearing unfair. The Court said:

> … the trial judge did not make sufficient inquiries before concluding Ms. Moore had abandoned her claim for Unpaid Wages. Where the evidence of a self-represented party raises a question in the trial judge's mind about the specific relief the party is seeking, a trial judge must make the appropriate inquiries of the party to clarify the matter. Those inquiries must be made in a clear, unambiguous, and comprehensive way so that several results occur: (i) the trial judge is left in no doubt about the party's position; (ii) the self-represented person clearly understands the legal implications of the critical choice she faces about whether to pursue or abandon a claim; and (iii) the self-represented person clearly understands from the trial judge which of her claims he will adjudicate.

This duty is difficult in discipline hearings where most panel members themselves do not have legal training and skills and are expected to speak for themselves. (Independent legal counsel can only provide advice.) This duty to inquire also goes against much of the training of panel members who are cautioned to remain passive and let the parties present their cases without interference. These recent cases on the duty of adjudicators to actively assist self-represented parties without "descending into the arena" will require prosecuting counsel and independent legal counsel to push their boundaries, as well, to ensure a fair hearing.

The following statement by the Court about the role of small claims court judges applies with equal force to discipline panels:

> Deputy judges of the Small Claims Court operate under significant time and volume pressures. As well, they daily face the

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> challenge of trying to modify an adversarial civil litigation process historically predicated on representation by counsel to the increase in self-representation by parties. Nevertheless, such is the new reality. And it often requires a trial judge to take the time to ask those few extra questions to nail down, with clarity for all, the claims of the self-represented person upon which he will adjudicate. Trial fairness requires no less.

Duty to Provide Prompt Reasons

A recurring challenge for panel members is preparing reasons for their decision. Not only is writing reasons a foreign experience for most panel members, it is also difficult to do so as a team. In addition, most panel members participate in discipline hearings as volunteers. It is not surprising that reasons in discipline hearings are sometimes delayed for extended periods of time. However, that does not make the delay excusable.

In *R. v. Sliwka*, 2017 ONCA 426, the defendant in a criminal case was found not guilty of vicious and repeated physical and sexual assaults. The trial Judge, who was experienced and prominent, promised to provide reasons for her decision. The reasons did not appear despite repeated requests. After six months the Crown appealed the decision on the basis of the absence of reasons in a case where the outcome was not obvious from the record (i.e., there were serious inconsistencies in the defendant's statements and the defence theory of an unknown intruder had little support).

The Court granted the appeal, saying:

> There is no way of knowing how the trial judge arrived at her verdicts. Without any semblance of a road map to those verdicts, the Crown's right of appeal from the acquittals is rendered illusory. This is not a case in which the trial record as a whole reveals the basis upon which the acquittals were entered and allows for a meaningful appeal. Counsel for the respondent has gone through A.C.'s evidence very carefully. There are clearly problems with parts of her evidence. Counsel's submissions go only so far as to demonstrate the need for careful reasons in this case. Unfortunately, the trial judge gave none.

In a postscript the Court said:

> Our order directing a new trial is a terrible result for everyone involved in this proceeding. The trial judge's failure to give reasons, despite her repeated promises to do so, has frustrated the proper administration of justice. Nor is this the first time that this trial judge's failure to provide reasons has required this court to order a new trial. It must be the last time.

One can imagine the harm to the credibility of a regulator if such comments were made by a court of its discipline tribunal. At the time of publication the CBC has reported that the Canadian Judicial Council is initiating an inquiry into the matter.

Ineffective Representation

Legal representation of a member is not always the answer to the self-representation issue. A recurring

issue is how a discipline tribunal can address concerns that a member is not being well-represented at a hearing. It is almost impossible for the panel to raise this concern without creating grounds for mistrial. Nevertheless, ineffective representation can be grounds for a successful appeal.

This is evident from another criminal case at the Ontario Court of Appeal where a new trial was ordered (*R. v. E. H.*, 2017 ONCA 423). The defendant was found guilty of sexual assault and sexual interference. The main issue was that his lawyer had not watched the video of the statement that the defendant had given the police. Nor did defence counsel prepare the defendant for cross-examination on the video-recorded statement. Obviously counsel was unable to re-examine the defendant on clarifications and context contained in the statement. The finding against the defendant was based in large part on the inconsistencies in the defendant's statements from the video statement given seventeen months previously.

The Court said:

> Nevertheless, and through no fault of her own, the trial judge rejected the appellant's evidence because of these "contradictions." Her findings, which were unequivocal and unqualified, were a reasonable response to the evidence before her. However, with hindsight, we now know that: (1) the appellant's very poor performance was due to trial counsel's ineffectiveness; and (2) the apparent "contradictions" between the appellant's statement and his trial evidence would have been either explained away or made more benign had the appellant been properly prepared, or had trial counsel been equipped to re-examine on these areas.

A new trial was ordered. Unfortunately, the Court offered no guidance as to how the adjudicator could have prevented this unfortunate outcome.

Some possible strategies for regulators to consider include:

- When notifying a member of a referral to discipline, provide information about the need to select a lawyer who is familiar with discipline matters and perhaps even suggest some questions to ask prospective counsel.
- Use the pre-hearing process to encourage the member to see their legal counsel in action before the hearing starts and to communicate any concerns about lack of preparation in a safe setting.
- If it appears to the panel that the member's lawyer is clearly ineffective, speak to independent legal counsel about available options.
- Where a successful appeal is based on ineffective representation, the regulator should report the matter to the Law Society.

As Molière said: "The greater the obstacle, the more glory in overcoming it."