Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
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Scope of Review of Screening Committee Decisions

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A number of professions have a tribunal that is authorized to review the decisions of their screening committee.[1] Typically the reviewing tribunal examines the reasonableness of the decision and the adequacy of the investigation. A frequent issue is how much deference should the reviewing tribunal accord to the investigative choices and dispositions made by the regulator and its screening committee. In *The College of Physicians and Surgeons of British Columbia v The Health Professions Review Board*, 2018 BCSC 2021, <http://canlii.ca/t/hw4sk> the Court provided a detailed analysis of this issue.

The complaint in issue related to the clinical care provided by a family physician. As permitted under the legislation, the Registrar concluded that the complaint should not undergo a full investigation. The Court concluded that the reviewing tribunal should accord significant deference to this decision:

> Integral to the legislative scheme is statutory flexibility that recognizes that the College should be afforded a measure of deference in determining what procedures are best suited to its regulation of the profession and the public interest. This flexibility also recognizes that the College must allocate its own investigative and regulatory resources while balancing the demands of administrative and fiscal efficiency.

The Court went on to say:

> The initial screening determination made by the Registrar in this case necessarily required an exercise of discretion. The nature of the complaint, the conduct or competence to which the matter related, whether the Registrant had been the subject of previous complaints, the allocation of resources, and the public interest objectives of transparency and accountability all informed the assessment.

The Court accepted that the screening function of regulators did not require that findings of fact be made in every case. Regulators could decide which cases required such an adjudication and which could be otherwise addressed.

The Court also reinforced the distinction between a serious outcome for the client and a serious error by the practitioner:

> I also agree with the College and the Registrant that the Review Board, in its decision, conflated a serious impact with a serious matter as that term is understood from a professional regulatory jurisdictional perspective. The Review Board focussed on the alleged harm and the physical, mental, and emotional consequences to the Complainant rather than the conduct, or alleged misconduct, of the Registrant. A serious health outcome is not determinative of

[1] Screening committees are often called a Complaints Committee or an Investigations Committee. In some professions, staff, such as the Registrar, perform this function.

> whether the complaint constitutes a serious matter from a regulatory perspective.

The Court concluded that the reviewing tribunal had not shown sufficient deference to the regulator and had substituted its view of the seriousness of the matter for that of the regulator.

The Court went on to analyze at great length the reviewing tribunal's scrutiny of the "adequacy of the investigation". The Court concluded that this was simply a review of the reasonableness of the investigation. This legislative language did not create a distinct standard of review or confer an original jurisdiction to the reviewing tribunal. The adequacy of the investigation was not analogous to whether procedural fairness had been provided. The Court said:

> If the Review Board were able to liberally exercise its discretion to substitute its decision on the adequacy of an investigation for that of the College, a regulatory body, this would undermine the principle of self-governance. Importantly, it would fail to accord any deference to the College in exercising its specialized expertise in assessing the conduct and competence of its registrants. The degree of deference afforded in a reasonableness standard of review recognizes the reality that those working day to day in implementing complex administrative schemes will develop a considerable degree of expertise: *Dunsmuir*, at para. 49. It also reflects the practical reality that health colleges do not have unlimited resources to investigate complaints. Furthermore, under the *HPA*, [i.e., the enabling legislation] the Review Board is charged with conducting a review on the record. In my view, this reflects a legislative intent that the Review Board accord deference to the first instance administrative law decision- maker, the College.

As the reviewing tribunal had applied the wrong test for reviewing the adequacy of the investigation, the Court returned the matter to a different panel of the tribunal for a new decision.

Interestingly, a significant part of the Court's analysis related to the "expertise" imputed to self-regulating professions. Members of the profession involved in the investigation and screening of complaints have a unique perspective and understanding of the issues that arise in practice. Also, a strict scrutiny of the regulator's decision by a lay tribunal would undermine the concept of self-regulation. While the Court also recognized that expertise could be developed through the handling of numerous complaints, it would be interesting to see if a future Court would impute a lower level of expertise (or authorize a stricter level of scrutiny by a reviewing tribunal) to regulators of professions that are not self-regulating (e.g., appointed by the government rather than elected by the profession).

It is also of interest that this judicial review application was brought by the regulator, and not the complainant or the practitioner. While this issue was dealt with on consent, this role for the regulator suggests that, even though its decision is being scrutinized, the regulator has a sufficient legal interest in at least some issues to create standing to initiate a judicial review application.