

September 19, 2012

Volochay v. College of Massage Therapists of Ontario, 2012 ONCA 541

Administrative Law Appeal

Factual Background

- The College of Massage Therapists of Ontario (the “College”) received a complaint from a patient alleging that an RMT had sexual intercourse with her and threatened to kill her. The College notified the member of the fact of a complaint, but did not serve him with a particularized notice of the complaint because the complainant tried to withdraw the complaint, allegedly as a result of intimidation by the member.
- Several months later, the College’s Complaints Committee referred the matter to the Executive Committee to consider a full investigation of the member’s practice, despite its failure to comply with the statutory notice requirement.

Procedural History

- The member initially sought a review of the decision of the Complaints Committee by the Health Professions Appeal and Review Board (the “HPARB”). He subsequently withdrew his request for a review, and brought a judicial review application. The application judge granted the judicial review application and quashed the decision of the Complaints Committee, as well as another decision following the member’s withdrawal of his request for a review by the HPARB, on the basis that the College had acted “without jurisdiction so that its proceedings to date in respect of the complaint are a nullity.”
- The College was granted leave and appealed to the Court of Appeal for Ontario.

Issue on Appeal

- Did the application judge err in principle in granting judicial review?

Analysis

- The College could continue to investigate the complaint, despite the withdrawal.
- The College breached its duty of procedural fairness to the member by failing to provide him with proper notice of the complaint.
- Whether the College breached its duty of procedural fairness was not a “true question of jurisdiction” (i.e. whether the tribunal had the authority to start the inquiry in the first place).

- In any event, characterizing a question as one of true jurisdiction does not entitle an aggrieved party to automatic access to the courts.
- The review by the HPARB was an “adequate alternative remedy” that disentitled the member to judicial intervention.
- It was unnecessary to decide whether the member’s alleged “egregious conduct” after the complaint was made disentitled him to relief.
- No other exceptional circumstances justified judicial intervention.

Holding

- The Court of Appeal allowed the appeal and set aside the Order of the application judge (the member’s application for judicial review dismissed).

Discussion Points

- Significant deference owed to administrative decision-makers, especially after *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654
- Discretionary nature of judicial review
- Potential bars to judicial review:
 - Prematurity
 - Existence of an adequate alternative remedy
 - Mootness or lack of utility
 - Justiciability
 - Absence of exceptional circumstances (e.g. evidence of hardship, prejudice, costs, exceptional delay)
 - Disqualifying conduct by the applicant
- “True questions of jurisdiction” extremely narrowly circumscribed
- Importance of the applicable statutory framework