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Doctors Affected by Hospital Unit Closure Have Minimal Procedural Fairness Rights: Public Program Discretion Tops Individual Procedural Rights

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Cases Considered:

MacDonald v Alberta Health Services, 2013 ABQB 404.

It is tempting to view the Alberta Queen's Bench decision in *MacDonald v Alberta Health Services,* 2013 ABQB 404 as a simple affirmation that there is no legal right to consultation on government decisions about public programs. See, for example, *Canadian Assn of Regulated Importers v Canada (Attorney-General),* [1993] 3 FC 199 (TD); rev'd [1994] 2 FC 247 (CA), where a change by the Minister to the distribution of import quota for hatching eggs and chicks affected traditional importers. But little reflection is needed to see that the procedural issues raised by Alberta Health Services' (AHF) decision to close the obstetrics unit at the Banff Hospital are far more nuanced. The applicant, Dr. MacDonald, who with his wife and partner Dr. Fowke, performed all deliveries at the Hospital in 2012 seemed to be left wondering whether every arguably interested person except he and his partner were consulted and had some input into the closure decision.

The evidence showed that on February 16, 2012 Dr. MacDonald and Dr. Fowke attended, by invitation, one of two "community engagement" sessions intended to gather information from "stakeholders." Previously the issue had been raised and consultations with over 60 people, including other doctors and hospital administrators, had occurred and the potential decision was communicated to the applicants. Subsequently, as Justice Sheilah Martin found, a firm closure decision was made by AHS officials in August 2012. Then actions, including an open public meeting, were taken to address negative public response to the decision.

So, were Dr. MacDonald's procedural rights denied? Was he entitled, in the circumstances, to be more fully consulted before the closure decision was finalized? Justice Martin's conclusion was "no."

She found that Dr. MacDonald had standing, either as a "person aggrieved" because the decision directly affected how he was able to treat his patients or, alternatively, on the basis of the *Finlay v Canada (Minister of Finance*, [1986] 2 SCR 607, criteria for discretionary public interest standing (justiciable issue, genuine interest and no other reasonable and effective way to challenge the decision). The standing analysis was undertaken on the judge's own initiative because the applicant's counsel apparently (and erroneously) considered his client's standing to be "obvious" (paras 21 and 22) and did not respond to the AHS arguments on this issue.

Further, Justice Martin held that Dr. MacDonald did cross the threshold for procedural fairness rights. But it is apparent that he did not, in the court's view, get much beyond the threshold. His

best hope seemed to be to invoke the doctrine of legitimate expectations. But the case authorities, including *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, confirmed to Justice Martin's satisfaction that this meant clear, unambiguous and unqualified representations by the decision maker that the Doctor would be offered a specific form of consultation on the decision. Justice Martin concluded that there was no evidence of this kind of representation.

With the legal doctrine of legitimate expectation unavailable, Dr. MacDonald could muster little for the court's application of the procedural fairness contents criteria from *Baker*. These criteria and the court's comments (at para 81) are as follows:

1. Nature of the decision-making process: "administrative, policy based and polycentric".

2. Nature of the statutory scheme and particular provisions: "engages the expertise" of AHS, "affects broader public" and "not aimed at specific individuals."

3. Importance of the decision to affected persons: "impact on the community"; does not require the same procedural safeguards as for example, "cases involving the deportation of individuals."

4. Legitimate expectations: None.

5. Judicial deference to the decision maker (at para 83): AHS has broad powers and decision flexibility; no required statutory decision process or consultation requirements: decisions were final and there is no statutory appeal. This "procedural authoring" indicates a "high degree of deference."

The result, according to Justice Martin, was that:

> … procedural fairness requirements in this case are minimal, amounting to little more than providing the affected public with an opportunity to have some input into the decision making process. (para 84)

This was so even though she also concluded that:

> The actual consultation conducted was not perfect and may not stand as a shining example of best practice. (para 85)

To return to the point made in the first paragraph, unlike the Federal Court of Appeal's 1994 decision in *Canadian Association of Regulated Importers*, this decision was not simply a matter of procedural fairness principles not applying to a policy decision, with affected persons "seeking … to impose a public consultation process" on the decision maker. Citizens now demand and expect some level of consultation when significant public service cuts or changes are made by public authorities. AHS responded in this way. But this still appears to be more a matter of public policy than law. Procedural rights belong to affected individuals in the general public. These require opportunities for some level of response by persons directly affected (here in the doctors' professional employment). But the case suggests that for the decision maker this is more a matter of a program designed by a good communications consultant, than a "hearing" in the traditional quasi-judicial sense of that term.

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